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ANTITRUST AND AMERICAN BUSINESS ABROAD
TODAY

Spencer Weber Waller*

In 1958, the late Kingman Brewster published a remarkable book entitled *Antitrust and American Business Abroad*.¹ In that book, then Harvard Law School Professor Brewster argued that it was not in the United States's overall economic, diplomatic, or foreign policy interests to apply the Sherman and Clayton Acts to international and foreign business activities to the full extent arguably permitted by the language of the antitrust laws and the Constitution.² In analyzing both the legal doctrine and policy issues, Brewster formulated a series of proposed reforms, including most prominently the adoption of a so-called "jurisdictional rule of reason" to govern when the United States should exercise jurisdiction over a case involving anticompetitive conduct taking place outside the territory of the United States.³

Since its publication, *Antitrust and American Business Abroad* has influenced two full generations of scholars, practitioners, and judges in thinking about the application of United States antitrust law to the conduct of business in international markets.⁴ In this Article, I suggest that the impact of *Antitrust and American Business Abroad* was a product of how well it responded to the business and legal environment in which it appeared and how it, in turn, helped change that environment.⁵ Now, nearly forty years later, I wish to further suggest how the concerns in international antitrust law and enforcement policy have changed and outline the new antitrust chal-

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2. Id. at 442-58.
3. Id. at 301-06, 362-71, 446-48.
4. See infra notes 119-43 and accompanying text (discussing the impact of Brewster's book on caselaw and legislative developments).
5. See infra notes 38-87 and accompanying text (discussing the domestic and international climates at the time Brewster's piece was published).
lenges and opportunities for American businesses operating in international markets.  

I. THE SETTING FOR ANTITRUST AND AMERICAN BUSINESS ABROAD

Antitrust and American Business Abroad was a ground-breaking work because of its author, subject matter, methodology, and timing. Each factor contributed to the book’s lasting influence.

A. The Author

Kingman Brewster was a figure of national and international distinction with a record of outstanding public service, of which his legal scholarship was but a small part. Oddly enough, Brewster began as a bit of an isolationist, leading the Yale University chapter of “America First” while an undergraduate. These views were quick to change. Upon graduation in 1941, he worked in Washington, D.C., for the office of Inter-American Affairs, under the direction of Nelson Rockefeller. In 1942, Brewster joined the Navy and served as an aviator on antisubmarine patrols in the Atlantic Ocean until the end of World War II.

Following graduation from Harvard Law School, he worked in Paris as an assistant to the special representative of the Marshall Plan. After a short stint on the faculty of MIT, Brewster joined the Harvard Law School faculty in 1950. Three years later he was made a full professor at the age of thirty-four, specializing in antitrust and international economic law.

In 1960, Brewster left Harvard Law School to become provost of Yale University. Following the death of then Yale President A.

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6. See infra notes 144-225 and accompanying text (discussing significant recent changes in international antitrust concerns).
7. For the biographical details of Kingman Brewster’s life, see N.B.A. Notes, CHIC. TRIB., Nov. 10, 1988, § 4, at 5; Kingman Brewster, ex-ambassador to Britain and Yale president, BOSTON GLOBE, Nov. 9, 1988, at 69; Eric Pace, Kingman Brewster Jr., 69, Ex-Yale President and U.S. Envoy, Dies, N.Y. TIMES, Nov. 9, 1988, at D29; Bart Barnes, Ex-President of Yale, Kingman Brewster Dies, WASH. POST, Nov. 9, 1988, at C8.
8. Kingman Brewster, Ex-Ambassador to Britain and Yale President, supra note 7, at 69.
9. Id.
10. Id.
11. Id.
12. Pace, supra note 7, at D29.
13. Id.
14. Kingman Brewster, Ex-Ambassador to Britain and Yale President, supra note 7, at 69.
Whitney Griswold in 1963, Brewster became acting president and within a matter of months was offered the job on a permanent basis. Brewster's tenure as President of Yale from 1963 to 1977 brought him to national prominence. He received both praise and criticism for his decisions expanding minority recruitment, cutting back on the admission of the sons of alumni, and, in 1969, admitting women students for the first time in the two hundred sixty-eight year history of Yale.

These controversial decisions were a mere prelude to a series of decisions that brought Brewster into direct public conflict with the Nixon Administration. Brewster was an outspoken opponent of the Vietnam War and once led a Yale antiwar demonstration in Washington, D.C. This activism combined with his statements doubting that black radicals in America could get a fair trial and his decision to open Yale facilities to more than ten thousand demonstrators protesting the recent murder trial of Black Panther leaders may have saved Yale from much of the strife that engulfed U.S. colleges in the late 1960s and early 1970s. It also earned him a place on the "enemies" list of the President of the United States, and he received the public wrath of Vice President Agnew, who had called for his resignation. On the lighter side, these same decisions earned him a place for years as the liberal and erudite "President King" in the Doonesbury comic strip by the creator, Gary Trudeau, who was a Yale student during this era.

In 1977, President Jimmy Carter appointed Brewster as the United States Ambassador to Great Britain. He served with great popularity among the British until 1981, when he returned to the United States to practice law. He continued to make his mark on a diverse set of legal issues, including serving as a special master on

15. Id.
16. Barnes, supra note 7, at C8.
17. Pace, supra note 7, at D29.
18. Kingman Brewster, Ex-Ambassador to Britain and Yale President, supra note 7, at 69.
19. Id.
20. Id. (indicating that black activists Bobby Seale and other Black Panther leaders were being tried for the slaying of Alex Rackley).
21. Id.
22. Pace, supra note 7, at D29.
23. Kingman Brewster, Ex-Ambassador to Britain and Yale President, supra note 7, at 69.
24. Pace, supra note 7, at D29.
free agency disputes in the National Basketball Association. In 1986, Brewster returned to England once more, this time to serve as the master of University College, Oxford University, which was a most unusual position for an American citizen, and he continued in that position until his death at the age of sixty-nine in 1988.

B. Brewster's Legal Scholarship

*Antitrust and American Business Abroad* was the crowning, but by no means the only, academic achievement for Kingman Brewster. Not surprisingly, the bulk of Brewster's scholarship came during his service as a member of the Harvard Law School faculty. Prior to *Antitrust and American Business Abroad*, Brewster had published two articles and a number of shorter pieces for the Harvard Law School Bulletin.

*Antitrust and American Business Abroad* was published in 1958, when Brewster was thirty-nine years old. Shortly thereafter, Brewster published a casebook on international business transactions with Milton Katz, Brewster's Harvard Law School faculty colleague, as well as mentor and boss during Brewster's post-war work in Paris on the Marshall Plan. Although his subsequent administrative and diplomatic positions made substantial formal scholarship difficult, Brewster continued as a speaker and writer on antitrust, interna-

26. *Kingman Brewster, Ex-Ambassador to Britain and Yale President*, supra note 7, at 69; Pace, supra note 7, at D29.
27. Brewster served on the Harvard Law School Faculty from 1950 until 1960. See Pace, supra note 7, at D29.
28. Kingman Brewster, Jr., *Restraint of Trade with Foreign Nations: The Relevance of Business Purpose*, 13 BUS. LAW. 792 (1958) (questioning whether the definition of "restraint of trade" is different for foreign commerce than its definition for domestic commerce); Kingman Brewster, Jr., *Legal Aspects of the Foreignness of Foreign Investment*, 17 OHIO ST. L.J. 267 (1956) (seeking answers to problems that lawyers face today in the private, public and promitive sectors which may facilitate international legal relations in the future).
31. MILTON KATZ & KINGMAN BREWSTER, JR., *The Law of International Transactions and Relations* (1960). The casebook contained a fifty-five page treatment of overlapping and conflicting regulation of restrictive and monopolistic practices as well as proposals for international action in the competition law area. *Id.* at 549-604. This appears to have been one of the first comprehensive treatments of its kind in contemporary casebooks along with an even lengthier treatment in the second edition of Chester Oppenheim's 1959 antitrust casebook. See S. CHESTERFIELD OPPERHEIM, *FEDERAL ANTITRUST LAWS CASES AND COMMENTS* 913-1027 (2d ed. 1959).
tional law, and other legal issues well into the 1980s. 32

C. The Antitrust Environment in 1958

Brewster studied antitrust and entered academia to teach and write about the field in an era very different from our own. It was an era when antitrust had only recently reorganized itself as a separate field of specialists and moved away from being part of a broader general category of trade regulation or corporate law. Professor Milton Handler had published the first modern antitrust casebook in 1937. 33 In 1958, students and professors of antitrust largely had a choice between the 1948 edition of Professor Chesterfield Oppenheimer's *Cases on Federal Anti-Trust Laws* 34 or the second edition of Professor Handler's casebook published in 1951. 35 While there were a number of fine articles, handbooks, and treatises on antitrust, there was nothing like the explosion of casebooks, hornbooks, treatises, monographs, guidelines, and other descriptive and analytical literature that is available today from the government, 36 the Antitrust Section of the American Bar Association, 37 academic


33. MILTON HANDLER, CASES AND OTHER MATERIALS ON TRADE REGULATION (1937); see also JAMES ANGELL MCLAUGHLIN, CASES ON THE FEDERAL ANTI-TRUST LAWS OF THE UNITED STATES (1933).

34. S. CHESTERFIELD OPPENHEIM, CASES ON FEDERAL ANTI-TRUST LAWS INCLUDING RESTRAINTS OF TRADE AT COMMON LAW (1948). Oppenheimer did not publish a second edition of his casebook until 1959.

35. MILTON HANDLER, CASES AND OTHER MATERIALS ON TRADE REGULATION (2d ed. 1951); see also FRANK ELKOURI, TRADE REGULATION CASES AND MATERIALS (1957). Professor Elkouri's casebook is shorter and much more of a survey in comparison to either the Handler or Oppenheimer work and has no separate chapter on the application of antitrust to the foreign commerce of the United States.

36. The Antitrust Division of the Department of Justice now publishes and disseminates in hard copy and electronic form a variety of guidelines, speeches, press releases, economic studies, and business review letters in addition to the wide availability of briefs and other papers filed in the course of litigation. The Federal Trade Commission publishes and disseminates similar materials in addition to the publications of the decisions of the Commission.

37. The Antitrust Section of the American Bar Association is probably the largest publisher of legal materials pertaining to antitrust in the world. Its publications include *ANTITRUST LAW DEVELOPMENTS* (3d ed. 1992) and its annual updates, the *Antitrust Law Journal*, a series of now 20 monographs, a series of practice handbooks, and a variety of continuing legal education materials.
presses, commercial and publishers, professionally edited journals, and student-run law reviews. Brewster's contributions thus must be understood in light of the state of general antitrust law and policy and the special concerns involving foreign commerce during that period.

1. The Domestic Agenda

Brewster wrote *Antitrust and American Business Abroad* in a time of almost unlimited antitrust expansion which found support in both the case law and the structural consensus in then contemporary industrial organization economic theory. From the end of the Great Depression well into the 1960s, the Supreme Court when it addressed antitrust issues, expanded liability, and preserved or created *per se* rules which rendered categories of agreements or behavior illegal on their face. Much of this trend began with Justice Douglas's opinion in *United States v. Socony-Vacuum Oil Co.* and its famous footnote 59, formulating the strictest possible *per se* condemnation of agreements between competitors affecting the pricing mechanism. In the decade preceding the appearance of *Antitrust and American Business Abroad*, the Supreme Court added or affirmed *per se* rules or their functional equivalents condemning ex-

in connection with programs conducted worldwide.

38. For representative views both praising and criticizing the antitrust landscape of this era, see A.B.A. ANTITRUST SECTION, AN ANTITRUST HANDBOOK (1958); SOUTHWESTERN LEGAL FOUNDATION, PROCEEDINGS OF THE 1958 INSTITUTE ON ANTITRUST LAWS (1958); JOE S. BAIN, BARRIERS TO NEW COMPETITION (1956); G.E. HALE & ROSEMARY HALE, MARKET POWER: SIZE AND SHAPE UNDER THE SHERMAN ACT (1958); CARL KAYSEN & DONALD F. TURNER, ANTITRUST POLICY: AN ECONOMIC AND LEGAL ANALYSIS (1959). Scholars in this area also extensively probed the analyses of the legislative history of the Sherman Act and the purposes underlying the United States antitrust laws. HANS B. THORELLI, THE FEDERAL ANTITRUST POLICY (1955). The author "attempts to push the frontiers of research concerning the federal antitrust policy of the United States" by examining the social science interpretation of the policy's origination and the institutionalization period of the policy. *Id.* at vi.

39. The prior ambivalence of the United States executive branch and the judiciary towards the value of antitrust is set forth in Appalachian Coals v. United States. 288 U.S. 344 (1933) (holding that a coal company combination was not *per se* unlawful under the Sherman Act). For a discussion of the conflicting policies and programs in the New Deal's antitrust decisions, see ELLIS W. HAWLEY, THE NEW DEAL AND THE PROBLEM OF MONOPOLY (1966).

40. See infra notes 43-57 and accompanying text (discussing the Court's tendency to find liability in antitrust cases during this period).

41. 310 U.S. 150 (1940).

42. *Id.* at 225-26 n.59 ("Whatever economic justification particular price-fixing agreements may be thought to have, the law does not permit on inquiry into their reasonableness. They are all banned because of their actual or potential threat to the central nervous system of the economy.").
exclusive dealing contracts,\textsuperscript{43} minimum and maximum resale price maintenance not protected by state law,\textsuperscript{44} refusals to deal,\textsuperscript{45} and tying.\textsuperscript{46}

In the merger area, the Department of Justice waited until 1955 to bring its first test cases under the 1950 Celler-Kefauver Amendment strengthening Section 7 of the Clayton Act.\textsuperscript{47} The Supreme Court would not definitively interpret those 1950 amendments until the next decade in \textit{Brown Shoe Co. v. United States}.\textsuperscript{48} However, the Justice Department had used the Clayton Act successfully to reach back decades and to invalidate a partial vertical integration of Gen-

\textsuperscript{43} Standard Oil Co. v. United States, 337 U.S. 293, 314 (1949) (using § 3 of the Clayton Act). "It cannot be gainsaid that observance by a dealer of his requirements contract . . . effectively foreclose[s] whatever opportunity there might be for competing suppliers to attract his patronage . . . ." \textit{Id}.\textsuperscript{44} Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, 340 U.S. 211, 213 (1951) (holding that Seagram's refusal to sell to a wholesale liquor business because that business did not agree to Seagram's maximum resale price was per se illegal). Maximum price fixing along with minimum price fixing were held per se illegal because they restrain the trader's freedom to set his own prices according to his own judgment. \textit{Id}.\textsuperscript{45} Lorain Journal Co. v. United States, 342 U.S. 143 (1951) (holding that a refusal to deal violates §2 of the Sherman Act). In this case, Lorain Journal attempted to prevent a radio station from cutting into the journal's substantial monopoly on news and advertisement distributions by refusing to print any customer's advertisement who also dealt with the radio station. \textit{Id}. at 150-51; see also Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 212 (1959) (holding that "[g]roup boycotts, or concerted refusals by traders to deal with other traders," are prohibited).\textsuperscript{46} A tying agreement is one in which the seller agrees to sell a product to a buyer only on the condition that the buyer purchases a different (or "tied") product as well. \textit{Northern Pac. Ry. Co. v. United States, 356 U.S. 1, 5 (1958)}. The case held that tying agreements are \textit{per se} unreasonable when the seller has sufficient market power to restrain trade of the "tied" product. \textit{Id}. at 6; see \textit{Times-Picayune Pub. Co. v. United States, 345 U.S. 594, 608-09 (1953)} (reiterating the rule that tying agreements are \textit{per se} unreasonable when the seller is in a monopolistic position in the market for the "tied" product and when trade of the "tied" product is substantially restrained).\textsuperscript{47} Stanley N. Barnes, \textit{Mergers, in Conference on the Antitrust Laws and The Attorney General's Committee Report 57, 65} (James A. Rahl & Earle Warren Zaidins eds. 1955) [hereinafter \textit{Conference Report}] (explaining that no cases were filed under § 7 of the Clayton Act after the 1950 amendment until \textit{Schenley, General Shoe, and Hilton Hotel}).

The current version of § 7 provides in relevant part:

\begin{quote}
No person engaged in commerce or in any activity affecting commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another person engaged also in commerce or in any activity affecting commerce where . . . the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.
\end{quote}


\textsuperscript{48} 370 U.S. 294 316-23 (1962) (discussing how the Supreme Court interpreted the amendment by commenting on the deletions and additions that had been made to the amendment).
eral Motors and DuPont. This began a string of litigation victories in merger cases before the Supreme Court based on increasingly ephemeral effects on competition, where the only principled basis for decision, according to Justice Potter Stewart, was that the government always won.

In the monopolization area, the Supreme Court endorsed the Second Circuit’s Alcoa decision as early as 1946 and held that a defendant was guilty of monopolization following proof of monopoly power unless the defendant could demonstrate that the monopoly power had arisen from historical accident, superior foresight skill or industry, or otherwise had been thrust upon the defendant. The Court decided the Griffith case in 1948 with Justice Douglas stating that monopoly power was an unlawful evil, whether exercised or not. By 1954, the Court merely affirmed per curiam Judge Wyzanski’s decision which expansively applied Section 2 to impose liability in the United Shoe litigation. Perhaps the only monopolization case of any comfort to defendants was the Dupont cellophane case which added more stringent limits to the definition of relevant markets and became the only antitrust battleground in


51. Von’s Grocery, 384 U.S. at 301 (Stewart, J., dissenting) (“The sole consistency that I can find is that in litigation under § 7, the Government always wins.”).


54. United States v. Griffith, 334 U.S. 100, 107 (1948) (“So it is that monopoly power, whether lawfully or unlawfully acquired, may itself constitute an evil and stand condemned under § 2 even though it remains unexercised.”).

55. United States v. United Shoe Mach. Corp., 110 F. Supp. 295 (D.Mass. 1953), aff’d per curiam, 347 U.S. 521 (1954). United was a company that made and leased machinery that made shoes. Id. at 339. The court found that its leasing procedure created barriers to the entry of competitors into the shoe machinery field. Id. at 340. First, the procedures kept machine renters from disposing of a United machine to get another. Id. Second, United offered more favorable replacement terms when lessees were ready to switch machines. Id. Third, United offered repair services which prevented a separate repair industry from evolving. Id. The court thus found that the leasing procedures maintained the monopolization of the market in violation of § 2 of the Sherman Act. Id. at 341.


57. In determining whether the defendant had monopoly power, the court looked beyond the market for cellophane alone. Id. at 394-404. The court held that it was necessary to look at the market “composed of products that have reasonable interchangeability for the purposes for which
which a powerful or seemingly dominant firm could win. Otherwise, liability was nearly automatic once power within a relevant market was established.

The leading antitrust commentators of the 1950's were largely accepting of the existing overall legal landscape. For example, in 1955, the Attorney General's National Committee to Study the Antitrust Laws, which was composed of leading antitrust practitioners, government officials, and academics issued its report. Rather than take on the wholesale reform of antitrust, the Committee saw its task as setting out "as clearly as possible the path antitrust has traveled and what it augurs for the future." The Report's discussion of Section 1 of the Sherman Act is almost entirely descriptive, except for mild criticism of the development of the intra-enterprise conspiracy doctrine. This section of the Report focuses on the per se treatment of price fixing and how to fit various types of cases and practices within that category. The Report is very accepting of the nearly total presumption of illegality in cases under Section 2 of the Sherman Act upon proof of monopoly power and suggests only the mildest reformulation of Alcoa as not requiring total lethargy on the part of a proven monopolist.

The acceptance of the vast majority of the antitrust status quo and the mild tone of the Committee's few recommendations continues throughout most of the Report including its analysis of the administration and enforcement of the antitrust laws. This is not to say that the Report or mainstream antitrust doctrine did not have

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59. Id. at 4. The co-chairman at a subsequent conference specifically denied that the Committee "had plans for a complete overhauling of the antitrust laws." S. Chesterfield Oppenheim, Remarks on the Report of the Committee, in CONFERENCE REPORT, supra note 47, at 9, 11. Similarly, a member of the committee criticized dissenting members and commentators for assuming that the Committee's purpose was to rewrite the antitrust laws. Edward R. Johnston, Appraisal of the Report and its Major Recommendations, in CONFERENCE REPORT, supra note 47, at 15.

60. George E. Hale, The Sherman Act: Sections 1 and 2, in CONFERENCE REPORT, supra note 47, at 33-36 (discussing disagreement among the committee as to whether an intra-enterprise conspiracy to drive a competitor from the field should be covered under § 2 instead of § 1, since such conspiracies inevitably involve an attempt to monopolize).


62. Id. at 55-60.

63. Id. at 343-83. The strongest departure from the status quo here was the majority's call for the elimination of the mandatory treble damage remedy to be replaced by discretion on the part of the court. Id. at 378-80.
its critics,64 but merely to suggest the high degree of consensus prevalent among the leading antitrust enforcers, practitioners, and scholars recruited for the Attorney General’s prestigious Committee and its influential Report. When there was dissent in the Committee’s report it generally came from members who felt that even more stringent rules of prohibition and greater enforcement were appropriate.65

2. The International Agenda

Brewster also faced a rapidly expanding sea of antitrust liability in the international area. The antitrust horizon had been permanently altered by the jurisdictional aspects of the Alcoa decision in 1945.66 Alcoa abandoned the need for proof of conduct within the United States and held that conduct abroad fell within the prescriptive jurisdiction, or subject matter jurisdiction, of United States under the antitrust laws if it produced certain intended effects within the United States.67 Following Alcoa, the assertion of jurisdiction was almost uniformly upheld as the lower courts put less and less emphasis on the question of intent and required only trivial effects in the United States to assert jurisdiction over anticompetitive

64. See, e.g., 1955 REPORT, supra note 58, at 390 (dissent of Louis B. Schwartz) (arguing that the majority report weakens enforcement of antitrust laws by giving broader scope to the “rule of reason” and cutting back on certain classes of “per se” antitrust violations, and thus it “fails to adopt necessary measures for strengthening the law so as to create a truly competitive economy in this county.”); Edward R. Johnston, Appraisal of the Report and its Major Recommendations, in CONFERENCE REPORT, supra note 47, at 15 (evaluating the committees’ findings); Estes Kefauver, The Attorney General’s Committee Report in Perspective, 7 MERCER L. REV. 258 (1956) (claiming that the committee was attempting “massive education” on antitrust law, and in the process, erred in its interpretation of the laws); Louis B. Schwartz, The Schwartz Dissent, 1 ANTITRUST BULL. 37 (1955) (claiming that the majority committee report weakened antitrust laws and adopted no measures to strengthen the law or forward antitrust goals); Milton Handler, An Examination of the Chapter on Patent Antitrust Problems in the Attorney General’s Committee Report, 1 ANTITRUST BULL. 156 (1955); Report of the Attorney General’s Committee on Antitrust Law - A Symposium, 104 U. PA. L. REV. 145 (1955) (publishing a collection of articles to clarify the Report); Kenneth S. Carlston, Basic Antitrust Concepts, 53 MICH. L. REV. 1033 (1955) (commenting on Chapter 1 of the report); Symposium, Antitrust Law, 24 GRO. WASH. L. REV. 1 (1955) (presenting commentary on various aspects of the report including patent antitrust problems, enforcement of antitrust laws, and antitrust application to banking); Antitrust Administration and the Attorney General’s Committee Report - A Brief Symposium, 50 NW. U. L. REV. 305 (1955) (presenting commentary on the recommendations made in Chapter VII of the Report, which deals with the administration and enforcement of antitrust laws).

65. 1955 REPORT, supra note 58, at 390 (dissent of Louis B. Schwartz).

66. 148 F.2d 416, 444 (2d Cir. 1945).

67. Id.
conducted anywhere in the world. The more controversial assertions of jurisdiction in the lower courts included many international cartel cases and often included a variety of restraints involving intellectual property such as key cartel cases involving the international activities of Imperial Chemicals, General Electric, National Lead, and Minnesota Mining & Manufacturing.

The United States Supreme Court’s 1951 decision in *Timken Roller Bearing Co. v. United States* probably was the most high profile and controversial of this line of decisions. In *Timken*, the Supreme Court upheld antitrust liability against an agreement between a United States bearings manufacturer and a major British rival jointly to control partially affiliated British and French manufacturing entities by allocating territories and fixing pricing through a trademark licensing agreement and other devices. The Court rejected arguments that the collusive arrangement was necessary because of the special characteristics of international business. While *Timken* can be read for the uncontroversial proposition that international cartels cannot be implemented through sham licensing ar-

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68. After Alcoa, 249 cases were filed through May 1973 involving foreign trade, and none were dismissed for lack of jurisdiction. Spencer Weber Waller, International Trade and U.S. Antitrust Law § 5.03 n.12 (1995); see generally id. § 5.03 (explaining that the courts interpreted Alcoa expansively) see also Dominicus Americana Bohio v. Gulf Western Indus., 473 F. Supp. 680, 687 (S.D.N.Y. 1979) (requiring only more than de minimus effect for subject matter jurisdiction).


70. Imperial Chem. Indus., 100 F. Supp. at 511 (finding jurisdiction over a New York corporation owned by an English corporation when its New York offices and staff were used solely to carry out the business of the English corporation).


72. National Lead Co., 63 F. Supp. at 513 (exercising jurisdiction and finding antitrust violation for dividing world into trade territories for sale of titanium compounds).


74. 341 U.S. 593 (1951).

75. Id. at 595-99.

76. Id. at 599.
rangements or by merely calling something a joint venture, it was read at the time as potentially much broader. Noted commentators including the 1955 Attorney General's Committee Report felt compelled to state that *Timken* did not make all licensing restraints *per se* unreasonable, that all joint ventures were not *per se* unreasonable, and that foreign investment through subsidiaries was not an automatic violation of the Sherman Act.  

The other principal topics of international antitrust interest in the late 1950's were more international and comparative in nature. There was still the last gasp of interest in the development of a true international antitrust code. Interest had waned in the wake of the failed Havana Charter and its restrictive business practices provisions for the never ratified International Trade Organization (hereinafter ITO). In the 1950s, the Economic and Social Council of the United States unsuccessfully attempted to revive the ITO's agenda in the area of restrictive business practices. The increasing tensions of the Cold War between the developed market economies of the West and the centrally planned economies of the Soviet Union and its dependents made international progress on this issue impossible and interfered with subsequent efforts in the United Nations as well.  

At the same time, interest in comparative and foreign antitrust was increasing exponentially. Japan and Germany had been forced to adopt new competition statutes as a condition of surrender at the end of World War II. Other industrialized western nations

77. Id. at 597.  
78. 1955 Report, supra note 58, at 78, 87-88 (noting that *Timken* did not "cast any cloud upon restrictions in trade-mark licenses as such").  
83. For a discussion of competition law and policy in Germany both before and after World
adopted or expressed interest in adopting competition statutes, often using the United States as a model. The competition rules of the European Coal and Steel Community and the new competition rules of the broader European Economic Community were of considerable interest to American business actively seeking to export, license, or invest in a rebuilt Western Europe.

D. The Innovation of Antitrust and American Business Abroad

Brewster was not the only member of the first generation of international antitrust scholars. Professor James Rahl of Northwestern University Law School and Professor Eugene Rostow of Yale University Law School are other prominent examples. Leading gov-
ernment officials and private practitioners working and writing in the field of international and comparative antitrust during this era included Sigmund Timberg, Wilbur Fugate, and Gilbert Montague. Many of these individuals also served on the 1955 Attorney General’s Committee.

Brewster’s focus and interests were different from his contemporaries and most of the scholars and commentators which have followed him. Professor Rahl chose to emphasize the developing competition law of the European Community, especially following the creation of an effective enforcement mechanism in 1963 empowering the European Commission to investigate and punish violations. Wilbur Fugate in his treatise, as it continues to evolve to this day, has emphasized a more historical approach to the development of United States antitrust law and policy in the foreign commerce area.

While the 1955 Attorney General’s Committee Report devoted considerable attention to antitrust problems involving foreign com-


91. GILBERT H. MONTAGUE, TRUSTS OF TODAY: FACTS RELATING TO THEIR PROMOTION, FINANCIAL MANAGEMENT, AND THE ATTEMPT OF STATE CONTROL (1904).

92. See 1955 REPORT, supra note 58, at vii (listing Gilbert H. Montague, James A. Rahl, and Eugene V. Rostow as members of the committee).

93. See JAMES A. RAHL, COMMON MARKET AND AMERICAN ANTITRUST: OVERLAP AND CONFLICT (J. Rahl ed. 1970). The book was sponsored by the European Common Market Antitrust Project and its goal was to satisfy the need for “a definition of the sources, types and seriousness of international antitrust conflict, with the United States and the Common Market [of Europe] as specific objects of study.” Id. at xi. The majority of the book concentrates on European and American antitrust history and policy while the remainder of the book discusses general international approaches to antitrust. Id.; see also BARRY E. HAWK, UNITED STATES, COMMON MARKET AND INTERNATIONAL ANTITRUST: A COMPARATIVE GUIDE (2d ed. 1993). Hawk’s book is divided into two parts. Id. at vi. Part one discusses the application of U.S. antitrust in the interanational arena. Id. Part Two is an analysis of the Competition rules of the EEC (European Economic Community). Id. Hawk focussed on the EEC “because of the importance to international trade of the member states comprising the Common Market and as an example of a highly developed foreign system of competition rules and enforcement.” Id.

In keeping with these interests, Professor Rahl served in the early 1960s as probably the first American resident law firm partner working in Brussels and Professor Hawk, until quite recently, has served as a resident partner in the Brussels office of Skadden, Arps, Slate, Meagher & Flom.

94. See, e.g., WILBUR L. FUGATE, FOREIGN COMMERCE AND THE ANTITRUST LAWS (4th ed. 1991). Mr. Fugate continues his work in this field and is also a contributor to an ABA monograph on special defenses in international antitrust litigation. The first edition of Fugate’s book appeared in 1958, the same year as Antitrust and American Business Abroad and often was reviewed together with Brewster’s book. See infra note 113 (citing to reviews by Weston, Packer and Metzger).
merce and moved well beyond the description and acceptance of the status quo found in much of the rest of the report, it expressly eschewed the very topic Brewster found most interesting; namely, whether antitrust helped or hindered the foreign commerce of the United States and the related foreign policies of the United States government.  

Brewster's project also differed from much of the contemporary writing in terms of the origins of Antitrust and American Business Abroad and its methodology. His book was neither solely a theoretical academic inquiry nor merely a practice-oriented analysis of past decisions. Antitrust and American Business Abroad grew out of a study for the Special Committee on Antitrust and Foreign Trade of the Association of the Bar of the City of New York and received funding from the Merrill Foundation for the Advancement of Financial Knowledge. In addition to traditional legal research and analysis, Brewster conducted interviews with businessmen and attorneys who had experience with international business transactions and their related antitrust problems. These interviews, as well as Brewster's own insights, formed the combination of pragmatism and theory which made Antitrust and American Business Abroad so appealing to practitioners, policy makers, and scholars.

Antitrust and American Business Abroad was divided into three parts. The first part analyzed the fundamental problems, policies, and conflicts between antitrust and foreign policy. The second part analyzed the impact of United States antitrust law and policy on specific types of transactions such as exporting, the licensing of technology, and investment in foreign markets.

Part three contained Brewster's overall conclusions and recommendations for change, so as not to discard United States antitrust

95. See 1955 REPORT, supra note 58, at 66 ("[T]his Committee has made no independent factual study to provide any basis for determining whether our antitrust laws have helped or hindered the foreign commerce of the United States . . . .")
96. See BREWSTER, supra note 1, at v.
97. Id. at vii.
98. The work also included three appendices growing out of the City Bar's study. The first appendix, prepared by the late Professor Donald Trautman of the Harvard Law School, was entitled "A Study of the International Environment: The International Reach of American regulatory legislation Other Than the Sherman Act." Id. at 309. Stuart L. Pittman prepared an appendix on "The Foreign Aid Programs and the United States Government's Antitrust Policy." Id. at 459. David Gill prepared the final appendix on "Problems of Foreign Discovery." Id. at 474.
99. Id. at xiii-xv.
100. Id. at xv-xxi.
law in the international arena, but to better align antitrust principles with the broader national interest.\textsuperscript{101} His recommendations concerned both the process of bringing and resolving claims and the substance of the rules to be applied.

First, he suggested that “[a]ny complaint or proposed proceeding involving foreign conduct, rights, properties, or parties should be offered for the consideration and comment of the Department of State before it is filed”\textsuperscript{102} and that the State Department should further be consulted in connection with any “proposed relief governing foreign parties or properties or rights . . . .”\textsuperscript{103} More controversially, he also proposed a procedure that would allow the President to terminate an antitrust proceeding or grant an exemption if the National Security Council found it essential to the national security to do so.\textsuperscript{104}

With respect to the assertion of jurisdiction to prescribe, or subject-matter jurisdiction as it was generally referred to in that era,\textsuperscript{105} Brewster recommended the adoption of a jurisdictional rule of reason by which jurisdiction is tested not merely by the presence of some effect in the United States but through a weighing of such factors as:

(a) the relative significance to the violations charged of conduct within the United States compared with conduct abroad; (b) the extent to which there is explicit purpose to harm or affect American consumers or Americans' business opportunity; (c) the relative seriousness of effects on the United States as compared with those abroad; (d) the nationality or allegiance of the parties or in the case of business associations, their corporate location, and the fairness of applying our law to them; (e) the degree of conflict with foreign laws and policies; and (f) the extent to which conflict can be avoided without serious impairment of the interests of the United States or the foreign country.\textsuperscript{106}

Brewster made important recommendations with respect to the application of United States antitrust law to export conduct as well. Brewster recommended the abolition of the Webb-Pomerene Act which granted a narrow exemption to export conduct of registered

\textsuperscript{101} Id. at xxi-xxiv.
\textsuperscript{102} Id. at 444.
\textsuperscript{103} Id. at 445.
\textsuperscript{104} Id. at 456-58.
\textsuperscript{105} The Third Restatement of Foreign Relations Law now discusses the concept of legislative jurisdiction or subject-matter jurisdiction in terms of jurisdiction to prescribe. \textit{Restatement (Third) of the Foreign Relations Law of the United States} § 401(a) (1987).
\textsuperscript{106} Brewster, \textit{supra} note 1, at 446.
Brewster’s recommendations in this area were not intended to expand, but to contract, antitrust liability. Brewster argued that the exemption had come to be perceived as the sole means by which joint exporting activity could escape antitrust liability and that the narrow interpretation of the exemption by the enforcement agencies and the courts and the resulting uncertainty in the business community had acted to prevent a variety of useful export activity that created no harmful effects in the United States. He advocated bringing export conduct under the general standards of the Sherman Act and recommended interpreting the Sherman Act to bar agreements affecting exports only upon proof of a substantial effect on the United States market or a similar effect on United States export opportunities.

On the substantive level, Professor Brewster was a staunch opponent of *per se* rules in the international arena. Specifically, he proposed the abolition of the *per se* rule in analyzing restraints found in the licensing of intellectual property in international markets and the creation of legitimate joint ventures between competitors to penetrate foreign markets. Finally, he was quite critical of the intra-enterprise conspiracy doctrine, especially as it purported to impose liability on parent-subsidiary dealings in international markets.

II. THE LEGACY OF ANTITRUST AND AMERICAN BUSINESS ABROAD

*Antitrust and American Business Abroad* was well praised from the moment it was published. The book was reviewed in the American Bar Association Journal, American Journal of Comparative


108. *Brewster, supra* note 1, at 454-55.

109. *Id.* at 455-56.

110. *Id.* at 448.

111. *Id.* Brewster believed instead of *per se* illegality, legality should depend upon the seriousness of the probable economic effect and the apparent purpose behind the act. *Id.*

112. *Id.* at 181. Brewster stated that in parent-subsidiary dealings, if foreign expansion "is done by a branch or division of the American Corporation without separate incorporation, there is no basis for liability . . . . There is only one legal entity, and it takes at least two to make a conspiracy." *Id.* It should be noted that although Brewster clearly favored the abolition of this doctrine of liability, he addressed the topic in his chapter on ownership of foreign enterprise and not in the recommendations section.
Law, the Journal of Legal Education, and the law reviews of Brook-
ylyn Law School, Columbia, George Washington, Georgetown,
Harvard, and the University of Pennsylvania. All the reviews
were positive, if not glowing, regardless of whether the reviewer
agreed with Brewster’s specific policy recommendations. Antitrust
and American Business Abroad was hailed as “unexcelled,” “an
extraordinary work,” “a masterpiece of legal writing,” and “a
masterly balance between the academic appraisal of the problems
under discussion and the consideration given to the needs of the
counsellors of American business.”

Antitrust and American Business Abroad soon became a stan-
dard cite for judges in international antitrust cases. Its original 1958
dition and the second edition as prepared by James Atwood in
1981 have been cited in seventeen cases, including the most sig-

book as “extraordinary”); Wolfgang Fikentscher, 9 AM. J. COMP. L. 557, 557 (1960) (book re-
view) (“[O]ne of the most interesting books on the influence of American antitrust on interna-
tional business of the last years.”); Wolfgang G. Friedmann, 58 COLUM. L. REV. 1311, 1311
(1958) (book review) (commenting that Brewster's book is “comprehensive and penetrating”);
has produced a well-documented scholarly work); Heinrich Kronstein, 11 J. LEGAL ED. 592, 593
(1959) (book review) (noting that the book presents a “masterly balance between the academic
appraisal of the problems under discussion and the consideration given to the needs of the coun-
(noting that Brewster provides a current and comprehensive report); Stanley D. Metzger, 47 GEO.
L. J. 611, 613-14 (1959) (book review) (stating that Professor Brester’s discussion “presents much
(book review) (noting that Brewster has produced a “masterpiece of legal writing”); Glen E. West-
ton, 27 GEO. WASH. L. REV. 613, 614 (1958) (book review) (stating that Brewster's book is “unex-
celled” and should be invaluable to the anti-trust practitioner).

114. See Kaufman, supra note 113 at . The reviewer disagrees with Brewster's ideological
concepts of antitrust. Id. at 368. The reviewer indicated that Brewster was incorrect to believe
that outdated antitrust concepts present an obstacle for foreign achievement. Id. Furthermore, the
reviewer believed antitrust laws are “an expression of our basic concept of freedom of economic
opportunity” and are the “most important characteristic . . . of the way of life which we es-
pouse.” Id. Another reviewer believed Professor Brewster's analysis of United States v. Aluminum
Co. and the theory of extraterritoriality in the international jurisdiction context are inaccurate.
Metzger, supra note 113, at 613.

118. Kronstein, supra note 113, at 593.

119. Hartford Fire Ins. Co. v. California, 113 S. Ct. 2891, 2910 & n.24 (1993); Continental
Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 705 n.12 (1962); In re Insurance
Antitrust Litig., 938 F.2d 919, 928 (9th Cir. 1991); Laker Airways Ltd. v. Sabena, Belgian World
Airlines, 731 F.2d 909, 942 n.123 (D.C. Cir. 1984); American Rice, Inc., v. Arkansas Rice Grow-
ers Co-op. Assoc., 701 F.2d 408, 413 n.6 (5th Cir. 1983); Montreal Trading Ltd., v. AMAX Inc.,
661 F.2d 864, 870 (10th Cir. 1981); FTC v. Compagnie de Saint-Gobain-Pont-a-Mousson, 636
significant and controversial applications of United States antitrust law to international business.

In addition to serving as a reference and research tool, *Antitrust and American Business Abroad* often succeeded in persuading enforcement officials, judges, and law makers to move international antitrust law and policy in line with Brewster's recommendations.\(^{120}\) For example, the Department of Justice and the Federal Trade Commission routinely consult with the State Department\(^ {121} \) and any affected foreign nations,\(^ {122} \) and both agencies have committed themselves in published guidelines to carefully considering foreign policy implications before initiating investigations or taking enforcement actions.\(^ {123} \) On occasion, foreign policy considerations have led the

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120. *See* Interamerican Ref. Corp. v. Texaco Maracaibo, Inc., 307 F. Supp. 1291, 1298 (quoting Brewster as stating that “[a]nticompetitive practices compelled by foreign nations are not restraints of commerce, as commerce is understood in the Sherman Act, because refusal to comply would put an end to commerce”). The court further stated that American business abroad does not carry with it the freedom and protection of competition it enjoys here, and our courts cannot impose them. *Id.*

121. Informal consultation with State Department appears to have predated the publication of *Antitrust and American Business Abroad* by some years. *See* 1955 *REPORT*, *supra* note 58, at 97-98.

122. In many cases the United States is obligated to inform and consult with a foreign nation affected by an antitrust investigation or enforcement action as a result of a bilateral antitrust cooperation agreement or compliance with multilateral guidelines promulgated by the Organization of Economic Cooperation and Development. *Organization for Economic Cooperation and Development Council Meeting at Ministerial Level, Declaration on International Investment and Multinational Enterprises*, O.E.C.D. Press Release A(76)20 (June 21, 1976) *reprinted in* 15 *Int'l Legal Materials* 969, 974 (1976). It also stated the following: Enterprises should while conforming to official competition rules and established policies of the countries in which they operate . . . be ready to consult and co-operate, including the provision of information, with competent authorities of countries whose interests are directly affected in regard to competition issues or investigations. Provision of information should be in accordance with safeguards normally applicable in this field. *Id.*

Department of Justice or the President himself to refrain from taking action. 124

Brewster's jurisdictional rule of reason became the basis for the Ninth Circuit's decision in *Timberlane Lumber Co. v. Bank of America, Nat'l Trust & Sav. Assoc.* 125 *Timberlane* and its progeny revised the *Alcoa* intended effects test 126 to require an additional balancing of the interests of the United States and concerned foreign nations before finding or exercising jurisdiction to prescribe the conduct under United States antitrust law. 127 The influential *Third Restatement of Foreign Relations Law* has adopted a version of Brewster's test as a requirement of international law that jurisdiction to prescribe must be "reasonable" as measured by a balancing of many of the familiar factors advocated in *Antitrust and American Business Abroad.* 128

11, 1988) [hereinafter 1988 INTERNATIONAL GUIDELINES].


125. 549 F.2d 597, 613 (9th Cir. 1976) (adopting Brewster's "jurisdictional rule of reason" which evaluates and balances the relevant considerations in each case).

126. See supra note 66 and accompanying text (discussing the *Alcoa* effects test).

127. *Timberlane*, 549 F.2d at 613.

128. THIRD RESTATEMENT, supra note 105, at §§ 402-03 (noting that the balancing factors include the extent to which the activity takes place within the territory, the connections between the regulating state and the person responsible for the activity to be regulated, the character of the activity to be regulated, the importance of the regulation to the international arena, and the extent to which the regulation effects the regulation of other states).

Even where the jurisdictional rule of reason was not adopted courts and commentators were forced to confront and address Brewster's ideas. See *Laker Airways Ltd. v. Sabena, Belgium World Airlines*, 731 F.2d 909, 942 & 942 n.123 (D.C. Cir. 1984) (citing Brewster as articulating "several other well-established principles" which could be utilized by the defendants in a later proceeding should the facts reveal that the United States laws are not applicable due to foreign governmental involvement); *In re Uranium Antitrust Litig.*, 617 F.2d 1248, 1255 (7th Cir. 1980) (finding the "jurisdictional rule of reason" as set forth in *Timberlane* consistent with the Court's current pronouncement due to the fact that a district judge had already determined jurisdiction in the case). The ad hoc balancing approach called for by the jurisdictional rule of reason engendered a huge debate in the academic literature which continues to this day. The various criticisms of comity as a test for jurisdiction are compiled and summarized in WALLER, supra note 68, § 5.11.

One of the most significant critics of the jurisdictional rule of reason as a rule of law has been the Department of Justice and the Federal Trade Commission in the more recent International Enforcement Guidelines. While pledging to carefully consider comity in the exercise of prosecutorial discretion, the enforcement agencies have contended that a governmental decision to bring an enforcement action is a definitive and binding determination that overall United States interests outweigh those of any affected foreign nations. The Guidelines then contend that the judiciary may not second guess or review this decision by the Executive Branch. See 1995 INTERNATIONAL GUIDELINES, supra note 123, § 3.2; 1988 INTERNATIONAL GUIDELINES, supra note 123, § 5 n.167. The 1995 Guidelines do not take any position on whether a comity analysis should or
A federal district court in Delaware also paid Brewster the highest compliment possible to a treatise writer by adopting his ideas to change the law. In *Interamerican Refining Corp. v. Texaco Maracaibo, Inc.*, the court utilized the foreign sovereign compulsion for the first, and so far only, time to excuse a defendant’s anticompetitive conduct on the basis that it had been compelled by a foreign government acting in its sovereign capacity. In formulating an absolute defense for such compulsion, the court relied on *Antitrust and American Business Abroad* stating:

In his book, *Antitrust and American Business Abroad*, Professor (now President) Kingman Brewster states a proposition which should be self-evident. Anticompetitive practices compelled by foreign nations are not restraints of commerce, as commerce is understood in the Sherman Act, because refusal to comply would put an end to commerce. American business abroad does not carry with it the freedom and protection of competition it enjoys here, and our courts cannot impose them. Commerce may exist at the will of the government, and to impose liability for obedience to that will would eliminate for many companies the ability to transact business in foreign lands.Were compulsion not a defense, American firms abroad faced with a government order would have to choose one country or the other in which to do business. The Sherman Act does not go so far.

Even when not explicitly cited, many of Brewster’s recommendations have entered black letter law. The Supreme Court, in 1984, eliminated the intra-enterprise conspiracy doctrine for joint action between a parent corporation and its unincorporated divisions or wholly-owned subsidiaries in the *Copperweld Corp. v. Independence Tube Corp.* decision and paved the way for the lower courts to eliminate the doctrine in most situations where the parent corporation has effective control of its subsidiaries. The judicial and Department of Justice attitudes towards vertical restrictions and the licensing of intellectual property has moved as far away from per se rules as possible, except where the licensing transaction is a sham.

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130. Id. at 1298.
131. Id.
132. 467 U.S. 752 (1984) (holding that a parent company and its wholly owned subsidiary are incapable of conspiring with each other for the purposes of §1 of the Sherman Act).
133. See *Waller*, supra note 68, § 1.10 n.15 (listing lower courts which did not find a violation where there “is effective common control among corporation affiliates”).
134. For cases reflecting judicial attitude moving away from per se rules, see *Waller*, supra note 68, § 9.
for outright collusion between competitors. A similar evolution has taken place in the analysis of joint ventures as well.

Brewster's ideas also have influenced the course of legislative developments. In the later 1970s and early 1980s Congress held extensive hearings on whether the antitrust laws were responsible for an increasing United States trade deficit and a perception that export performance was declining. In 1982, Congress did not amend or abolish the Webb-Pomerene Act, but instead enacted two new statutes to reduce uncertainty over the antitrust consequences of exporting and to encourage innovative forms of joint exporting. First, Congress enacted the Foreign Trade Antitrust Improvements Act which specified that anticompetitive restraints involving exports will be subject to United States antitrust law only if they produce direct, substantial, and foreseeable effects in the United States market or on the export opportunities of a United States entity. Second, Congress enacted the Export Trading Company Act which allows exporters or groups of exporters to receive advance certification that their conduct will not violate the antitrust laws, binding immunity from challenge by the Antitrust Division, and valuable procedural and substantive protections if the arrangement is challenged by a private plaintiff.

In 1984 and 1993, Congress similarly passed new legislation to encourage joint ventures. Both the National Cooperative Research Act and the later National Cooperative Production Amendments specify that the full rule of reason is the standard to be

135. U.S. Dep't of Justice and Federal Trade Commission, Antitrust Guidelines for the Licensing and Acquisition of Intellectual Property, § 3.4 (Apr. 6, 1995) (licensing arrangements presumed to create significant integrative efficiencies which warrant analysis under the rule of reason unless the putative integration itself is a sham); 1988 INTERNATIONAL GUIDELINES, supra note 123, at ___.

136. See, e.g., Broadcast Music, Inc. v. CBS, 441 U.S. 1 (1979) (vertical blanket licenses of copyrighted material granted by an association of composers to broadcast media held not to be per se illegal price-fixing under the Sherman Act where the effect and the purpose of the practice have significant procompetitive potential); see also supra note 78 and accompanying text (commenting that all joint ventures are not unreasonable).


138. For the text of the Webb-Pomerene Act, see supra note 107.


applied in judging the legality of covered joint ventures and provides a registration procedure whereby firms would be subject only to single damages if their joint venture is subsequently challenged in a suit for damages.\textsuperscript{143} In all of these judicial and legislative developments there are explicit references or echoes of the ideas and recommendations in \textit{Antitrust and American Business Abroad}.

\section*{III. TODAY'S ISSUES FOR \textbf{\textit{ANTITRUST AND AMERICAN BUSINESS ABROAD}}}

The year 1958 was a long time ago. The world in which international business is conducted has changed dramatically. Even since 1988, the year of Kingman Brewster’s passing, the world has changed in ways that have surprised everyone. The United States foreign policy is still adjusting to the cataclysmic changes and opportunities brought on by the collapse of the Soviet Union and the struggles of many countries that are seeking to make the transition to a more democratic and market-oriented economy.\textsuperscript{144} United States international trade and economic policy has evolved and, in many instances, has become indistinguishable from foreign and national security policy in responding to trade and competitiveness issues in international organizations,\textsuperscript{145} multilateral or bilateral negotiations,\textsuperscript{146} unfair trade disputes,\textsuperscript{147} and in continuing to consider the role of antitrust law and competition policy in promoting the interests of the United States and the global trading system.\textsuperscript{148}

Since the mid-1970s, antitrust itself has changed in response to a changing underlying political and economic consensus. \textit{Per se} rules

\begin{itemize}
\item \textsuperscript{144} See Kathleen E. McDermott, \textit{U.S. Agencies Provide Competition Counseling to Eastern Europe}, 6 \textit{Antitrust} 4 \textit{passim} (1991) (citing various officials' positive responses to the United States offering antitrust counseling to Eastern Europe).
\item \textsuperscript{145} For a detailed evaluation of the interrelationship between foreign policy, national security, and international trade and competitiveness, see Gary B. Born, \textit{A Reappraisal of the Extraterritorial Reach of U.S. Law}, 24 \textit{Law & Pol'y Int'l Bus.} 1, 74-75, (1992) (noting the relationship between the Atomic Energy Act, 42 U.S.C. §§ 2011-2296 (1988), the Nuclear Non-Proliferation Act of 1978, Pub. L. No. 95-242, 92 Stat 120 (amending the Atomic Energy Act of 1952), and the Export Administration Act, 15 C.F.R. §778.2(a) when they address the the transfer of nuclear weapons or their component parts, technical information, and their impact on trade).
\item \textsuperscript{147} Id. at 34.
\item \textsuperscript{148} Micheal L. Weiner, \textit{The Increasing Internationalization of Antitrust}, 8 \textit{Antitrust} 31 (1993).
\end{itemize}
virtually have vanished in all areas of vertical restraints.\textsuperscript{149} Horizontal restraints typically are deemed \textit{per se} unreasonable only when the agreement is inevitably anticompetitive.\textsuperscript{180} Monopolization and merger cases require more than just minor number crunching in order for the government or private plaintiff to prevail.\textsuperscript{181} Private plaintiffs face a variety of hurdles in the form of direct purchaser requirements,\textsuperscript{182} standing issues,\textsuperscript{183} and proof of antitrust injury\textsuperscript{184} before even reaching the merits of their antitrust allegations.

Many of these changes have come since \textit{Antitrust and American Business Abroad} was expanded and updated with great skill by

\textsuperscript{149} For example, in \textit{Continental T.V. Inc.}, the Supreme Court held that vertical non-price restrictions normally will be judged under a rule of reason standard absent significant proof that the practice inevitably and unreasonably restricts interbrand competition. \textit{Continental T.V. Inc. v. GTE Sylvania Inc.}, 433 U.S. 36, 59 (1977). Even tying offenses which remain nominally \textit{per se} unreasonable involve proof of most of the requirements of the full rule of reason before \textit{per se} liability is invoked. \textit{Jefferson Parish Hosp. Dist. No. 2 v. Hyde}, 466 U.S. 2 (1984).

Resale price maintenance remains \textit{per se} unreasonable, but has been virtually defined out of existence through restrictive formulations of what constitutes resale price maintenance, heightened standards of proof, and heightened requirements for a private plaintiff to prove antitrust injury. \textit{Atlantic Richfield Co. v. USA Petroleum}, 495 U.S. 328 (1990) (holding no standing for private plaintiff to challenge most forms of maximum resale price maintenance); \textit{Business Elecs. Corp. v. Sharp Elecs. Corp.}, 485 U.S. 717 (1988) (requiring proof of ongoing agreement regarding price or price levels following termination of price cutter for \textit{per se} treatment); \textit{Monsanto Co. v. Spray-Rite Corp.}, 465 U.S. 752 (1984) (holding proof of complaints by competing dealers admissible, but not sufficient, to show that dealer was terminated pursuant to actionable conspiracy).


\textsuperscript{151} United States v. General Dynamics Corp., 415 U.S. 486, 510-11 (1974) (using the availability of usable resources to predict future ability to compete, the Court found the Government's estimate of the defendant's market power unrealistic); United States v. DuPont De Nemours & Co., 351 U.S. 377, 380 (1956) (articulating that the primary consideration is "whether defendants control the price and competition in the market for such part of trade or commerce as they are charged with monopolizing").

\textsuperscript{152} Kansas v. Utilicorp United, Inc., 497 U.S. 199, 207 (1990) (relying on \textit{Hanover Shoe, Inc. v. United Shoe Machinery Corp.} which restricted the definition of "direct purchasers" to only the "immediate buyers from the alleged antitrust violators" and, thereby preventing the plaintiffs from bringing a claim).

\textsuperscript{153} Lovett v. General Motors Corp., 975 F.2d 518, 520 (8th Cir. 1992) (listing the factors to determine standing to recover private damages in an antitrust claim as follows:

\begin{enumerate}
  \item the causal connection between the alleged antitrust violation and the harm to the plaintiff;
  \item improper motive;
  \item whether the injury was of a type that Congress sought to redress with the antitrust laws;
  \item the directness between the injury and the market restraint;
  \item the speculative nature of the damages; and
  \item the risk of duplicate recoveries or complex damage apportionment).
\end{enumerate}

\textsuperscript{154} Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 334 (1990) (distinguishing that a plaintiff may not recover damages simply by showing "injury causally linked to an illegal presence in the market," but only if he proves the injury was "attributable to an anticompetitive aspect of the practice under scrutiny").
James Atwood in 1981. It is clearly time for another look at the same issues that Brewster first considered in 1958 and the many new issues that have arisen since that time. I am very fortunate to have that opportunity. Although I approach the project of preparing a third edition of Antitrust and American Business Abroad with gratitude to both James Atwood and Diane Wood, who made my participation possible, I also approach it with some trepidation.

The most significant developments have occurred in six main areas. First, I believe that the events of the past fifteen years have addressed many of the concerns in Atwood and Brewster regarding the extraterritorial application of United States antitrust law to the conduct of persons and firms outside our borders. I believe this issue has faded in prominence, somewhat, as a result of the rest of the world acknowledging the legitimacy of some form of extraterritoriality and the United States executive branch and many courts becoming increasingly more sensitive to the need for restraint and limits in the use of extraterritoriality.

This does mean not that the issue has gone away. Government enforcement policy is always subject to change. In addition, the specter of private litigation unconstrained by foreign policy or national interests remains. There will always be cases and controversies of extremely high profile that will involve the reach of United States antitrust and the legitimate interests of foreign nations.

For example, the Supreme Court can be criticized for underappreciating the virtues of international comity in Hartford Fire Insurance Co. v. California. Hartford Fire is troubling since the decision can be interpreted to hold that international comity should never be a consideration unless the foreign interest amounts to out-

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156. Professor Diane Wood taught at the University of Chicago Law School immediately prior to her service as Deputy Assistant Attorney General of the Antitrust Division for Appellate and International matters. In that position, she was the primary drafter of the 1995 International Guidelines, supra note 123. Diane Wood is now a judge on the United States Court of Appeals for the Seventh Circuit. Then Professor Wood prepared the 1993 cumulative supplement to Atwood & Brewster supra note 155 and would have prepared the third edition but for her government service.
157. See supra notes 105-06.
158. For a discussion on the acceptance of the United States position on extraterritoriality by Germany, France, Switzerland, and Japan, see Gary B. Born, A Reappraisal of the Extraterritorial Reach of U.S. Law, 24 Law & Pol'y Int'l Bus. 1, 67 (1992).
159. 113 S. Ct. 2891 (1993).
right compulsion of private actors. However, I am not particularly critical of the result reached in that case because the evidence fairly strongly suggested that the defendants intended to affect the United States insurance market and that their conduct in fact produced direct, substantial and foreseeable effects.

On the other hand, the Colorado district court in Rivendell Forest Products, Ltd. v. Canadian Forest Products, Ltd. appears overly enamored of deference to unproven foreign interests. In that case, the district court dismissed a private treble damage action without any attempt to conduct discovery or critically examine the nature and strength of the Canadian governmental interests and the relative importance of those interests in comparison to those of the United States.

My prediction is that both of these extreme sort of cases will occur in the future in the nature of occasional brushfires and will be dealt with pragmatically, more as matters of private self-interest, rather than as the type of all consuming diplomatic battles of sovereignty and international law that has occurred in the past. There is a broad international acceptance of some form of extraterritoriality, but with some limits. If you look at what the world community actually does, and not just its rhetoric regarding specific U.S. antitrust cases, the use or acceptance of some form of extraterritoriality can be said to be nearly universal enough to be considered a rule of customary international law.

As extraterritoriality with limits becomes the norm, there needs to be an emphasis on increasing the ability of the courts to decide questions of extraterritoriality, the effects doctrine, and the comity of nations in a fair and sophisticated manner on the basis of record evidence rather than mere rhetoric. Counsel and the courts need to be familiarized with international and comparative legal materials.

160. Id. at 2910 (relying on Restatement (Third) of Foreign Relations Law §415 cmt.j, the Court quoted that "'[T]he fact that conduct is lawful in the state in which it took place will not, of itself, bar application of the United States antitrust laws' even where the foreign state has a strong policy to permit or encourage such conduct.")

161. Id. at 2909-10.


163. Id. It was sufficient that the economic matter giving rise to the antitrust complaint was subject to an ongoing trade dispute between the nations for the court to deny extraterritorial application of the Sherman Act. Id.

164. See Waller, supra note 68 § 5.

165. See Born, supra note 158, at 67 (discussing the international acceptance received by the United States on its extraterritoriality position).
in order to present well-founded arguments about the merits of jurisdiction to prescribe in the routine cases that will dominate the docket, and the controversial ones that will still arise from time to time.

The Department of Justice needs to play a more constructive role in this process in two ways. First, the Antitrust Division needs to change an unfortunate attitude that arose in the mid-1980s that comity and other special international defenses somehow do not apply to government antitrust enforcement actions. Comity, the act of state doctrine, and foreign sovereign compulsion are not solely the product of the separation of powers under the United States Constitution and need to be applied rigorously not just as part of the exercise of prosecutorial discretion, but in all types of litigation regardless of the identity of the plaintiff.

The Antitrust Division also needs to participate more frequently in private antitrust litigation. This was urged by Brewster in 1958, repeated by Atwood in 1981, and supported by many other commentators. Participation by the government as amicus curiae rarely occurs in any kind of private antitrust litigation, except when the Supreme Court requests the views of the Solicitor General on the granting of certiorari or the merits of a case, and almost never occurs in the district court where it can do the most good. The Antitrust Division as a whole, and in particular the Foreign Commerce Section, could play an important role in providing factual material for the evidentiary record in evaluating the strengths of foreign and United States interests in such cases without getting involved in the question of antitrust liability which have

166. 1988 INTERNATIONAL GUIDELINES, supra note 123, §§ 4-6. The 1995 INTERNATIONAL GUIDELINES reach the same conclusion, see supra note 123, § 3.2-3.  
167. The doctrine of Comity is a willingness of one sovereign to grant a privilege to the legislature, executive, or judicial act of another sovereignty out of deference to that sovereignty. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 401 (1987).  
168. The act of state doctrine precludes the courts of this country from inquiring into the validity of governmental acts committed by recognized foreign sovereign within its own territory. See e.g., W. S. Kirkpatrick v. Environmental Tectonics Int'l Corp., 493 U.S. 400 (1990).  
170. See BREWSTER, supra note 1, at 445-46.  
171. See ATWOOD & BREWSTER, supra note 155, at 355.  
172. See supra note 113 (citing persons who supported Brewster's findings).  
yet to be determined. For example, the antitrust cooperation agreements with both Canada and Australia envisions participation upon request in order to inform the United States court of any consultations between the two countries germane to the private litigation.\textsuperscript{174} If such participation is routine and the Division is acting as an informational resource for the court, it will go a long way towards avoiding the polarization and politicization that could take place if the Antitrust Division takes a position in a particular case favoring either party.\textsuperscript{176} In the rare case where the stakes are so high that the Antitrust Division simply should remain silent, it should say so. Otherwise, judges should request the Division’s participation and it should do so on its own.\textsuperscript{178} The result will be more informed decisions, less rhetorical excesses, and an increased likelihood that these disputes will remain as hotly contested private disputes and not as diplomatic incidents.

Second, I think it is important to lay to rest an issue that I regard primarily as a red herring — namely whether antitrust law should apply a different substantive standard to foreign commerce cases. This issue arose most prominently in Justice Frankfurter’s dissent in \textit{Timken}\textsuperscript{177} in which he stated:

\begin{quote}
[T]he conditions controlling foreign commerce may be relevant here. When as a matter of cold fact the legal, financial, and governmental policies deny opportunities for exportation from this country and importation into it, arrangements that afford such opportunities to American enterprise may not fall under the ban of a fair construction of the Sherman Act because comparable arrangements regarding domestic commerce come within its
\end{quote}

\textsuperscript{174} Memorandum of Understanding as to the Notification, Consultation and Cooperation with Respect to the Application of National Antitrust Laws, U.S.-Canada, May 8, 1984, § 11, \textit{reprinted in}, 23 I.L.M. 275 (1984) (providing for the court in which a private antitrust suit is pending the substance and the outcome of the consultations under this agreement); Agreement Relating to Cooperation on Antitrust Matters, U.S.-Australia, June 29, 1982, Art. 6, \textit{reprinted in}, 21 I.L.M. 702 (1982) (allowing one government to request another to participate in a private antitrust court proceeding where the issue has been subject-matter notification and consultations under the agreement).

\textsuperscript{175} It also avoids the situation in the 1980s when participation in private litigation was part of the Reagan Administration’s agenda to change the substance of antitrust doctrine. Stephen F. Ross, \textit{Interview: Professor Eleanor M. Fox}, 6 \textit{Antitrust} 8, 11 (1991).

\textsuperscript{176} Procedurally, the Antitrust Division can participate through 28 U.S.C. § 517, which permits it to file suggestions of interests.

The Solicitor General, or any officer of the Department of Justice, may be sent by the Attorney General to any State or district in the United States to attend to the interests of the United States in a suit pending in a court of the United States, or in a court of a State, or to attend to any other interest of the United States.


\textsuperscript{177} United States v. Timken Roller Bearing Co., 341 U.S. 593 (1951).
Brewster adopted many of these themes in arguing that *per se* rules for domestic antitrust violations should not be applied indiscriminately in the foreign commerce area. This same idea was echoed in the 1977 International Antitrust Guidelines of the Antitrust Division which stated:

The rule of reason may have a somewhat broader application to international transactions where it is found that (1) experience with adverse effects on competition is much more limited than in domestic markets, or (2) there are some special justifications not normally found in the domestic market.

As we stand in 1995, this issue is no longer a particularly useful topic for debate. The courts and more recent Antitrust Divisions of both Republican and Democratic administrations have not endorsed or implemented the themes of Frankfurter, Brewster, or the 1977 Guidelines. In contrast, the 1988 International Guidelines and the 1995 International Guidelines are quite explicit that the Antitrust Division and the Federal Trade Commission think the substantive rules of antitrust are the same whether they are being applied in national, international, or world markets. It is increasingly more clear that antitrust law will distinguish between foreign commerce and domestic cases by applying different jurisdictional rules and a narrow range of special defenses, but will apply the same basic rules of liabilities in examining the merits of the dispute.

I am not at all sure that Brewster would object to this development given that the basic rule of antitrust liability for virtually all areas of the law today is the rule of reason, except for hard-core

178. *Id.* at 605-06.
179. **Brewster**, *supra* note 1, at 79-84, 354-56.
182. *See supra* note 179 (noting Brewster's adoption of several of Frankfurter's themes).
183. *See supra* note 180 (citing language from the 1977 International Antitrust Guidelines which echoes Frankfurter's dissent).
184. *See* 1995 **International Guidelines**, *supra* note 123, § 2.0 (noting that the same substantive rules apply to all nationalities after jurisdictional requirements and considerations of international comity have been satisfied).
187. Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977) (treating all vertical non-price agreements under the rule of reason); *see also* Northwest Wholesale Stationers, Inc. v.
horizontal collusion as to price,\textsuperscript{188} production,\textsuperscript{189} territories,\textsuperscript{190} or customers.\textsuperscript{191} Even in the area of horizontal collusion, the debate over whether the substantive rules should be different is misleading. Under \textit{Socony-Vacuum} and its famous footnote 59, horizontal agreements relating to pricing are \textit{per se} unreasonable regardless of the lack of effect or the lack of power of the conspirators.\textsuperscript{192} The Department of Justice, should it desire to do so, could prosecute any number of would-be cartelists whose fanciful schemes have no possibilities of injuring competition. In contrast, the improbable or powerless foreign conspiracy will be beyond the reach of United States antitrust law, since it produces no discernable effect in the United States. A United States court is unlikely to find jurisdiction absent a direct, substantial, and foreseeable effect in the United States or on United States export opportunities. Thus, the foreign cartelist effectively is subject to a version of the rule of reason in order to satisfy a jurisdictional threshold, whereas a domestic conspirator in exactly the same situation is subject to the prosecutorial discretion of the Antitrust Division.

The third main issue I see is the need for a far greater skepticism about the desirability or the necessity to promote United States export cartels or tolerate those of other countries. I am far more negative than either Atwood\textsuperscript{193} or Brewster\textsuperscript{194} about the utility or value of export cartels as a policy tool of the United States or the need to tolerate the continuation of such practices on the part of other nations. The vast majority of joint export conduct is either substantively legal under the United States antitrust laws\textsuperscript{195} or beyond the

\textsuperscript{189} In \textit{Re Detroit Auto Dealers Ass'n, Inc.}, 955 F.2d 457 (6th Cir.) (holding limitations on output inherently suspect), \textit{cert. denied}, 113 S.Ct. 461 (1992).

\textsuperscript{190} Palmer \textit{v. BRG of Georgia, Inc.}, 498 U.S. 46 (1990) (per curiam).


\textsuperscript{192} United States \textit{v. Socony Vacuum Oil Co.}, 310 U.S. 150, 255 n.59 (1940) (ruling that "a conspiracy to fix prices violates §1 of the Act though no overt act is shown, though it is not established that the conspirators had the means available for accomplishment of their objective, and though the conspiracy embraced but a part of the interstate or foreign commerce in the commodity").

\textsuperscript{193} \textit{See ATWOOD \& BREWSTER, supra} note 155, §§ 9, 19.06.

\textsuperscript{194} \textit{See supra} notes 107-09 and accompanying text (discussing Brewster's views regarding the application of antitrust to export conduct).

\textsuperscript{195} \textit{See supra} notes 149-54 and accompanying text (discussing changes in United States anti-
jurisdiction of the United States antitrust laws under the Foreign Trade Antitrust Improvements Act. The empirical evidence suggests that both the Webb-Pomerene Act and the Export Trading Company Act have failed to increase U.S. exports, create new jobs, or provide other significant economic benefits for the United States. While sensible jurisdictional limits and a willingness to let other nations protect their own markets are a principled position, to promote conduct which can include export cartels aimed at other countries reeks of hypocrisy. It complicates United States enforcement policy both in taking action against such foreign cartels aimed at the United States market and in cooperating with other jurisdictions who wish to take action against our export associations aimed at their markets. It further complicates the role of the United States in the creation or implementation of free trade areas and regional markets if market access becomes, or is perceived to be, an invitation for mercantilistic behavior by officially approved export cartels by any of the trading partners. I stand by my past position and that of most other commentators in favor of the elimination, rather than the validation, of such practices through multilateral diplomatic means.

Fourth, the relationship between the international trade and antitrust laws is of great concern to American business abroad. The dumping laws are a particularly egregious example of a set of

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196. 15 U.S.C. § 6A (1988); see also supra note 139 and accompanying text (discussing the preconditions for anticompetitive restraints to be subject to United States antitrust law).
201. “Dumping is the sale of products in an export market for less than the price of the same goods in the domestic market. At its simplest, dumping is a form of international price discrimination.” Waller, supra note 68, § 12.02. Foreign producers might engage in dumping in the United States to eliminate their excess capacity, to dispose of obsolete merchandise, or to compete as a new entrant in U.S. markets. Id. Dumping laws create remedies for domestic industries injured by
international trade laws that seek to penalize aggressive, but profitable, pricing strategies that the antitrust laws normally seek to promote.\textsuperscript{202} While American industry can misuse those laws in ways that violate the antitrust laws,\textsuperscript{203} far more often United States industries lawfully utilize the remedies in precisely the way Congress intended to suppress import competition.\textsuperscript{204} Now the shoe is on the other foot as a growing segment of United States industry must respond to dumping and other unfair trade proceedings in an increasingly large number of markets of critical importance to United States prosperity.

These two bodies of law need to be reconciled in order to promote the competition on the merits that both international trade law and antitrust law seek to protect. To date, United States law has done a miserable job of reconciling these principles from an antitrust standpoint. United States law has responded typically by subordinating antitrust to protectionist trade goals and increasing the power of the import relief laws whenever Congress passes new trade legislation.\textsuperscript{205}

The international level affords a greater hope. The Organization of Economic Cooperation and Development (hereinafter OECD)\textsuperscript{206} is engaged in a long-term attempt to bring both bodies of law into greater harmony. Perhaps the new World Trade Organization\textsuperscript{207}


\textsuperscript{202} See \textsc{Waller}, supra note 68, § 12.02 (illustrating that dumping may be a natural consequence of healthy competition in the U.S.). The Supreme Court has gone so far as to hold that even below-cost pricing is lawful where there is no reasonable likelihood that the defendant could ever recoup its losses or effectively exercise monopoly power in the future. See \textsc{Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.}, 113 S. Ct. 2578 (1993).

\textsuperscript{203} \textsc{Waller}, supra note 68, § 13.01 (explaining that American industry could misuse trade laws by filing frivolous trade petitions “to harass and injure foreign competitors,” or by threatening to initiate or settle trade cases in order to be “used as a disguise for collusion in the United States or world markets”).

\textsuperscript{204} Id.

\textsuperscript{205} For an example, see the progressive strengthening of the so-called escape clause codified at 19 U.S.C. § 2251 \textit{et. seq.} which permits U.S. producers and workers to seek protection from even fairly traded imports.

\textsuperscript{206} See \textsc{Organization for Economic Cooperation and Development, Obstacles to Trade and Competition} (1993).

also will enter this critical debate about the meaning of competition and the best method to promote, rather than frustrate, that process.

Fifth, certain aspects of the business and government communities look at antitrust not just as an impediment, but as a potential ally in the struggle to open new markets to United States goods and services. They look to United States antitrust law and its foreign counterparts as a way of eliminating collusion and exclusionary conduct that prevents United States firms from entering new markets where negotiations and trade sanctions have been ineffective. Most of the impetus for this is the frustration over actual and perceived barriers to the sale of United States goods and services in Japan. Much attention needs to be paid to the narrow and limited role that antitrust can play in this effort and its jurisdictional and substantive limitations in confronting barriers in foreign markets.

At the same time, antitrust should not be viewed as a panacea to international trade problems which are more likely to be the result of governmental barriers which antitrust is powerless to attack. Antitrust law also needs to be shielded from pressures to corrupt a body of law which maintains competitive values into another protectionist weapon to be applied in a discriminatory fashion on the basis of nationality rather than the harm to competition.

Finally, I believe that the most significant antitrust constraint on the behavior of American business abroad is no longer United States antitrust policy at all, but rather the growth of foreign, regional, and developing international competition norms which arise out of very different cultural settings and impose substantive and procedural requirements that are often quite different and occasionally in conflict with United States norms. The challenge for American business will be to accommodate its behavior to these new norms in a way that is consistent with business objectives. The increasing burdens of these additional competition norms will produce great pressure to harmonize antitrust laws and procedures. More


209. Id.

210. For example, Eastman Kodak recently has filed a petition with the United States Trade Representative pursuant to § 301 of the Trade Act of 1974 seeking sanctions against Japan alleging it has been denied access to the Japanese market as a result of the Japanese government’s systematic toleration of private anticompetitive behavior.

211. See supra note 208.

212. Waller, supra note 68, § 6.09.
ambitious proposals to create truly international rules and procedures have been and will be produced. The nature of the success or failure of these efforts strikes me as the core issue for the decades to come, just as the question of the jurisdictional reach of United States antitrust law was the burning question in the past.218

My own views are that the goal of substantive harmonization is neither desirable nor feasible. In a recent article, I have argued that the United States antitrust laws represent a unique social and legal vision that cannot be exported to other countries in any recognizable form.214 Similarly, the competition laws of the European Union and the other systems with effective competition laws represent their own unique vision which cannot be sold, transferred, or used as the basis of a universal competition law.215 What seems likely to emerge from even the most good faith attempt at drafting an international antitrust code is either an unsuccessful and quixotic search for a detailed set of rules acceptable to the international community or a type of lowest common denominator approach of vague platitudes that will not advance the cause of competition law in the world community.

As an alternative, I would suggest two different types of harmonization — a harmonization of values and a harmonization of procedures. Where consensus exists as to the value of a system of competition enforced by law, then countries should be encouraged and supported to implement competition rules that are consistent with the shared norms and with national traditions and existing legal institutions. A single inflexible set of rules as to substantive competition law is not needed as long as the fundamental norms are furthered rather than subverted.

The shared norms most likely to emerge are a consensus against cartels both at home and for exports and a most favored nation and national treatment standard for enforcement decisions. This type of harmonization is both desirable and feasible and harnesses each country's own self interest as a tool for progress, rather than beginning a long and contentious negotiation process in order to create a single legal code which will favor some countries and impose burdens on others. The OECD is one forum where such discussions al-

213. See supra notes 66-73 and accompanying text (discussing early jurisdictional issues).
215. Id.
already have taken place and will continue to do so.\textsuperscript{216} I would urge also that the World Trade Organization consider this role for itself in the competition and trade area, rather than conceive its role as requiring the creation of a new international code of conduct for restrictive business practices.\textsuperscript{217}

Much work can also be done in the area of procedural cooperation. American business will benefit from a reduction in the differing and burdensome compliance requirements of multiple national competition laws. This benefit is most apparent in the merger area where a major transnational merger or acquisition can involve pre-merger notifications, either mandatory or voluntary, in more than a dozen legal systems, each with different deadlines, informational requirements, waiting periods, and procedures for second requests, all separate from the substantive standards of review for the transaction itself.\textsuperscript{218} This burden can be reduced without seeking to rewrite the substance of the rest of the world’s merger laws.

The ability of governments to investigate all types of potential anticompetitive conduct can be increased to the benefit of both consumers and businesses through the continuation and expansion of bilateral and multilateral cooperation agreements between enforcement agencies.\textsuperscript{219} In the area of collusion, monopolization, and mergers and acquisitions, competition enforcers confront the location of evidence beyond their national borders.\textsuperscript{220} The trend toward cooperating in defined circumstances where there are shared values and norms about competition matters, even where the investigation concerns matters not illegal in the country containing the evidence, is one of the most encouraging trends in international competition law.\textsuperscript{221}

\begin{footnotes}
\item 219. \textit{See}, e.g., \textit{supra} note 174.
\item 220. In this regard see the newly enacted International Antitrust Enforcement Assistance Act of 1994 which will permit the United States to enter into comprehensive cooperation agreements with foreign countries permitting the sharing of a wide range of confidential information. H.R. 4781, 103d Cong., 2d Sess. (1994).
\item 221. Waller, \textit{supra} note 214.
\end{footnotes}
Contacts between national enforcement agencies need to evolve beyond the conflict avoidance of the 1980s into true cooperation. In this regard, the passage of the International Antitrust Enforcement Assistance Act of 1994 is most encouraging. The ultimate success of this endeavor will depend on the language and usefulness of the bilateral cooperation agreements between the Antitrust Division, the Federal Trade Commission, and their foreign counterparts. If concerns about the confidentiality of trade secrets and other commercially sensitive information can be addressed, national antitrust enforcement will be more efficient. The cost of investigations will be reduced both to enforcers, targets, victims, and third parties and the likelihood of better decisions on the merits will be increased. This endeavor may not be a total blessing to the hard core violators of competition norms, but it would represent a victory for the vast bulk of American firms which vigorously compete and benefit from a competitive marketplace in which to do business, both at home and abroad.

III. Conclusion

Over the past two years, I have had the pleasure to study and reconsider the views expressed in Antitrust and American Business Abroad and its second edition and test them against the subsequent developments and my personal views. Both have changed somewhat. More importantly, I hope I am able to address today's issues in antitrust in the same manner that Kingman Brewster spoke to the important concerns of his era. Brewster addressed issues of extraterritorial jurisdiction and the seemingly inevitable growth of per se rules because those were the burning issues of his day. Those is-

222. E.g., Priorities of Canadian Competition Bureau Include Review of Understanding with U.S., 67 ANTITRUST & TRADE REG. REP. (BNA) 416 (1994) (explaining that cooperation between Canada and the U.S. has "led to convictions in both [countries] in the facsimile paper case, which marks the first time a joint investigation has produced convictions"). The United States and Canada also cooperated in the investigation and prosecution of price fixing in the plastic dinnerware industry.


224. No formal negotiations have begun as of July 1, 1995.

225. The Act requires that the foreign nation provide protection to confidential information equivalent to that provided by the U.S. in order to conclude an assistance agreement.

226. See supra notes 105-06 and accompanying text (discussing Brewster's jurisdictional rule of reason).

227. See supra notes 110-11 and accompanying text (discussing Brewster's opposition to per se rules).
issues remain important in the context of the investigation and litigation of particular disputes, but are now the province of antitrust specialists and are no longer the overarching policy questions of the day.

The hot button issues today relate more to the relationship of the competition rules in the United States and the competition related laws of our trading partners and the continuing conflict between competition and international trade remedies. The issues to be resolved include the extent to which the substance and the procedure of these laws can be coordinated, harmonized, and unified and whose interests will be served. In addressing these issues in a third edition of *Antitrust and American Business Abroad*, I hope to honor the most important legacy of Kingman Brewster, in seeking to persuade and not merely to describe.