Part I

SWEEP OF THE PROBLEM

Chapter 1

Antitrust and American Business Abroad Today

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§ 1:1 Introduction

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’ 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 U.S. Constitution. In analyzing both the legal doctrine and policy issues, Brewster proposed a series of reforms, including most prominently the adoption of a so-called “jurisdictional rule of reason” to govern when the United States should exercise jurisdiction over cases involving anticompetitive conduct taking place outside United States territory.

Since its publication, *Antitrust and American Business Abroad*, and its second edition prepared by James Atwood, has influenced several generations of scholars, practitioners, and judges in thinking about the application of U.S. antitrust law to the conduct of business in international markets. The impact of *Antitrust and American Business Abroad* has been 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. In a world with over 120 jurisdictions with competition laws, the time has come for a fourth edition. This chapter suggests how the concerns in international antitrust law and enforcement policy have changed and outlines the new antitrust challenges and opportunities for American business operating in international markets.

§ 1:2 Setting for Antitrust and American Business Abroad

*Antitrust and American Business Abroad* was a groundbreaking work because of its author, subject matter, methodology, and timing. Each factor contributed to its lasting influence.

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§ 1:3 Setting for Antitrust and American Business Abroad—Author

Kingman Brewster, Jr., 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.¹

Following graduation from Harvard Law School, he worked in Paris as an assistant to the special representative to 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 34, 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. Whitney Griswold in 1963, Brewster became acting president and was offered the job on a permanent basis within a matter of months.

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 268-year history of Yale. More controversially, 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 10,000 demonstrators protesting recent convictions 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. In 1977, President Jimmy Carter appointed Brewster as the U.S. Ambassador to Great Britain. He served with great popularity among the English 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

¹The biographical details of Kingman Brewster's life are taken from a press release issued by Yale University upon his selection as president of the University and the many obituaries published in leading United States and British newspapers following his death on November 8, 1988.
special master on free agency disputes in the National Basketball Association. In 1986 Brewster returned to England, to serve, most unusually for an American citizen, as the master of University College, Oxford University, a position which he held until his death at the age of sixty-nine in 1988.

§ 1:4 Setting for Antitrust and American Business Abroad—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.

§ 1:5 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 organized 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 only published the first modern antitrust casebook in 1937. In 1958, students and professors of antitrust largely had a


[Section 1:4]


[Section 1:5]

M. Handler, Cases and Other Materials on Trade Regulation (1937). See also J.A. Mclaughlin, Cases on the Federal Anti-Trust Laws of the United States (1933) (second edition of self-published casebook by Harvard
choice between the 1948 edition of Professor Chesterfield Oppenheim’s *Cases on Federal Anti-Trust Laws*,\(^2\) or the second edition of Professor Handler’s casebook published in 1951.\(^3\) 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, the Antitrust Section of the American Bar Association, academic and commercial publishers, professionally edited journals, and student-run law reviews. Brewster’s contributions must thus be understood in light of the state of general antitrust law and policy and the special concerns involving foreign commerce during that period.

§ 1:6 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.\(^1\) From the end of the Great Depression\(^2\) into the early 1970s, when the Supreme Court spoke on antitrust


\(^3\)Handler published the third edition of his work in 1960. See also F. 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 Oppenheim work and has no separate chapter on the application of antitrust to the foreign commerce of the United States.

\([Section 1:6]\)


\(^2\)The prior ambivalence of the U.S. executive branch and the judiciary toward the value of antitrust is set forth in Appalachian Coals v.
issues it did so usually to expand liability and preserve or create 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 exclusive dealing contracts, minimum and maximum resale price maintenance not protected by state law, refusals to deal, and tying.

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. The U.S. Supreme Court would not definitively interpret

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*S.N. Barnes, “Mergers,” in Conference on the Antitrust Laws and
those 1950 amendments until 1962 in Brown Shoe. However, the Justice Department used the Clayton Act successfully to reach back decades and invalidate a partial vertical integration of General Motors and DuPont, and would soon begin 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 U.S. 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 had otherwise been thrust upon the defendant. The Court decided the Griffith case in 1948 with language from Justice Douglas that monopoly power was an unlawful evil, whether exercised or not. By 1954, the Court merely affirmed per curiam Judge Wyzanski’s decision expansively applying Section 2 to impose liability in the United Shoe litigation.

Perhaps the only monopolization case of any comfort to

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14 U.S. v. Griffith, 334 U.S. 100, 107, 68 S. Ct. 941, 946, 92 L. Ed. 1236 (1948) (disapproved of by, Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 104 S. Ct. 2731, 81 L. Ed. 2d 628, 1984-2 Trade Cas. (CCH) ¶ 66065 (1984)).

defendants would have been the DuPont\textsuperscript{16} cellophane case which added more stringent limits to the definition of relevant markets, which became the only antitrust battleground in which a potentially dominant firm could win. Otherwise, liability was nearly automatic once power within a relevant market was established.

The leading antitrust commentary of this day was largely accepting of the existing legal landscape. For example, in 1955, the Attorney General’s National Committee to Study the Antitrust Laws, composed of leading antitrust practitioners, government officials, and academics, issued its report.\textsuperscript{17} 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 augurs for its future.”\textsuperscript{18} 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.\textsuperscript{19} This section of the Report focuses on the per se treatment of price fixing and how to fit various cases and practices within that category.\textsuperscript{20} 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.\textsuperscript{21}

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§ 1:7 International cases

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. Alcoa abandoned the need for proof of conduct within the U.S. and held that conduct abroad fell within the legislative jurisdiction, or subject matter jurisdiction, of the U.S. if it produced intended effects within the U.S. 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 order to assert jurisdiction over anticompetitive conduct anywhere in the world.

The more controversial of these assertions of jurisdiction in the lower courts often included a variety of restraints involving intellectual property as well. These included key cartel cases involving the international activities of Imperial Chemicals, General Electric, National Lead, and Minnesota Mining & Manufacturing.

The U.S. Supreme Court’s 1951 decision in Timken Roller Bearing Co. v. United States probably was the most controversial of this line of decisions. In Timken, the Supreme

[Section 1:7]


2 Kessler and Waller, International Trade and U.S. Antitrust Law § 6:3 (2d ed.).


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 price fixing through a trademark licensing agreement and other devices. The Court further rejected arguments that the collusive arrangement was necessary because of the special characteristics of international business. While Timken can be read for the uncontroversial propositions that international cartels cannot be implemented through sham licensing arrangements 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 1950s 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 for the International Trade Organization and its restrictive business practices provisions. In the 1950s, the Economic and Social Council of the United Nations 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 dependencies.

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341 U.S. at 595–99.
341 U.S. at 599.
dependents made international progress on this issue impossible, and interfered with subsequent efforts in the United Nations as well.\footnote{See Miller & Davidow, Antitrust at the U.N.: A Tale of Two Codes, 18 Stan. J. Int’l L. 347 (1982).}

At the same time, interest in comparative and foreign antitrust was increasing. Japan and Germany had been forced to adopt new competition statutes as a condition of their surrender at the end of World War II.\footnote{For a discussion of competition law and policy in Germany both before and after World War II see J. Maxeiner, Policy and Methods in German and American Antitrust Law: A Comparative Study (1986); Gerber, Constitutionalizing the Economy: German Neo-Liberalism, Competition Law and the ‘New’ Europe, 42 Am. J. Comp. L. 25 (1994); I.E. Schwartz, “Antitrust Legislation and Policy in Germany; A Comparative Study,” 105 U. Pa. L. Rev. 617 (1957). For a similar discussion regarding Japan see M. Matsushita, International Trade and Competition Law (1993); Saito & Tamura, The Historical Background of Japan’s Antimonopoly Law, 1994 U. Ill. L. Rev. 115.}

Other industrialized western nations adopted or expressed interest in adopting competition statutes, often with the U.S. as a model. The competition rules of the European Coal and Steel Community\footnote{Treaty Establishing the European Coal and Steel Community, Articles 65–66.} and the new competition rules of the broader European Economic Community\footnote{Treaty Establishing the European Economic Community, Articles 85–90, entered into force Jan. 1, 1958, 298 U.N.T.S. 11.} were of considerable interest to U.S. businesses actively seeking to export, license, or invest in a rebuilt Western Europe.

§ 1:8 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 government officials and private practitioners working and writing in the field of international and comparative antitrust during this era include Sigmund Timberg, Wilbur Fugate, and Gilbert Montague. Many of
these individuals also served on the 1955 Attorney General's Committee.¹

Brewster's focus and interests were different from those of his contemporaries and most of the scholars and commentators who 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.² Wilbur Fugate in his treatise emphasized a more historical approach to the development of U.S. antitrust law and policy in the foreign commerce area.³

While the 1955 Attorney General's Committee Report devoted considerable attention to antitrust problems involving foreign commerce, 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 U.S. and the related foreign policies of the U.S. government.⁴

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. Antitrust and American Business Abroad 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

[Section 1:8]

¹Montague, Fugate, and Professors Rahl and Rostow served on the 1955 Attorney General's Committee, although Brewster did not.


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 more than one hundred interviews with businessmen and attorneys with experience in international business transactions and their related antitrust problems. It was these interviews, as well as Brewster's own insights, which 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, technology licensing, and investing in foreign markets.

Part Three contained Brewster's overall conclusions and recommendations for change, so as not to discard U.S. antitrust law in the international arena, but to better align antitrust principles with the broader national interest. His recommendations concerned both the process of bringing and resolving claims and the substance of the rules to be applied.

First, he suggested that "any 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," and that the State Department be further consulted in connection with any "proposed relief governing foreign parties or properties

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or rights." 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 national security to do so.9

With respect to the assertion of legislative or subject matter jurisdiction as it was generally referred to in that era,10 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 U.S. 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.11

Brewster made important recommendations with respect to the application of United States antitrust law to export conduct as well, and also recommended abolition of the Webb-Pomerene Act, which granted a narrow exemption to export conduct of registered export associations.12 His recommendations in this area were not intended to expand, but to contract, the application of U.S. antitrust law. Brewster argued that the exemption had come to be perceived as the sole means for joint exporting activity to escape antitrust liability, and that the narrow interpretation of the exemption by enforcement agencies and the courts, and the resulting uncertainty in the business community, had acted to prevent

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11Brewster, Antitrust and American Business Abroad, at 446.
a variety of useful export activities that created no harmful effects in the U.S.. He advocated both bringing export conduct under the general standards of the Sherman Act, and interpreting that Act to bar agreements affecting exports only upon proof of a substantial effect on the U.S. market or a similar effect on U.S. 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.13 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.14

§ 1:9 Legacy of Antitrust and American Business Abroad

Antitrust and American Business Abroad was well received from the moment it was published. All the reviews were positive,1 regardless of whether the reviewer agreed with Brewster’s specific policy recommendations. Antitrust and American Business Abroad soon became a standard cite for judges in international antitrust cases. Its original 1958 edition, the second edition as prepared by James Atwood in 1981, and the current edition have been cited in the most

14Brewster, Antitrust and American Business Abroad, at 181. Although Brewster clearly favored the abolition of this doctrine of liability, he addressed the topic in his chapter on ownership of foreign enterprise, not in the recommendations section.

[Section 1:9]


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significant and controversial applications of United States antitrust law to domestic and international business.  

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In addition to serving as a reference and research tool, *Antitrust and American Business Abroad* has often succeeded in persuading enforcement officials, judges, and lawmakers to change international antitrust law and policy in line with Brewster’s recommendations. The Department of Justice and the Federal Trade Commission now routinely consult with the State Department\(^3\) and any affected foreign nations,\(^4\) and both agencies have committed themselves in published guidelines to carefully consider foreign policy implications before initiating investigations or taking enforcement actions.\(^5\) On occasion, foreign policy considerations have led the Department of Justice or the President himself to refrain from taking action.\(^6\)

Brewster’s jurisdictional rule of reason became the basis for the Ninth Circuit’s decision in *Timberlane Lumber Co. v. Bank of America, N.T. & S.A.*\(^7\) *Timberlane* and its progeny revised the *Alcoa* intended effects test to require an additional balancing of the interests of the United States and concerned foreign nations before finding or exercising jurisdiction to proscribe the conduct under U.S. antitrust law. The influential Third Restatement of Foreign Relations Law adopted a version of the Brewster test as a requirement of

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\(^3\)Informal consultation with the State Department appears to have predated the publication of *Antitrust and American Business Abroad* by some years. See Attorney General’s Office, U.S. Dep’t of Justice, Report of the Attorney General’s National Committee to Study the Antitrust Laws (Mar. 31, 1955) at 97–98.

\(^4\)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. See § 15.


\(^6\)U.S. Dep’t of Justice, Press Release, Nov. 19, 1984 (terminating grand jury investigation of passenger air travel between the United States and the United Kingdom based on foreign policy considerations).

international law, that jurisdiction to proscribe must be “reason-
able,” as measured by a balancing of many of the factors advocated in *Antitrust and American Business Abroad*.

A federal district court in Delaware paid Brewster the highest compliment possible to a treatise writer by adopting his ideas to change the law in a different area. In Inter-
america Ref. 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, . . . 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 recom-

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8 Third Restatement at §§ 402 to 403.


10 307 F. Supp. 1298 (citations omitted).
mendations became 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 decision,\(^\text{11}\) and paved the way for lower courts to eliminate the doctrine in most situations where the parent corporation has effective control of its subsidiaries.\(^\text{12}\) Attitudes toward vertical restrictions in the licensing of intellectual property have moved as far away from per se rules as possible, except where the licensing transaction is a sham for outright collusion between competitors.\(^\text{13}\) A similar evolution has taken place in the analysis of joint ventures as well.\(^\text{14}\)

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 partially responsible for an increasing United States trade deficit and a perception of declining export competitiveness.\(^\text{15}\) As a result, 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 U.S. antitrust law only if they produce direct, substantial, and foreseeable effects in the U.S. market or on the export opportunities of a United States entity.\(^\text{16}\) Congress also enacted the Export Trading Company Act, which allows exporters or

\(^{11}\)Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 104 S. Ct. 2731, 81 L. Ed. 2d 628, 1984-2 Trade Cas. (CCH) ¶ 66065 (1984).

\(^{12}\)See Kessler & Waller, International Trade and U.S. Antitrust Law, at § 1.10.


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.\footnote{17}

In 1984 and 1993, Congress similarly passed new legislation to encourage joint ventures. Both the National Cooperative Research Act\footnote{18} and the later National Cooperative Production Amendments of 1993\footnote{19} specify that the full rule of reason is the standard to be 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. In all of these judicial and legislative developments there are echoes of the ideas and recommendations in \textit{Antitrust and American Business Abroad}.

\section*{§ 1:10 Today’s issues for antitrust and American business abroad}

The world in which international business is conducted has changed dramatically since 1958. Even since 1988, the year of Kingman Brewster’s passing, the world has changed in ways that have surprised everyone. U.S. 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 seeking to make the transition to a more democratic and market-oriented society. U.S. international trade and economic policy has evolved and, in many instances, has become indistinguishable from foreign policy and national security in responding to trade and competitiveness issues in international organizations, multilateral or bilateral negotiations, unfair trade disputes, 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.

Since the mid-1970s, antitrust itself has changed in response to a shifting underlying political and economic consensus. Per se rules have virtually vanished in all areas

\begin{footnotes}
\footnotetext[17]{15 U.S.C.A. §§ 4013 et seq.}
\footnotetext[18]{15 U.S.C.A. §§ 4301 et seq.}
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Horizontal restraints typically are deemed per se unreasonable only when the agreement is inevitably anticompetitive. Monopolization and merger cases require more than just minor number crunching in order for the government or private plaintiff to prevail. Private plaintiffs face a variety of hurdles in the form of direct purchaser requirements, standing issues, and proof of antitrust injury before even reaching the merits of their antitrust allegations.

Many of these changes have come since Antitrust and American Business Abroad was expanded and updated by James Atwood in 1981 and the publication of the third edition in 1997. 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.

The most significant developments have occurred in six main areas. First, the events of the past fifteen years have addressed many of the concerns of Atwood and Brewster regarding the extraterritorial application of U.S. antitrust law to the conduct of persons and firms outside our borders. This issue has faded in prominence, somewhat, as a result of the rest of the world acknowledging the legitimacy of some

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The Supreme Court in Continental T. V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 97 S. Ct. 2549, 53 L. Ed. 2d 568, 1977-1 Trade Cas. (CCH) ¶ 61488 (1977), 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. Even tying offenses which remain nominally per se unreasonable involve proof of most of the requirements of the full rule of reason before per se liability is invoked. Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 104 S. Ct. 1551, 80 L. Ed. 2d 2, 1984-1 Trade Cas. (CCH) ¶ 65908 (1984) (abrogated by, Illinois Tool Works Inc. v. Independent Ink, Inc., 547 U.S. 28, 126 S. Ct. 1281, 164 L. Ed. 2d 26, 77 U.S.P.Q.2d 1801, 2006-1 Trade Cas. (CCH) ¶ 75144 (2006)).

Resale price maintenance is now subject to the rule of reason but has been virtually defined out of existence through restrictive formulations of what constitutes resale price maintenance, Business Electronics Corp. v. Sharp Electronics Corp., 485 U.S. 717, 108 S. Ct. 1515, 99 L. Ed. 2d 808, 1988-1 Trade Cas. (CCH) ¶ 67982 (1988); Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752, 104 S. Ct. 1464, 79 L. Ed. 2d 775, 1984-1 Trade Cas. (CCH) ¶ 65906 (1984), and heightened requirements for a private plaintiff to prove antitrust injury, Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 110 S. Ct. 1884, 109 L. Ed. 2d 333, 1990-1 Trade Cas. (CCH) ¶ 69019 (1990).
form of extraterritoriality and the U.S. government and most courts becoming more sensitive to the need for restraint and limits in the use of extraterritoriality.\textsuperscript{2}

This does not mean 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 high profile cases and controversies that will involve the reach of United States antitrust law and the legitimate interests of foreign nations.

For example, the U.S. Supreme Court can be criticized for under-appreciating the virtues of international comity in \textit{Hartford Fire Insurance Co. v. California}.\textsuperscript{3} \textit{Hartford Fire} is troubling since the decision can be read to hold that international comity should never be a consideration unless the foreign interest amounts to outright compulsion of private actors.\textsuperscript{4} On the other hand, it is difficult to be 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 district court in Colorado in \textit{Rivendell Forest Products, Ltd. v. Canadian Forest Products, Ltd.}\textsuperscript{5} appeared overly enamored of deference to unproved 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.

Both of these extreme sorts of cases will occur in the future more 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 battle

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\end{footnotes}
between sovereignty and international law that has occurred in the past. A broad international acceptance of some form of extraterritoriality exists, but with some limits. If one looks 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 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 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 U.S. Constitution and need to be applied rigorously not just as part 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 foreign commerce 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, and almost never occurs at the district court level where it can do the most good. The Antitrust Division as a whole, and

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61988 International Guidelines at §§ 4 to 6. The 1995 International Guidelines at §§ 3.2 to 3.3 contain a more balanced treatment of these issues but reach the same conclusions as the prior Guidelines.
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 U.S. interests in such cases without getting involved in the questions of antitrust liability which have yet to be determined.

If such participation is routine and the Division is acting as an informational resource for the court, it will go a long way toward avoiding the polarization and politicization that could take place if the Antitrust Division takes a position in a particular case favoring either party. In the rare case where the stakes are so high that the Antitrust Division should simply remain silent, it should say so. Otherwise, judges should request the Division’s participation and it should do so on its own. The result will be more informed decisions, less rhetorical excess, and an increased likelihood that these disputes will remain hotly contested private disputes, and not become diplomatic incidents.

Second, it is important to lay to rest the issue of whether antitrust law should apply a different substantive standard to foreign commerce cases. This issue arose most prominently in Justice Frankfurter’s dissent in *Timken* in which he stated:

> [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 condemnation.

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:

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7Procedurally, the Antitrust Division can participate through 28 U.S.C.A. § 517, which permits it to file suggestions of interests.


9Brewster, *Antitrust and American Business Abroad*, at 79–84, 354–
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.\textsuperscript{10}

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, Atwood, and 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 or international markets.\textsuperscript{11} It is increasingly clear that antitrust law will distinguish between foreign commerce and domestic cases by applying different jurisdictional rules and a narrow range of special defenses,\textsuperscript{12} but will apply the same basic rules of liabilities in examining the merits of the dispute.

It is by no means clear 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 horizontal collusion as to price, production, territories, or customers. Even in the area of horizontal collusion, the debate over whether the substantive rules should be different for foreign commerce is misleading. Under \textit{Socony-Vacuum} and its famous footnote 59,\textsuperscript{13} horizontal agreements relating to pricing are per se unreasonable, regardless of the lack of effect or the lack of power of the conspirators. 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.

\textsuperscript{356.}


\textsuperscript{11}\textit{See, e.g.,} 1995 International Guidelines at § 2.0.

\textsuperscript{12}\textit{See, generally, Antitrust Section, American Bar Association, Monograph No. 20, Special Defenses in International Antitrust Litigation} (1995).

In contrast, the improbable or powerless foreign conspiracy will be beyond the reach of U.S. antitrust law, since it produces no discernible effect in the U.S. It is unlikely that any U.S. court would find jurisdiction absent a direct, substantial, and foreseeable effect in the U.S. or on U.S. 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 is the need for a far greater skepticism about the desirability or the necessity to promote U.S. export cartels or tolerate those of other countries. We question the utility or value of export cartels as a policy tool of the U.S. 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 or beyond their jurisdiction under the Foreign Trade Antitrust Improvements Act. Empirical evidence suggests that both the Webb-Pomerene and the Export Trading Company Acts have failed to increase either U.S. exports, create new jobs or provide other significant economic benefits.\(^\text{14}\) 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. The better course appears to be the elimination, rather than the validation, of such practices through multilateral diplomatic means.

Fourth, the relationship between the international trade and antitrust laws remains of great concern to American

business abroad. The dumping laws are a particularly egregious example of a set of international trade laws that seek to penalize aggressive, but profitable, pricing strategies that the antitrust laws normally seek to promote. While American industry can misuse those laws in ways that violate the antitrust laws, far more often U.S. industries lawfully utilize the remedies in precisely the way Congress intended to suppress import competition. Now the shoe is on the other foot as a growing segment of U.S. industry must respond to dumping and other unfair trade proceedings in an increasingly large number of markets of critical importance to U.S. prosperity.

There is a need to reconcile these two bodies of law in order to promote the competition on the merits that both international trade law and antitrust law seek to protect. U.S. law to date has done a miserable job of reconciling these principles from an antitrust point of view and has typically responded by subordinating antitrust to protectionist trade goals and increasing the power of the import relief laws whenever Congress passes new trade legislation.

Fifth, certain segments of the business and government communities look at antitrust not just as an impediment, but as a potential ally in the struggle to open markets to U.S. goods and services. They look to U.S. antitrust law and its foreign counterparts as a way of eliminating collusion and exclusionary conduct that prevents U.S. 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 U.S. goods and services in Japan. More attention needs to be paid to the narrow and limited role that antitrust can play in this effort as well as its jurisdictional and substan-

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15 See, e.g., Kessler and Waller, *International Trade and U.S. Antitrust Law* Ch. 13 (2d ed.). 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. Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 113 S. Ct. 2578, 125 L. Ed. 2d 168, 1993-1 Trade Cas. (CCH) ¶ 70277 (1993).

tive limitations in confronting barriers in foreign markets. 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, the most significant antitrust constraint on the behavior of American business abroad is no longer U.S. 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 U.S. norms. There are over 120 jurisdictions with competition law regimes. The United States is no longer alone, or even necessarily dominant, in competition law enforcement. In addition to EU competition law, competition law in Japan, Korea, China, India, Russia, and numerous other jurisdictions are of critical concern to U.S. firms depending on the extent of their global operations. In many cases, the substantive law in these jurisdictions is stricter than that of the U.S. and the jurisdictional reach may be just as expansive. Long gone are the days where compliance with U.S. antitrust provisions eliminates the risk of liability abroad. We have entered an era of global competition planning, compliance, investigation, and litigation.

This new global competition world encompasses both new issues and the return of familiar ones. New issues not foreseen even twenty years ago include the growing criminalization of cartel behavior in many jurisdictions and the accompanying growth of leniency programs. While cartel enforcement is partially converging, unilateral conduct, vertical restraints, and certain aspects of merger law may be diverging with the U.S., rather than the rest of the world, as the outlier. In addition, direct and indirect government

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involvement in anticompetitive behavior has returned to the scene as an important issue to confront for both good competition policy and enforcement.

The challenge for U.S. 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. Adapting to such a multilateral competition law world appears to be the core issue for the decades to come, just as the question of the jurisdictional reach of U.S. antitrust law was the burning question in the past.

§ 1:11 Conclusion

This fourth edition seeks to respond to today's issues in antitrust in the same way that prior editions spoke to the important concerns of 1958, 1981, and 1997.

Today, the hot button issues relate more to the relationship of competition rules in the United States to 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 and should be coordinated and harmonized to the overall benefit of both the United States and the world trading community.