an indemnity of over $15,000,000. These facts are mentioned, not for the purpose of criticism, but to add force to the argument that if we intend to abandon our traditional policy of neutrality permanently and take an effective part in maintaining peace and suppressing aggression throughout the world, we should not remain in the dubious position in which we found ourselves in the year 1941. Our position, as well as that of every other signatory, should be made clear that, in case of violations of the international agreement against aggression, we retain the right to act separately against any law-breaking state or in concert with such other states as may wish to join us in any case where the United Nations fails to act.

The most forceful argument that has been made by critics of our so-called isolationism is that our policy has encouraged war because of the belief that we would not take sides. It is further argued that if our eventual participation had been foreseen, the wars would not have started. An international organization in which one powerful member is capable of paralyzing collective action against aggression is as dangerous to the preservation of peace as any other form of isolation. If we must help police the world in order to save ourselves and our civilization, we should be free to do so without incurring the reproach from any quarter that our action is in violation of international law or treaties.

GEORGE A. FINCH

Editor-in-Chief

PROPOSED INTERNATIONAL LEGISLATION WITH RESPECT TO BUSINESS PRACTICES

That agreements between private business enterprises engaged in international trade, which regulate the terms of competition between them, can have important effects upon the flow of that trade has long been apparent. During the period between the two World Wars, agreements of this nature were entered into on a broad scale, particularly in Western Europe.[1] Often these agreements were supported by government policy and sometimes supervised or participated in by government agencies.[2] The Nazi totalitarian state, as it prepared for World War II, utilized the position of German industry in many of these combines or cartels to the fullest extent possible for its political and military purposes.[3]

In the years 1935–1940, enforcement action under the anti-trust laws in the United States, with its traditional anti-trust policy and emphasis upon competition, was increasingly directed against these cartels, particularly where American companies had any share therein. Suits were commenced

[1] Edward S. Mason, *Controlling World Trade*, 1946, p. 11 (hereinafter referred to as Mason); Ervin Hexner, *International Cartels*, 1945, pp. 3–18 (hereinafter referred to as Hexner).

[2] Mason, p. 14; Hexner, pp. 12, 28–29.

[3] Wendell Berge, *Cartels, Challenge to a Free World*, 1944, p. 214; Mason, pp. 96–132. See also Joseph Borkin and Charles A. Welsh, *Germany's Master Plan*, 1943.

https://doi.org/10.2307/2193317 Published online by Cambridge University Press

by the Department of Justice to enforce the anti-trust laws against any agreement or course of business operations which restrained either the export or import trade of the United States. The courts, departing further and further from their original limits of jurisdiction as laid down in the American Banana Co. Case,[4] rendered decisions upholding the application of the anti-trust laws when it could be shown that any agreements, wherever made, respecting goods, wherever produced, in their effect curtailed or limited what came into or went out of the United States.[5] During the war years this anti-trust policy and these decisions were utilized in an effort to break agreements which were deemed to hamper the war effort of the United States.[6]

In 1944 President Roosevelt wrote Secretary Hull asking that the State Department prepare itself for international consideration of the cartel problem.[7] With the close of the war the State Department announced its *Proposals for an International Trade Organization*[8] and these Proposals contained a Chapter dealing with the problem of business agreements.[9] Modified at the preliminary conference in London, this chapter[10] forms a

[4] *American Banana Company v. United Fruit Company*, 213 U. S. 347 (1909).

[5] *United States v. Aluminum Company of America*, 148 F. 2d 416 (1945); *United States v. National Lead Company*, 63 F. Supp. 513 (1945).

[6] *Annual Reports of the Attorney General of the United States, 1941–1944.* A typical statement of this policy is found in the 1944 Report, p. 19:

> The enforcement of the Anti-trust Law during the fiscal year has been directed at those strategic points in the economy where the removal of restraints and monopolistic conditions would have the greatest effect in aiding war production and in preserving for the post-war period the opportunity for free and competitive enterprise.

[7] In a letter of September 6, 1944, to Secretary of State Hull, President Roosevelt said in part:

> During the past half century the United States has developed a tradition in opposition to private monopolies. . . . This policy goes hand in glove with the liberal principles of international trade for which you have stood through many years of public service. . . . Unfortunately a number of foreign countries, particularly in continental Europe, do not possess such a tradition against cartels. . . . I hope that you will keep your eye on this whole subject of international cartels because we are approaching the time when discussions will almost certainly arise between us and other nations. *Department of State Bulletin,* Vol. 12, p. 254.

To this letter Secretary Hull replied on September 11, 1944:

> I shall continue to follow closely the progress of this work on the subject of international cartels, . . . in the near future, and consistent with the pressing demands of the war upon your time, I want to present to you in more detail plans for discussion with other United Nations in respect to the whole subject of commercial policy. Same, p. 292.

[8] *The United States Proposals for Expansion of World Trade and Employment* were originally announced in connection with the public announcement of the British Loan Agreement on December 6, 1945 (*Department of State Bulletin,* Vol. 13, p. 913; Pub. 2411, Commercial Policy Series 79, 1945).

[9] Chapter IV.

[10] Chapter IV of *The Proposals* became Chapter V of the *Suggested Charter for an International Trade Organization* (Pub. 2598, Commercial Policy Series 93, September 1946), which, after the preliminary conference in London between October 15 and

https://doi.org/10.2307/2193317 Published online by Cambridge University Press

part of the *Revised Charter for an International Trade Organization* which is now under discussion at Geneva.

The Chapter in question deserves a fuller consideration than it has perhaps received. Comments have tended to be of a rather general nature reflecting little more than a judgment as to whether the United States was winning or losing its fight against cartels. To those interested in the spreading development of international organization and the attempt to foment the progressive development of international law, this chapter deserves more intensive consideration. Here is an attempt to obtain international agreement and make it effective with regard to a matter of basic economic theory and policy. To the extent that it should be made effective, it would have its impact upon business arrangements all over the world. This particular chapter reflects the economic thinking of one country, the United States, which is almost the only country in the world in which there exists at present legal and administrative machinery adequate to carry it out.[11]

It is proposed that the participating nations shall first of all agree to take appropriate measures to prevent, in international trade, restrictive business practices whenever such practices have harmful effects on the expansion of production and trade and the maintenance of high levels of real income or on any of the purposes of the Organization. In addition there is a specific agreement by the member nations that certain specified practices shall be subject to investigation if the Organization considers them to have such harmful effects.[12] Provision is then made for the Or-

---

November 26, 1946, became Chapter VI of the *Revised Charter for an International Trade Organization* (Department of State, December, 1946). The official text of the Charter as revised will be found as the appendix to the "Report of the First Session of the Preparatory Committee of the United Nations Conference on Trade and Employment," London, October, 1946, U.N. Document E/PC/T/33.

[11] The other country whose economic thinking is most closely represented in this chapter of the Charter is Canada. For a discussion of Canadian Statutes and cases in this field see Harry A. Toulmin, Jr., *International Contracts and the Anti-Trust Laws*, 1947, Chapter V.

[12] The practices referred to are:

(a) fixing prices or terms or conditions to be observed in dealing with others in the purchase, sale or lease of any product;

(b) excluding enterprises from any territorial market or field of business activity, allocating or dividing any territorial markets or fields of business activity, allocating customers, or fixing sales or purchase quotas;

(c) boycotting or discriminating against particular enterprises;

(d) limiting production or fixing production quotas;

(e) suppressing technology or invention, whether patented or unpatented;

(f) extending the use of rights under patents, trade marks or copyrights to matters not properly within the scope, or to products or conditions of production, use or sale which are not the immediate subjects, of the authorized grant. *Revised Charter for An International Trade Organization*, Chapter VI, Article 39, 3.

In the prior *Suggested Charter*, there was a presumption that these practices had such

https://doi.org/10.2307/2193317 Published online by Cambridge University Press

ganization to receive complaints, to investigate them, make findings, and "request" the member to take every possible action against harmful practices, including recommendation of specific remedial measures. The Organization is also authorized to conduct studies on its own initiative, both with respect to business practices and with respect to the domestic laws of the member nations relating thereto and to make its recommendations.[13]

Each member nation, in its turn, agrees to take all possible steps by legislation or otherwise to prevent harmful business practices; to take the fullest account of the Organization's findings in considering the initiation of action in accordance with its system of law and economic organization to prevent, within its jurisdiction, the continuance or recurrence of any practices which the Organization finds to have been harmful; to establish procedures to deal with complaints; to conduct investigations and to furnish the Organization with requested information or reports. Finally members are authorized to coöperate with each other in making effective any remedial order issued by one of them, and any member is free to act on its own account in enforcing any national statute or decree directed toward preventing monopoly or restraint of trade.

Certain features of this proposal are notable. In the first place, it is clearly designed within the framework of international agreement rather than of world government. The law which determines the validity or invalidity of any particular business arrangement or practice is still the national law of the nation having jurisdiction.

Nothing contained in this proposal tends to resolve or even improve the pressing and difficult problem of overlapping national jurisdiction. Undoubtedly, in theory, the proposal is designed to reduce some of the jurisdictional difficulties by bringing national policies closer into line, but, to the extent that they remain divergent, the jurisdictional issue must remain a paramount one. It would appear that some method should be worked out for settling this problem.

The exact nature of the obligation which the member nations are assuming is far from clear. One feature of this problem is presented by the question under discussion in the United States as to whether the Charter, if adopted, would or would not be a treaty. If it is a treaty under Article II, Section 2, of the United States Constitution, its provisions would be the supreme law of the land, overriding existing legislation. However, the indications are that our government regards it merely as an

harmful effect, and member nations agreed not merely to investigate, but to take corrective action.

[13] This Chapter of the Charter was extensively revised by the Preparatory Committee at its meeting in London, and now represents a compromise between conflicting points of view. The effect of this revision has been to reduce considerably the rigidity of prohibitions contained in previous drafts and also to curtail certain powers originally given to the proposed International Trade Organization.

https://doi.org/10.2307/2193317 Published online by Cambridge University Press

executive agreement, which would not affect our existing law, however much it might place this nation under obligation to adopt the requisite legislation to make our laws conform to the provisions of the Charter.[14]

Assuming that the latter is the true interpretation of the Charter, we find what appears to be rather clear and definite agreement among the nations as to the kinds of practices which are to be outlawed. (Since the amendment process is quite cumbersome—approval of two-thirds of the member nations is required—it may well be that the definition is too precise and rigid.)

This precision of definition is lacking, however, in the statement of what action the member nations are obligated to take. The obligation given strongest expression is the general one "to take all possible steps to insure" that the prohibited practices are not engaged in. When, however, the findings or recommendations of the Organization itself are involved the members are only obligated "to take the fullest account of them in considering whether to initiate action in accordance with their own systems of law and economic organization." [15]

The heart of the measure seems to be contained in the provisions authorizing the Organization itself to investigate "complaints" and make studies and to submit finding and recommendations.[16] In this area the Organization is comparatively free to go its own way, subject to the important reservation that the subject matter is so complex and often so highly technical that the procurement of a staff of adequate size, disinterestedness, and competence may well present budget problems of real importance. Having in mind the enormous burden which the process of investigation imposes upon the investigated, this power could be easily abused and could even more easily be made the basis of extensive and burdensome but futile academic investigations.

The problem presented by international business agreements is one of immense complexity. It is one in which there is a wide divergence of opinion between nations, a divergence based sometimes on pure economic theory, sometimes on differences between economic situations or legal systems. Clear agreement between the nations on any parts of the prob-

[14] *The United States Tariff Commission* published, in March, 1947, a document of 149 pages which analyzes the Charter provisions and comments on them. This commentary indicates the various ways in which the statutes of the United States would have to be amended to bring them into conformity with the Charter.

[15] Prior to the London meeting, member nations were obligated to "Take action, after recommendation by the Organization, to terminate and prevent the recurrence of a particular restrictive business practice or a group of practices. . . ." *Suggested Charter*, Article 37 (5). Now, members are only obligated "to take the fullest account" of such recommendations. *Revised Charter*, Article 42, 1 (b).

[16] Prior to the London Meeting the Organization did not have to await complaints from member nations but had power to call general consultative conferences on its own initiative. *Suggested Charter*, Article 36.

https://doi.org/10.2307/2193317 Published online by Cambridge University Press

lem, with resulting uniformity of policy and practice, is unquestionably a much-to-be-desired goal. It is to be hoped that an attempt will not be made to conceal a real absence of agreement behind generalizations which can be the subject of multiple interpretations or behind the authorization of comprehensive studies which cannot be adequately conducted and whose recommendations have no real prospect of being carried out. The twin causes of international organization and international law can perhaps be best served by pursuing limited but attainable objectives.

JOHN E. LOCKWOOD

WHEN DID THE WAR BEGIN?

Captain Bennion, in command of the battleship *West Virginia,* was killed at Pearl Harbor on December 7, 1941, in the Japanese attack on the ship and the harbor. The New York Life Insurance Company paid the principal sum of $10,000 due under the policy he had taken out in 1925 but refused to pay the $10,000 demanded as a double indemnity in case of death by accident. The reason for this refusal was the fact that the policy excluded an accident which occurred in "war or an act incident thereto."

Mrs. Bennion sued for the double indemnity in the State Court of Utah from which the case was removed by the company on the ground of diversity of citizenship to the United States District Court. The District Judge, Honorable Tillman Johnson, directed a verdict in favor of the plaintiff, a judgment which was reversed on appeal by the Circuit Court of Appeals, Judge Murrah for the majority holding that the attack on Pearl Harbor "commenced" a war with Japan.[1] *Certiorari* was refused by the Supreme Court and a petition for rehearing was also denied.

Thus the opinion of Judge Murrah in the C.C.A. is the final judicial utterance in the case. It would be easy to agree with this opinion but for the fact that four cases in lower courts [2] have decided against the insurance company and in favor of the plaintiff.

It was the contention of some of the justices writing the opinions in these cases that war did not begin until Congress declared war on December 8, 1941, at 4:10 P.M. Hostilities, however, had begun on the morning of December 7, and the Japanese had issued a declaration of war two hours and forty minutes after the attack began. It may be asked why a declaration of war by the United States was issued at all, since most wars have commenced without a declaration of war. The answer is that the President

[1] *Louise C. Bennion v. New York Life Insurance Company,* No. 3308, CCA, 10th, 1946; cert. denied by the Supreme Court April 28, 1947. For text of decision see p. 680, below.

[2] *Savage v. Sun Life Ins. Co.,* 57 E. Supp. 620 (W.D. La.). *Pang v. Sun Life Assur. Co.,* Circuit Court, 1st Judicial Circuit, Territory of Hawaii, dated Aug. 2, 1944, appeal 37, Hawaii 208 (1945). *Rosenau v. Idaho Mut. Benefit Assoc.* (Idaho) 145 Pac. (2d) 227. *West v. Palmetto State Life Ins. Co.,* 202 S.C 422, 25 S.E. (2d) 475, 145 A.L. R. 1461.

https://doi.org/10.2307/2193317 Published online by Cambridge University Press