WORLD TRADE CONTROL

by

Edward Mason

Edward Mason's book is essential for the understanding of the postwar problems on international trade. The Preparatory Conference, at present discussing the United States proposed "Charter of an International Trade Organization," will find in Mason's book the most elaborate examination of the American position in international trade. It is possible to restate roughly the thesis of the book as follows: (1) Attempts shall be made to come to an international agreement on outlawing restrictive practices, (discrimination, price fixing, distributing markets and the like.) For the purposes of policing registration of participation in international business agreements "of an enduring character" and in foreign enterprises shall be requested by an international office. (2) In cases of certain commodities, after a thorough investigation by governmental study groups, market regulations may prove necessary. Such regulation must take place on an intergovernmental level. (3) If the international cooperation should fail, the anti-trust legislation should then be endorsed with the qualification that participation of American firms in foreign cartels does not violate this legislation unless directly hindering import in the United States.

These principles can be expected to arouse controversial discussions among economists. As this is a review in a legal publication, we must limit ourselves to Mason's legal assumptions and to his criticisms of the Department of Justice. Mason's principal presumptions on the law as it exists today is to be found on pages 77 and 83, and may be briefly summarized in the following statement: The participation of subsidiaries and affiliates of American firms operating abroad not only in domestic cartels but also in international cartel arrangements is not inconsistent with our anti-trust legislation if cartel arrangements are limited to areas in which such agreements are tolerated, approved or even imposed. Thus the only limitation suggested by Mason is that the participation of American firms in cartels directly restricting imports into the United States is illegal.

While we are mainly concerned with the legal validity of the principle stated by Mason, we wish to evaluate the actual meaning of his statement in relation to the organization of world trade. (1) A modern foreign cartel is not only an organization of one commercial level, (manufacturers or wholesalers or retailers), but of all three levels. An American-controlled firm which voluntarily participates in such a structure practically excludes any import of his American competitors into the area covered by the cartel. (2) American subsidiaries in England which agree between themselves and with English firms and subsidiaries of Swiss and French firms on the distribution of the international market, for all practical purposes regulate American export markets. If for instance the subsidiary of a Swiss firm in England promises to a subsidiary of an American firm not to compete in South Africa, the parties in interest understand their agreement as meaning that the United States combine shall not compete with the Swiss combine. A clear indication for this assumption; this device of agreements between subsidiaries often is

coordinated with exchange of patents and technological information among such subsidiaries which have the entire technology of the patent corporation. Therefore the agreement between the subsidiaries amounts to an exchange between the two combines in regard to their entire technology. If the agreement not to compete in South Africa actually only refers to the British subsidiary, the consideration paid for would be unreasonable. That would be especially the case if the agreement was reached between an American-controlled subsidiary in England and an English combine. The careful reader of trade journals is observing this trend in the immediate present.

I do not see any help in the limitation made by Mason to the effect that agreements are illegal if they directly affect imports into the United States. Limitation of export is implied limitation of import, since export pays for import. Furthermore, regulation of foreign markets is regulation of American domestic markets, provided the United States has not a monopolistic position in the production of the pertinent goods. The prices and the quantity of production in foreign markets determine possible import into the United States. Direction of goods from one foreign market into others means imports into the United States are affected. Are they among the "indirect effects" under Mason's designations? Is it actually our law that in all these cases the antitrust legislation has to withdraw since "at best it would be difficult to exercise an extra-territorial jurisdiction; at worst it would involve a serious interference with business practices customary abroad?" (p. 77)

Mason has some forceful legal authority supporting him. Justice Holmes, speaking for the Supreme Court, interpreted legal protections for an American firm on the following facts. In 1903 the plaintiff purchased a banana plantation in Panama and built a railway to connect this plantation with the port. The defendant, a large American firm, together with its associates, was in complete control of the banana market. They hired some people who happened to be officers in the army of a government of doubtful legal status for the purpose of destroying the competitor's establishment altogether. The hirelings completely destroyed the plaintiff's plantation and railway and the defendant's monopolistic position was reestablished. In the face of these facts, the court found it a general and almost universal rule that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act was done. (American Banana Co. v. United Fruit Co. 213 U.S. 347 1909)

For some time this case has not been cited as as existing authority, but quite recently we find references are being made to this decision again. (American Medical Assn. V. U.S. , Aluminum Corp. of America v. U.S. 148 F2 416 (1939). As a matter of fact the social and international conditions under which the Banana case was decided were completely different from modern conditions. In 1909 no one considered as possible an act of "legal significance", especially of tortious character, committed in foreign countries with the exception of the famous law school case where a person on the American side of the borderline is shot by a person standing on the Mexican side of the borderline. Today there are many cases in which the security of the country and of its citizens can be endangered by acts "lawfully" done abroad. Recently a high Federal court (Branch v. Federal Trade Commission 141 F 2d 31 (C.C.A. 7th 1944), had to deal with a Washington, D. C. "educational institute" which by

circular letter sent instructions on medicine to students in Latin America. Every person who showed an interest in these letters, which were drafted by people who had no training in medicine whatsoever, was promised a "graduation" certificate. The Federal Trade Commission issued a decree prohibiting this business activity. The institute, relying on the Banana case, in its appeal to the court argued that our courts and executive agencies have no jurisdiction in business transactions of American citizens consummated abroad. Deciding in favor of the Federal Trade Commission the court pointed out that the Commission does not assume to protect the petitioner's customers in Latin America. It seeks to protect the petitioner's competitors from his unfair practice, begun in the United States and consummated in Latin America. It seeks to protect foreign commerce. If that commerce was being defiled by resident citizens of the United States to the disadvantage of other competing citizens of the United States, the United States has a right to protect such commerce from defilance even though the customer may look to his own sovereign for protection. The right of the United States to control the conduct of its citizens in foreign countries in respect to matters which a sovereign ordinarily governs within his own territorial jurisdiction has been recognized repeatedly. Congress has the power to prevent unfair trade practice in foreign commerce by citizens of the United States. Is not this opinion a challenge to Mason's statement of the law and of recent dicta in court decisions? Is it not an even more forceful argument in favor of covering cartel activities of American firms abroad by the Sherman Act, if we realize that without American participation the following pre-war cartels could not have existed. Aluminum, artificial silk and rayon, aspirin, berylium, cable and radio communication, cellulose, citric acid, copper, dental supplies, dyestuffs, electrical lamps and machinery, explosives, glass, household appliances, iodine, insulin, lead, lead oxide, magnesite, magnesium, matches, motion pictures, newsprint, optical gladd, paper and pulp, plate glass, phonographs, rails, records, steel, sulpher, tankers, titanium, tobacco, tubes, vegetable oils, and wagons. The mere fact of an American corporation in these fields would have made impossible private cartels. Mason's argument is based on an underestimation of the American position. A governmental action, by which American-controlled firms are compelled to join cartels, brings these cases on another level not discussed here. If once the discussed legal assumptions of the book should break down, its legal consideration of the export association case (p. 68) and its position to the problem of "advance clearance of proposed International Business Agreements," (p. 85) becomes doubtful. (See Kronstein-Leighton, Cartel Control: A Record of Failure (Feb. 1946) 55 Yale L. J. 297)

Mason's book is replete with criticisms of the Department of Justice. This is regrettable, coming just at a moment when the government policy seems to become a part of the international policy on which all parties agree. The excellent report of the United States Associates, International Chamber of Commerce on, "World Trade and Employment" indicates the full approval of a strong anti-cartel policy by American business. It serves, in my opinion, no good purpose to connect Borkin-Welsh's book on "Germany's Master Plan" against which I objected in 1943 (Commonweal June 4, 1943 p. 171-2) with the Department's anti-trust policy. Not a single case has been selected on the theory

of this book. Mason's principal argument against Wendell Berge's book (Cartel's Challenge to a Free World, Public Affairs Press, Washington, D. C.) is that he overvalues cartels. A good deal of this controversy is based on a difference in definitions of cartels. Berge is using it with emphasis on monopolistic control, (wherefore he sees in cartels all evils of international monopolies), while Mason is using it in regard to any agreement having effect on free flow of trade. There is one point which Mason, while attacking the Anti-Trust Division, may have overlooked. Without the work of this Division, Mason and the Cartel Committee, whose chairman he was, would not have had the material on which their work is based. Mason is doing an important job in freeing discussions on world trade control from the harsh and bitter words used in the early campaign. But he would be even more effective if he would not have reverted to this former method of discussion when he considered the work of the people who prepared a good deal of the road to his successful performance. Lawyers and economists who are studying problems of international trade will be grateful to Mason - and the Department of Justice. An examination of their combined work is an invitation to a more unbiased and impartial study.

Note: On the work of ~~the International Chamber of~~ Commerce see Terrill, Cartels and the International Exchange of Technology, (American Economic Review Proceedings, V. 36, May 1946); Report on the United States "Proposals for the Expansion of World Trade and Employment", State Dept. pub. #2411 (May 1946)

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