

SPEECH DELIVERED BY HEINRICH KRONSTEIN\*  
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The invitation you have extended to me has a special meaning. Your Center, the Institut für Ausländisches und Internationales Wirtschaftsrecht in Frankfurt under Professor Schlochauer, Professor Coing and me, and the parallel Institute for International and Foreign Trade Law at Georgetown University, entrusted to me, are working on closely related issues. The American and European problems have to be studied together, or at least on parallel lines. They are inseparable, whether one likes it or not. The Frankfurt conference on international cartel law of June 1960 at which leading American, Latin American, Asiatic and European scholars and practitioners have participated, formulated the issues in the field of relations between government and business in international trade. Under the impact of this conference we are preparing our research and future conferences.

We are guided by the basic recognition that the relationship between government and private corporations, just as any other legal question, cannot be governed simply by pragmatic answers but they have to be ruled by principles to which government and private corporations have to be subordinated.

For quite some time, the Center for the Study of Democratic Institutions has been examining the relationship between political government and private power (private corporation or trade union). The material already presented shows how the functions of both have been distorted. Agreement

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seems to exist that a re-established order should assure the preponderance of the political power in the scope of political government, while maintaining the preponderance of private organization in trade and industry. Consent seems to exist that somehow private power should be brought into line with the "public interest." Today I am trying to supplement your rich material from the particular aspect of government and corporation in the foreign trade of the United States and examine what, from this aspect, we may learn for the future relationship and for the prevalence of the "public interest." The experience of the past shows that without finding of workable standards government cannot effectively control, and corporations cannot be blamed for lack of compliance with, an alleged public interest.

The last intensive dispute on the American corporation and government took place at the time of Theodore Roosevelt and shortly later continuing until the establishment of the Federal Trade Commission in 1914. This discussion came much nearer to the real point than the preceding dispute during the period of the popularists. At present, I am engaged in a study of the archive material of the Bureau of Corporation, established under Theodore Roosevelt, and of the first days of the Federal Trade Commission. While the present stand of my studies does not permit me to make any definite report, so much I may say:

There were three groups engaged in the disputes: Theodore Roosevelt, Wilson and "business." Theodore Roosevelt and his adviser on Corporation, the first Corporation Commissioner H. Garfield, son of the President, envisaged a state, powerful enough to regulate decisively in the governmental interest. For them public investigation of corporations and publications on their activities were means not only of public information and of bringing

corporations into a line conforming with public interest, but they expected a development in the United States similar to the trend in Germany, as they saw it, where in their opinion government by its very status in society was actually in a commanding position over enterprises or any other private institution. The Wilson group agreed on the need of publicity but for quite another reason. They wanted to show that corporations behave according to the rules of competition which, in the opinion of this group, alone should keep the corporations within the boundaries necessary from the viewpoint of public interest. The third group resisted all demands for public inspection or information and practically favored the laissez faire principle in regard to any private power wherever the firm might want to go.

At least, the dispute between the adherents of Roosevelt and Wilson, especially Brandeis, remains unresolved. While the Federal Trade Commission, having substantial visitorial power over corporations, had been authorized to publish a report on corporations and to issue cease and desist orders, the legislator left it practically open to which end these powers should be used. One covered up the controversy behind the words "fair" and "unfair" practices. Twice in the period between 1914 and today, the gap resulting from the empty compromise was temporarily bridged under the first period of the New Deal in the principal direction of Theodore Roosevelt, and under the second period of the New Deal when Thurman Arnold was in charge of the Anti-trust Division in the direction of Wilson. Today we are swimming once more among all different possibilities.

The student of the records and documents of the Federal Trade Commission of the time immediately after its organization is rather surprised to realize what pressure the first commissioners were exposed to, to lay aside

the prohibition of cartels or rules on restraint of trade, and to assume the power to license any agreement between corporations even if inconsistent with the Sherman Act, if only consistent with whatever the Commission considered public interest. Brandeis, in a personal conversation with the Commissioners, warned, while others argued in favor of such a step. It is an old device of vested interests, to use alleged or real defense needs or wars or purported or real inferiority to foreign competitors to reach on a round-about way what could not be reached directly. Immediately after the organization of the Federal Trade Commission, the first European war broke out. Public opinion was outraged by reports on German cartels and it was easy to justify American cartels as a proper system for meeting these cartels rather than to rely on the superior liberal system of trade.

Before I had an opportunity to study the archives of the Federal Trade Commission, I was under the impression that the so-called Webb-Pomerene Act was really only an emergency action in answer to the European cartels. The archives show how closely the preparation of the Webb-Pomerene Act was related to the attempt to undermine the Sherman Act by a method of licensing restraint of trade in the entire domestic and foreign fields. Indeed, the examination of the status of American corporations in international trade is helpful in the clarification of the general relationship between government and corporations.

The problem of the relationship between government and corporation comes more into the open when we consider foreign trade. Up to this day the conflict between American antitrust legislation and foreign laws has been raising again and again the question whether an American corporation operating abroad directly or through the channels of a subsidiary remain obliged to obey American laws subject to the American economic system.

In your discussion, the suggestion has repeatedly been made that it should be up to the government or government agencies to determine the public interest and to instruct corporations how to serve such public interest. The notes by Mr. Ferry on which your discussion on "The Corporation and the Economy" of April 1959 was based, refer to "the fragmentation of foreign aid activities and their ambiguous relations to one another and to private enterprise." Ferry suggested that "all foreign economic programs be brought under a single agency" which "would also be concerned with assuring that the private enterprise is used as fully as possible." Ferry would like to entrust the over-all problem to some type of planning agency.

I am going to expand upon and fill up Ferry's suggestions. For this purpose I am using some observations on the present international trade situation which in themselves are nothing else but a review of well-known facts. I hope my examples indicate to what extent government and corporations do not serve today those functions entrusted to them in society, -- that the balance of our social forces and their subordination to a principal aim, temporary or permanent, is disappearing today. From our examples we may learn what could be done to re-establish the balance and to clarify the functions of corporations and government. Without such a clarification, at least of the short-term aims of our society and of the function of each institution, it is impossible to define "public interest" which is to be assured and guaranteed by any kind of planning agency or any type of other government control.

I am convinced that Ferry's suggestions may be realized only if we find a satisfactory solution on the definition of public interest. However, I would like to differ with the philosophy expressed in the paper by Professor Jean Rondot, dated January 15, 1959, who would like to give the "state,"

at least the French state, considered by him wise by a gift of nature, the central position in all economic relations to the so-called underdeveloped territories, while governments of sovereign countries should exclude private activities. In a comparison with European conditions, however, one should understand the difference of the concept and purpose of "government" in Europe and the United States. I hope to show that the mere acceptance of a mixed economic system, composed of corporation and government, is practically of no help in the United States and Europe, and raises again the question: How are these parts of a mixed economy coordinated in regard to foreign trade or otherwise?

I may be permitted to state the following three assumptions as my examples from which we may learn something on the present relations between corporations and government:

(a) In American trade with, or in, "new" underdeveloped countries, private corporations assumed a very secondary position, while the American government took over control and active operation. It is the policy of the United States to support the aim of new sovereign governments to concentrate the principal industrial activities, and especially the international trade, including trade with the United States in the hands of those governments.

(b) The investments of American corporations in "old" underdeveloped countries undertaken with the full consent of the American government lost their protection. By principle of international law they are treated as private property entirely foreign to the American public system. It is only logical that in the formulation of American tariff, trade, or other economic policies and legislation, these investments and American interests are not given any consideration. The completely two-track American system of 1960 shows itself here.

(c) In the corporate relations between American corporations and Western European corporations, the two-track system has the effect of preventing any attempt of the government to reconcile political or problems of national economy, as the balance of payments, with the corporate interest.

I may be permitted to give some explanation to each of the three assumptions. It is needless to say that the following discussions intend to do no more than give enough material to lead to the final issue, how public and private interest in this field could be reconciled under a common denominator.

Discussing Assumption One

The American private corporation, the powerhouse of American technology and economic experience, is being deterred from the largest part of activities in the new underdeveloped countries.

During the last years the United States developed or at least accepted a policy in regard to American activity in the new countries in pursuance to which we find:

(a) On the American side either the U. S. Government, acting through one of many different agencies, or the U. S. Government jointly with other governments in the form of the United Nations or of an institution established under the auspices of the United Nations.

(b) On the side of the receiving nations, which have recently been given sovereignty, the "government" of these nations.

A number of more or less settled practices develop. For instance, outright gifts of military or other technical material, government loans for a long period of time, corporate loans or other forms of credit guaranteed by controlling or prescribing governmental agencies.

Private enterprise has lost its role as instigator, planner or executor of developments in those countries. It is not any more interested in taking risks. It does not take chances by anticipating the future needs of countries. It does not adapt its policy to the needs of these countries or of their own country in those foreign markets. Practically many foreign governments not in the Communist bloc have excluded private enterprise as eventual promoters in the most important fields of industry or they make such difficulties that they amount to practical exclusion.

The combination of military and economic aid in the same organization, the U. S. Government, is a most interesting example of confusion of social functions: The same organization under the same budget decides on military, technical and economic aid, while these may be administered by different agencies. It is at least interesting to observe a certain coincidence between the development of military dictatorships in new underdeveloped countries and the concentration of aid into centralized governmental agencies. The available statistical material, especially on the new countries, does not enable us to give statistical proof to my suggestion. A mere accumulation of investments in each of the new states would not be of much help. This evidential material is not necessarily an answer. My point made here is not contested at all.

The corporations have more or less accepted the policy pursued by the U. S. Government. They are accustomed today to come only into appearance if and as far as the government in one or the other form assumes almost the entire risk. No doubt, one of the reasons is the rule of international law as interpreted by the American experts on international law that local governments may nationalize enterprises or any form of investment at any time. Professor Stanley Metzger, my distinguished Georgetown colleague and

interpreter of official State Department thinking, in a carefully prepared article in the Journal for Public Law, 1960, does not leave any doubt on the right of any sovereign government to nationalize or to take over foreign-owned enterprises at any time provided the expropriating government promises to give fair compensation, whatever that may mean, in regard to currency, amount, and dates of payment. The startling events in Cuba are fresh in your mind. It may be more instructive to refer to a recent take-over of Belgian enterprises in Egypt, for instance, the Belgian-owned Cairo street-car system, the Heliopolis Corporation, which took place without any previous conflict or even announcement. Since even old underdeveloped countries may proceed in this way, the governments of the new countries may follow once enough private investments took place to make so-called nationalization interesting enough. Our corporations do not really fight this situation. They, jointly with experts of international and comparative law, are satisfied with a grant of guarantees of their own government acting eventually through the channel of a semi-governmental bank. The guarantees for the so-called political risk amount to 90 percent of the eventual losses. These guarantees, however, are only obtainable if and as far as the transaction remains within the scope of the rules and instructions of the U. S. Government. Under the present policy that requires that the whole transaction is acceptable to and supported by the friendly sovereign government of the "other" country. Therefore there is no room left for any careful planning undertaken for a long-term program by American experts. How could our government take the initiative in regard to such a program? How could, as a matter of budgeting, such a planning be justified? How could an aid budget, annually to be renewed and always subject to Congressional displeasure,

assure the execution of a plan once decided on? The initiative by this method is given to the sovereign new nations and their governments.

The sending of some experts on a loan basis may have been very helpful in some cases, but it does not substitute the wealth of knowledge and experience of our corporations in the technological field. The first period of wild projects may be over. At the beginning, these governments were inclined to look for symbols of power, such as steel plants. They have not been much attracted by the hard and slow road of building up an industry and to adapt the existing economy, agriculture, streets and other to higher and higher standards. The tragic story of Mossadegh in Iran, who overestimated the significance of oil for the West and misjudged the preparedness of his country to render oil refineries of Abadan speaks for itself.

Today at least in some countries one feels the increasing understanding of planning within realistic possibilities. However, one needs American, European and Russian "aid" -- or better, American, European or Russian operations.

The reference to Soviet Russia as an example for the building up of an underdeveloped country proves to be of doubtful value. Russia, a country restrained through certain political conditions, could enter and reach a stage of development previously attained by American and European nations. Russia knew where to go because other nations with similar background and resources went there before. Russia had the people prepared and fit to do the job. The great Russian heritage in pure science and in each field of culture has been and is a decisive factor. It does not mean any lack of respect for the new countries nor even some of the old underdeveloped territories if we doubt whether the Russian example can be repeated there successfully.

It is not encouraging that the governments of the new countries are very efficient in the revival of the old, almost forgotten and yet most successful art of diplomacy, of the always threatening "poor fellow." The student of European history of the 17th and 18th centuries finds most interesting examples of governments threatening at the same time the English, French, Spanish or Dutch governments, or, less effectively, the Emperor: They threatened to join the opposite camp or to make trouble at every opportunity offering itself. All Washington observers have experienced well prepared threats of this kind. The clear-cut threat to turn Communist does not work too well any more. This threat was used too often. But one vote in the United Nations in favor or against a certain resolution may do the trick. As long as the government instead of the corporation is actually executing the American contribution in the building up of our neighbor nations, such threats will be continued.

The present American government people engaged in the pertinent task are often just as enthusiastic and idealistic as they are naive. They expect a very speedy growth of technical and administrative skill in the new nations. They believe that the colonial powers could have educated enough experts at any time at any place. Of course, much more should have been done, but, even at the risk of being called a believer in racial inferiority, I suggest caution on this point.

Our governmental agencies dealing with the foreign aid program have no or not much chance to find a staff of technicians and experts prepared to operate successfully. Instead, a bureaucracy full of red tape has been built up almost unobserved.

It is an observation often made that whenever governments in an otherwise not socialized economy "take over" a field of endeavor, corporations keep out, even if important business opportunities remain. An English business organization of the last century would certainly not have overlooked the following business chances:

1. The last GATT report for 1959 expects an increase of imports into developing countries from \$35 billion to \$40 billion in 1960, to \$50 billion to \$55 billion in 1969. The same report believes that these countries during the same period are going to develop industries in the field of bicycles, kitchen tools, diesel motors and textiles. The report assumes that this development would require for the entire group of underdeveloped old and new countries an annual capital contribution of \$12 billion to \$13 billion compared with \$7.5 billion in 1960. Perhaps a real business company would have concentrated on one particular country or one particular line of businesses, but it would have acted in any case in spite of all risks.

Our corporations have accepted a certain public utility spirit. The shareholders of our corporations believe that annual profit is the only test of business operations. The philosophy of safety as expressed in our security regulations has done a job for which it was not intended: to deprive the management of business initiative.

Systematic planning operations are an outstanding job for industrial experts to be found in our corporations. Even this planning job is an important business chance, especially if undertaken by people who may have an interest and the technological capacity to do the job. Perhaps some of our corporations do this job. I doubt that it is done in a substantial way. The advisory job of industrial planners or economists not connected with industry

may do some good. They do not do the actual job. It is rather interesting to observe with which great success the industry of an industrial newcomer, Italy, entered the planning job. Fiat, Montecatini, Italian Edison, Innocento and Pirelli established a joint agency for the purpose of preparing the planning for underdeveloped territories. The Iran Government employed this joint Italian agency to prepare a plan for the development of the south-east part of Iran. Argentina, Egypt, Tunis and Togo followed. Negotiations with Central African states are pending. This systematic inclusion of a private agency into the planning job is an important step. The Federal Republic of Germany considers the setting up of a mixed agency composed of government and private groups to serve the same purpose.

The experience of underdeveloped countries shows that the inclusion of private groups into the planning job only is not sufficient. The private experts are needed once the plan for a development begins to operate. The recent endeavors of the Argentine Government to bring American and European technicians to the Argentine to run industrial plants erected with government aid speaks for itself. In spite of the fact that the number of industrial plants in Argentina directed with government aid has been increased in 1960 substantially, the total industrial production was decreased because of the lack of people to run the plants once established.

#### Discussing Assumption Two

The American corporation, which has invested substantial funds -- especially in the old underdeveloped countries -- in formulation of U. S. trade policy, is not treated as a part of the U. S. economy.

Among the American enterprises, the most active in foreign countries irrespective of government guarantees, the American oil companies are to be

found everywhere. While these oil corporations, just as other corporations, did not always behave as angels or even real ambassadors of the United States, it cannot be overlooked that they believed by their very actions to help the United States and the local countries. My special problem can be shown best by a reference to Venezuela. Within a short period of time the American oil companies transformed Venezuela from a poor agricultural economy into a country with a mixed economy, -- partly most modern and effective, partly technologically on the level of the year 1300. Only a few years ago the American steel industry, having acquired highly valuable iron ore deposits, became the second U. S. investor in Venezuela. This whole development revolutionized life in Venezuela. Only inactive people remained where they had been, or at least no one's aims remained the same. A modern industrial life, a modern capitalistic spirit was forced on the nation. This whole development in Venezuela depends on American imports of oil and later iron ore. When the American oil industry went to Venezuela the forecasters declared the end of our oil supply coming within a short period of time and the conditions of transportation of the oil from Venezuela to the United States appeared to be very good and free from any threat in case of war. The student of underdeveloped countries cannot be surprised that the investment of the scope of this Venezuelan oil investment led to social upheaval in Venezuela. The farming population living on the lowest possible standard met American luxury and a standard of living they never had imagined. Many people left their farms and tried to get a job in the oil industry. Some of them succeeded; others did not and are living under the lowest conditions around the cities, threatening the order in Venezuela. If everything would have proceeded in a relatively open market condition with the United States, the ups

and downs of the business cycle would not have brought about the dangers of a revolt. Iron ore deposits found and developed by American enterprise would have led the country out of the undesirable status of a monolythic economy. But Venezuela, as well as Standard Oil or its Venezuelan subsidiary, had to learn that the U. S. Government, especially Congress, accepted a most dangerous type of isolationism.

Our statisticians and planners had proved to be wrong. We did not enter a period of shortage of energy, and we were not just at a point of losing the battle for survival in the light of shortage of energy. Just the opposite; we are entering once more a period in which we do not know what to do with the multitude and quantity of energy.

The American politicians did not even consider what happens to Venezuela and to the American investors there. For them, this investment was just another profit-seeking job of private business. The fact that the American name was involved is of no importance to them.

The local coal interests and independent oil producers persuaded Congress and the executive to act only in their own interest. The so-called Johnson Oil Import Bill authorized the President to establish import quotas for oil into the United States. Venezuela is the primary loser.

Venezuelan oil had to look for substitute markets and has turned more strongly to Western Europe. The Near East oil, which to a large extent is under the control of American firms, had their principal markets there. U. S. coal also had an important market in Europe, at least temporarily. Now the American coal corporations try to influence Europe to introduce oil import quotas to keep out Venezuelan oil. This example shows best how not to act in American trade problems. Our example shows to which extent we do

not have a clear American trade policy, but we deal with expediencies whenever they arise, without consideration of the interdependencies of our corporate and individual interests. The same cases show another aspect of the degree of confusion. Just during the same week when the U. S. Government made a most drastic demand in Bonn for foreign aid not tied in any way to the buying of German goods. The president of the United Mine Workers submitted a paper to the Committee of the House of Representatives, strongly recommending the restriction of U. S. foreign aid to nations purchasing their coal supply in the United States as a remedy for unemployment in the American coal industry.

#### Discussing Assumption Three

The U. S. Government has no influence on investments made by American private corporations in other industrial countries, such as England, Australia, Western Europe or Japan.

Suddenly the American public found itself recently confronted with an alleged crisis of the balance of payments. For years one spoke of the dollar gap of the industrial European nations. The newspapers surprised their readers by reporting on the same day an alleged cry for help submitted to Germany and a new investment by Ford in shares of its English subsidiary. The government appeared to be without influence on the problem of investment in Western Europe. Not only the Government of the United States finds herself confronted with a development which may lead to undesirable results but also the European governments are not at all happy about the scope of the present investments by American firms and private persons in Europe. These investments not only have an inflationary effect, but they are an

element of insecurity, especially in situations which are dangerous politically or socially.

American corporations are defending their investment policy for many reasons. They usually refer to the following points:

(a) The American Government proved to be unable to avoid a price level usually described as noncompetitive with other industrial nations. In reports submitted to you in connection with the steel strike and the steel settlement, the American price tragedy has been discussed from different points of view. I find myself in agreement with those who consider it at least superficial to assume that this price level is an effect of trade union policies. In the reports submitted to you it was clearly shown that wages are just another elements of costs, whatever trade unionists or economists may say. In an industry as modern as the American industry, the percentage of the labor costs in the entire cost is so small that one should not find them a particular reason responsible for the present price level. The price rift between European and American prices is the result of many elements, some of them having historic backgrounds. American corporations which made these investments in Europe apparently expect this price gap to continue. They are even interested in maintaining exactly this price gap because otherwise one of the immediate reasons of their policy of investment would prove to be wrong.

(b) The European governments in the opinion of the investing American corporations are in favor of high tariffs. For this reason it is considered good policy for American exporters and American merchants to set up a strong independent and own position behind the tariff wall of the Common Market as well as of the EFTA. Again, these investing firms have an interest

exactly in this type of high tariff policy of the European governments. Once all these investments are made, they do not like to see an open market policy which may permit other American corporations which have not made large investments to come to Europe and to compete there or through European companies in other parts of the world. As I am going to explain later, the U. S. Government, from a political and over-all economic point of view, has just the opposite interest, namely, in a low tariff policy in Europe and in slow but planned common market of Europe and the United States.

(c) American industry is vitally interested in collecting and using all modern technology. It seemed to be the most effective way to obtain a continuous access to new technology -- to be predominantly financially interested in the corporations which undertake research or in corporations which, on the basis of special agreements or otherwise, have access to the technology of other European firms.

(d) Up to now European trade with new or old underdeveloped territories is easier and more profitable than the American trade, partly because of the different price level, partly because of less bureaucratic entanglements.

It may be surprising that at this point I am going to insert the following question: Where do we stand in regard to our three examples in the dialectic game between us and our Marxist adversaries? The Communists are masters of the dialectic method which plays an important role in the philosophical background of their ideology. Our students and our politicians do not know this great art known to mankind for quite some time. While the Russian considers no argument more convincing than the dialectic "proof,"

a practitioner of the dialectic method makes allegations and builds up notions which, if denied, lead the opponent right at the line where one wanted to get him.

I do not tell you anything new if I refer to an allegation of Communist propaganda that our corporations are penetrating underdeveloped territories in the service of the capitalistic system, exploiting these nations; that government is nothing else but an executive instrument of the monopolistic capitalists, that our corporations are bound to cooperate with the new capitalist groups in the young nations and extend the capitalistic form over the world.

The Academy of Science of the USSR, the Institute for Economics, published a book, Political Economy -- A Textbook, which is must-reading in Russia and all satellite countries, including Eastern Germany. In this textbook, which American students should know, you find the most articulate formulation of these allegations. Perhaps in our discussion, we will have an opportunity to go into details of these statements. I have the book here.

The present conditions exemplified by our three factual reports, appear to be answers to these allegations. Certainly, Americans are pragmatists. During the last period of 50 years, American policies just happened, but were not made or formulated on a long-time perspective. Therefore, it is not so that any group of American political or economic leaders have worked out the present conditions as the answer to the dialectic game; however, we have to admit that no one is more exposed to the danger of falling for the dialectic temptation than the pragmatic politician or economist who permits himself to be driven from point to point.

It happened to be that in our system economic and technological wealth are concentrated in our corporations. The only point in which we are necessarily inferior to the Russian system is the organization of government as a power group and force in technological and economic organization. By excluding or deterring our corporations from the most active participation in the underdeveloped territories, we are putting ourselves in a weak position and confuse the functions between government and corporations at one of the most delicate points.

European sources allege that in 1960 the entire Russian group spent \$700 million for economic and military aid to underdeveloped territories while the West spent during the same year \$4 billion without strictly military aid. (Industrie-Kurier, November 24, 1960). What about the effects? By disregarding the interest of American corporations in underdeveloped territories, our government may appear unbiased by foreign interests of American monopolies and thereby contradict Communist propaganda. In the world dispute, there is no distinction between the different elements of American society, corporation or government. The more our legislator stresses his exclusive allegiance to the American worker and producer within this country, the more he abandons American interest in foreign countries. Our Venezuelan example and its implication in the oil and coal problem in the United States and of the world, shows our point.

Once we let the American corporation go to Venezuela or to a similar country under similar conditions, -- once the American corporation undertakes its operation in line with American interests existing at the time, we cannot persuade local nations to believe that American governmental and private interests are so diverse that an unfavorable decision of the American

legislator is not the expression of the forces of isolationistic colonialism in government and corporation which use underdeveloped territories only as long as is helpful to them. A step done cannot be made undone. Because of so-called public interest, the U. S. legislator decides to deprive a country such as Venezuela of her share in the American market while the American investment has been made to supply this market. In those cases full consideration of the conditions in Venezuela appear to be an American obligation, just as much as the United States has an obligation to their own distressed areas.

By refusing to coordinate the investment policies of American corporation, f.i., in Europe, with American political interest, whenever those investments endanger American political and social aims, these corporations have been given the power to lead the United States as well as the other industrial nations into situations which have to bring about clashes of interest between those so-called capitalist nations, exactly as the Communist propaganda alleged.

These remarks may show that even if in different cases for different reasons, we are somehow on the wrong track in this dialectic game. The following elementary questions should be carefully examined:

(a) What has been actually accomplished in underdeveloped countries by the American aid program? To what extent was this aid program of military character and did not make a permanent contribution to cultural and social developments?

(b) What is the ratio between the actual expenses of the American foreign aid program and the money actually used for "foreign aid"? With respect to this question Taiwan, usually referred to as a most efficient example of U. S. Government operation, may be used as an instance.

(c) To what extent did the American foreign aid program get unfit governments into power in underdeveloped countries, especially generals who are the practical recipients of military aid?

Is there really no other approach to our problem? Is there really no way to bring the wealth of American technology and economic art concentrated in our corporations into the play in regard to the new countries? Is there really no way to come, based on the actual means of the United States, to a coordination of our corporate and public power under a definite political and economic program of the United States?

Our observation on the relation between government and corporations in foreign trade is only a symptom of the social organization which you have found in your previous discussions. It is most understandable that your reporters desire to overcome the present difficulties by setting up a public planning group of one or another kind. Indeed, something of this kind is necessary; however, what type of agency would fit in our society and would be able to do the trick? How would such an agency determine what is actually in the public interest? Is there some way in which this agency can operate without setting up some type of totalitarian state, in which this agency would actually be able to run government and economy?

The student of the problems principally dealt with in this report, is bound to ask himself, how this agency would have handled the following point: About two years ago, the prevailing opinion of our economists was that the United States gold position is so strong that any consideration of this condition in reaching economic opinions on the corporate or on the governmental level was not necessary. Then the problem appeared to be the

result of the so-called "dollar gap" under which the outside world seemed to suffer "forever." Corporations which did not buy or invest abroad appeared to be not to do their national duty. Today one is exactly of the opposite opinion and is inclined to consider a corporation investing money abroad or buying goods from foreign countries as a kind of traitor. How would the agency define the public good in such a situation, and how would they change their recommendations? The opinion of the energy planners who a few years ago recommended investments everywhere on account of the threatening shortage of energy, seems to be a warning example. Why today is the whole world full of oil and other sources of energy? What would the reference to the "public interest" entrusted to such an agency actually mean? Is a satisfactory approach to this entire problem not dependent on the existence of workable tests on the basis of which corporations and government know where to go and what is expected from them?

It has been an important contribution of the so-called new liberal school that Eucken and his friends have rediscovered a very elementary truth: In each period the economic order functions only as long as all participants, public and private, preserve the order and maintain the function of each institution within the social order. Eucken and his friends based their own hope for an order on the contrast to the national socialist idea of "order" by command of the Führer. In contrast to this pseudo-order, Eucken remodeled the idea of competition of free people as a guide which may be sufficient to give government and private groups the line of operation and the test of judgment. He envisaged the continuous control of corporate or governmental activities under the test of competition. While I have never accepted the idea that competition may be the one and only test to which private and

public organizations have to be subordinated, I agreed always with Eucken's idea that society can only function properly if each elements of the social fabric is subordinated to a standard and integrated into a system of an economic order in which each element and each institution has a place coordinated with the places of other elements and institutions. Once the American society will be conscious again of such a basic standard, nothing has to be dogmatic about it.

Under the European 19th century idea of social order, the state, whether organized on a democratic or an autocratic order, had the exclusive legal and sociological role in setting up the principles of the order. The failure of the "state," at least in Germany of the 1920's, led automatically to a disintegration and to a revolutionary setting up of a pseudo-order under the national socialist dictator.

In the United States the social forces lost their conviction that in a pluralistic society, they are real partners of any order and therefore have to cooperate in any reform of the social order. Our government of today works in a purely expedient method -- from problem to problem. We are in the danger of a freezing process in our pluralistic society, and of a failure of our political government to step in as a leader whenever leadership should be necessary to redefine the aim and the function of all the elements and principles of our society.

I may be permitted to clarify my point by contrasting European and American approach:

The origin of the American corporations is not the same as the origins of the European business corporations, the mercantilistic corporation which has been a part of the governmental setup. As far as the mercantilistic

corporations operated in the United States, they were servants and institutions of a foreign system. While I do not believe that the fathers of the American Constitution intended to set up any liberal economic system, the mere fact that there was no American governmental economic machinery when the Constitution was written gave the economic power to the play of an independent businessman. This is what Madison in the 10th chapter of The Federalist has to say:

"A zeal for different opinions concerning religion, concerning government, and many other points, as well of speculation as of practice; an attachment to different leaders, ambitiously contending for pre-eminence and power; or to persons of other descriptions, whose fortunes have been interesting to the human passions, have, in turn, divided mankind into parties, inflamed them with mutual animosity, and rendered them much more disposed to vex and oppress each other, than to cooperate for their common good. So strong is this propensity of mankind, to fall into mutual animosities, that where no substantial occasion presents itself, the most frivolous and fanciful distinctions have been sufficient to kindle their unfriendly passions, and excite their most violent conflicts. But the most common and durable source of factions, has been the various and unequal distribution of property. Those who hold, and those who are without property, have ever formed distinct interests in society. Those who are creditors, and those who are debtors, fall under a like discrimination. A landed interest, a manufacturing interest, a mercantile interest, a moneyed interest, with many lesser interests, grow up of necessity in civilized nations, and divide them into different classes, actuated by different sentiments and views. The regulation of these various and interfering interests forms the principal task of modern legislation, and involves the spirit of party and faction in the necessary and ordinary operations of the government."

The American corporation, f.i., in the State of Connecticut, grew from partnership-like groups which obtained a governmental permission to limit their liabilities. Later the two forms of the partnership-grown corporation and of the English mercantilistic corporation became the American business corporation of the 19th and 20th centuries.

The American corporation was always an institution built into the American pluralistic system. In this system, government was never felt as a superior group able to dictate the other groups. Madison in the same chapter describes the government as a kind of presiding judge and the other social forces co-judges. They shall decide on the following questions:

"Shall domestic manufactures be encouraged, and in what degree by restrictions on foreign manufactures? are questions which would be differently decided by the landed and the manufacturing classes; and probably by neither with a sole regard to justice and the public good. The apportionment of taxes, on the various descriptions of property, is an act which seems to require the most exact impartiality; yet there is, perhaps, no legislative act, in which greater opportunity and temptation are given to a predominant party, to trample on the rules of justice. Every shilling, with which they overburden the inferior number, is a shiling saved to their own pockets.

"It is in vain to say, that enlightened statesmen will be able to adjust these clashing interests, and render them all subservient to the public good. Enlightened statesmen will not always be at the helm: nor, in many cases, can such an adjustment be made at all, without taking into view indirect and remote considerations, which will rarely prevail over the immediate interest which one party may find in disregarding the rights of another, or the good of the whole.

"The inference to which we are brought is, that the causes of faction cannot be removed; and that relief is only to be sought in the means of controlling its effects."

At the beginning of the United States history, the American society was a force integrated by the enthusiastic will to build up a nation

of free individuals covering the entire continent. In the discussion between Theodore Roosevelt, Brandeis, Wilson and LaFollette, for the first time the issue came up -- how this social organization can be maintained in a modern society having powerful corporations.

Let me at this point return again where I started, namely, to the recognition that in 1914, when the Federal Trade Commission was established, this agency had to determine whether it has been organized as a mediator between the social forces in business or a guarantor of competition, or as a commander of business. They found after some discussion the answer by adopting the idea of competition as a guide in so-called monopoly cases, and the weak concept of "fairness" in all other matters which, step for step, penetrated the so-called monopoly field. The Federal Trade Commission found itself furthermore stopped in any effective policy on corporations by methods of administrative procedure which may be good for other cases but which are unusable in regard to our problem. There is no reason to believe that an agency established today under the plan of Mr. Ferry would not be exposed to exactly the same two devastating facts: first, a lack of test under which the agency should find what is in the public interest and what is not; secondly, a lack of a speedy procedure.

I believe that a good solution of the second point is impossible unless we find a satisfactory solution to the first point. All reorganizations of the federal administrative agencies will bring some good, but the basic deficiency will remain -- that they have no test under which they decide the cases.

In my study on the Federal Trade Commission, I hope to show the full impact of the very elementary principle of logic: No judicial proceedings, even no rational determination of any litigated point by an "outsider" is

possible unless one has a principle or aim to which this determination can be related. Any other determination is arbitrary. Neither intuition nor hunches are sufficient. I think we have even to define the word "arbitrary" as follows: a determination made without considering the proper relations to a preconceived aim or principle is "arbitrary."

Between 1914, the year of the establishment of the Federal Trade Commission, and the present, we had two wars and two postwar periods which gave the determining body tests of their own to prepare to win the war and to overcome the postwar troubles. Once these tests are no longer operative, our agencies in control of corporations are bound to run from case to case and to fail.

Our example should have shown sufficiently that the needs of American trade in the international field offer themselves as a basis of a national policy, for instance, securing the utilization of the wealth of our technology in the interest of the building up of a part of our neighbors, broadening the challenge of international trade for a balanced market having an open exchange of technology, giving each individual industry the fullest opportunity for utilization of its talents.

Under the special conditions of the American system, such tests cannot be set by mere legislation. We need tests growing from the cooperation of our social forces, especially governmental and corporate; while under our Constitution the formulation of "law" is up to Congress, Congress can only formulate legislation. The actual meaning of each piece of legislation has to be interpreted according to its control over the social order. The less clear and definite this interpretation of legislation and also of judicial or executive decrees is, the less effective will be the legislation. Within

our social order we have also rules set up by corporations, for instance, the conditions of sale or business in the domestic and international trade. These rules, if provided for by oligopolistic or monopolistic corporations, have factual power of law on the basis of the interdependence of our social forces. Public rules and these private rules should not remain unrelated. Even private tribunals, the organized arbitration, have done their job in the disintegration of our social order. They have to be reintegrated in a new concept of order.

Corporations in international and foreign trade of the United States can only be coordinated with the public interest after some new basic decisions have been made. It has to be decided what actually is the purpose of our foreign trade policy and which role shall be played by government and by corporations in regard to this trade. We have to make up our minds whether we wish a trend of our society to a new type of mercantilistic trade policy in which the test of good or bad is its effect on the U. S. public and private treasury, or an open market within the family of industrial nations. Activities of our corporations are necessarily quite different, whether we accept the one or the other decision. Once we have made such a determination it will be possible for a public agency to determine whether certain acts of corporations in foreign trade are in the public interest or against the public interest. It will be possible for our corporations to determine for themselves what is in the public interest and what is not.

We have to make up our mind whether we would like to retain or better, rebuild some type of free enterprise economy in which corporations and other private business organizations have the control of technology and of commercial and economic machinery. We do not have enough people to do both -- to

administer public and private technology in all fields. We do not have enough capital to do both. Furthermore, the experience shows that this type of a mixed economy does not work in our system.

Certainly in the trade with underdeveloped nations, we cannot change the existing situation from one day to the other. But we have to give the corporations systematically both the power and the responsibility for a large part of the American contribution to the development of the new countries. We may use many devices of public support of those corporations, such as tax exemptions, credits or other means.

This new role of the private corporations in this large and important part of international trade presupposes two important changes in our legal approach:

(a) We have to exercise our entire influence to change the international law rule as to expropriation of American or other foreign enterprises abroad. We may suggest the establishment of an international tribunal which can be called on by governments of underdeveloped countries or by private interests in those countries whenever they believe that agreements between corporations and governments or private interests in newly developed countries are unfair to such country. It may be considered unfair if the agreement does not provide for the right of local interests to acquire local enterprises owned by foreign interests after a certain period of time and under fair provisions for compensation.

(b) We have to include in our own legal system methods to bring American corporations operating abroad into line with our general standards of ethics and economic policy. Along the line of cases dealing with American participation in foreign cartels the courts have set up principles which may

guide us in the new work. An American corporation acting in a foreign country inconsistent with the American interests and the American principles of trade is subject to the control of our courts and eventually of our administrative agencies.

The procedure used by the Federal Trade Commission as well as by the courts prove to be highly inefficient to do a good job. I believe that once we have reached an agreement on the test, it should not be too difficult to find a speedy method of procedure.

In many respects we are more or less at the same point at which the organizers of the Federal Trade Commission had been in 1914. We will fail if we do not find clear definition of the tasks of corporation and government within our society and for definite purposes.

I may be permitted to say that we can only meet the Communistic threat if we believe in the efficiency of some type of capitalistic system here and in the underdeveloped territories. With great satisfaction I read Professor John Kenneth Galbraith's criticism of India's public sector enterprise. This statement of an outstanding representative of an ideology usually labeled as liberal may indicate that we are on the road to a broader agreement on this issue. The handling of this issue, however, is an inseparable part of the wider problem discussed here.

The President of the United States is a speaker not only for the government but for the nation and society, has the privilege to formulate a new basic line, on which corporations and government shall operate in the field of international trade.

The result of our considerations, principally based on our three examples, for the relationship between government and corporations may be stated as follows:

I. Conclusions as to the action of government and corporations

A. (1) Modern business corporations can only be brought effectively in line with any "public interest" if the government (controlling agencies as well as legislator) operate under a clear definition of "public interest."

(2) In the field of foreign activities of corporations, the President of the United States should define such public interest as quickly as possible. It is recommended to ask the legislator for a corresponding statement.

(3) Each agency entrusted with participation in the control of corporations is bound to base its determination on the statement of policy in regard to the foreign trade in the United States.

(4) It should be recommended to Congress to exercise the greatest reluctance to enact any statute, bill or regulation inconsistent with the general line once stated in regard to the foreign trade of the United States.

It is necessary that Congress does not interfere in the general principles of international trade whenever special interests of a certain part of the country are involved; if, however, for domestic reasons such an interference is necessary, even if inconsistent with the general principles, Congress should compensate those foreign countries in which the United States has a substantial interest for the loss of trade resulting from such action.

B. (1) In the field of international trade, the scope of activities of corporations and of government should be fully separated from each other with the aim to give corporations and other business enterprises the chance to act in accordance with their business interests as well as with the public interest. The present governmental activities in underdeveloped

territories (outside of military aid) should be curtailed as quickly as possible and new devices should be found for governmental guaranties.

(2) American corporations doing business abroad, directly or indirectly, are bound to obey principles of American law wherever they are. In the scope of the policies of the United States to be announced by the President, administrative agencies, eventually courts, should be given the power to control any corporation to remain in line with the policies set up.

The Federal Trade Commission by the grant of a special budget should be authorized to investigate as fast as possible the method of American corporate activities in the different foreign countries. This study may be restricted to a few special industries since it can be assumed that the same practices are used in all fields. On the basis of this report, corporations may be ordered to cease and desist certain practices which may call for future complaints in Latin America or other countries.

## II. Conclusions as to international and foreign law.

(1) The United States Government should be asked to re-examine the American attitude in the international law rules as to the legality of nationalization of foreign enterprises. It should be examined whether a rule could not be found which gives sufficient assurances to American corporations as well as to underdeveloped countries. It is suggested to establish a special international tribunal to examine the fairness of agreements between American and foreign corporations or governments. It should be considered unfair if the agreements do not permit local interests to take over the enterprise after a certain period of years provided fair compensation is guaranteed.

(2) It should be examined to what extent American and foreign, especially Western European and Japanese, corporations could build up joint programs for underdeveloped territories, provided that these agreements remain in the scope set by the American antitrust legislation as well as by the policy set by the President. Private bond issues should become again an important device of financing long-term investments in new countries.

(3) American and European governmental and private institutes should study jointly how a step for step development to a common American-European market can be found.

I hope you agree with me that the present conditions do not permit more definite answers. They call, however, for immediate formulation of principles and aims. The people who have envisaged the common European market have set up an aim of magnetic force. Each European corporation knows what the aim is and the end should be. Even if the political unification should never be accomplished, the trend of the setting up of this aim became a most effective force in the dynamic of Europe. Each governmental agency, whether on the level of the Common Market authorities or the state authorities, knows under which aspects each act has to be examined. Although the present development is slow, the trend and the test remain the same.

The United States has no such aim or trend. Therefore we have no chance of setting up an effective policy of control or of cooperation of government and corporations until our aims are clarified.

I believe your Center and our two Institutes have a common task: We should coordinate our research and work in each of the points you have discussed in your previous conferences and I have mentioned in my paper. We should try to become one of the channels through which the new ideas of our social order can be found.