to exhibit their wares, to plead their cases in court or to import their goods in their own vessels without discriminatory port duties or regulations.

Yet, benefits of a character not related to tariffs are not necessarily held to be inherent in a most-favored-nation clause. In several legal systems they must be enumerated to be claimed. It was a general feeling among the scholars from private-enterprise states that to assure protection on the highly practical matters of entry, access to courts, and shipping, the most-favored-nation clause should be redrafted from its generalized form to include specific reference to the matters on which equality of treatment is desired.

Draftsmen of future commercial treaties between state-trading and private-enterprise states will be wise, if the Rome deliberations represent sound thinking, to appreciate that the most-favored-nation clause should not be granted lightly with the feeling that it will facilitate in a state-trading market the expansion of trade which has usually flowed from non-discrimination in a private-enterprise market and that it is not, therefore, a true *quid pro quo* for a grant of the clause by a private-enterprise state to a state-trading partner. Further, it should be redrafted to include specifically the points on which equal treatment in entry, access to courts, shipping and perhaps other matters may ultimately be desired so that it amounts to more than a generalization. It must be in a form capable of serving as the foundation for a diplomatic protest should the occasion require. Such specification is not to imply that unfriendly discrimination can be expected from the hands of state traders. It is but the application of the rule of prudence required of a lawyer called upon to anticipate the quarrels which history indicates can arise even in relationships which start on the friendliest of terms.

JOHN N. HAZARD

ON SAVING INTERNATIONAL LAW FROM ITS FRIENDS[1]

As Thurman Arnold pointed out some years ago in *Symbols of Government,* those who attack either men or institutions on counts of irrationality or ineffectiveness are immediately met by the rejection-reactions of those attacked. For some centuries now international law has been on guard against its overt attackers. Whether international law has been able adequately to deal with all its detractors[2] remains somewhat in doubt, but

[1] The writer owes this title to George Ward Stocking, thought to be the author of an article called "On Saving the Sherman Act from its Friends." However, Dr. Stocking sets the record straight in this way: He took the title for his presidential address to the Southern Economic Association, "Saving Free Enterprise from its Friends," 19 Southern Economic Journal, No. 4 (April, 1953), from an earlier paper of Thomas E. Sunderland, General Counsel of the Standard Oil Co. of Indiana, "Saving the Sherman Act from Its 'Friends,'" 1950 Institute on Antitrust Laws and Price Regulations, Southwestern Legal Foundation 211–224.

[2] Including certain notable stylists and otherwise persuasive writers, who have the notion that there is an essential disutility to national interest to be found in international law. The classification of notable stylist Dean Acheson in this regard, in

of counter-resistance and vigilance from the system's spokesmen there can be no doubt.

As every woman and Dale Carnegie know, men and their institutions are also susceptible to the flattery of implied reliance and effectiveness. It is natural that compliments to the reasonableness, completeness and effectiveness of an international legal order be accepted with gratitude by the relatively few, such as the members of the American Society of International Law, who have identified their interests and their hopes with the success of international law. It has been difficult in the past for us to be honest with ourselves with respect to some of the pretensions to completeness and effectiveness which come to us from some of our fellow-guardians of international law. Now, as discourse at the last annual meeting of the Society demonstrated at several points in the program, our science has been flattered anew and to a considerable extent by newly-found friends.

It is the purpose of this editorial to raise for consideration whether, as a result of the new attachments manifest in the recent past, international law might not stand in need of saving, not from its enemies, but from certain of its friends. In two major instances appeals have of late been based squarely upon assumptions as to what international law *is* or positively requires. In both instances the policy aspects are highly arguable, the competing interests clearly evident, and much of the discourse colored by the emotive use of language.[3] One appeal to international law is that this law forbids the so-called *extraterritorial*[4] application of the United States antitrust laws. The other is that international law was violated by the "confiscation" in time of war of enemy "private" property.[5]

The issues of policy involved in both situations are certainly issues upon

view of his latest book, is a subtle thing upon which this writer is not ready to take a position.

[3] The discussion on return of German and Japanese assets at the last annual meeting of the Society afforded several interesting examples of "good" words and "bad" words. For example, those in favor of return used the "bad" word "confiscation" to describe what had occurred when, during World War II, the Allied nations took into public ownership enemy assets. Those against return, somewhat uncomfortably, tried to explain that while they too were against "confiscation," the analogy was to "eminent domain," etc. Humpty Dumpty would have understood perfectly.

[4] Italicized, because discourse does not always differentiate between: (1) the application of national law to foreign conduct if the actor is not within the territorial power of the state seeking to prescribe its rule for the conduct; (2) efforts of a state actually to enforce its law within the territory of another state; and (3) a broad or a narrow version of (1) above, involving expressions of opinion as to whether, and if so, under what circumstances, a state may apply its rule to conduct taking place outside its borders but having some effect (direct, indirect, slight, significant) within its borders or on its interests.

[5] The current argument based on international law is summarized in DeVries, "The International Responsibility of the United States for Vested German Assets," 51 A.J.I.L. 18, 27 (1957). The inter-war debates, in which the late Professor Borchard participated with such vigor, will also be recalled. It is understood that a 1957 Press Release from the White House, announcing a plan for settlement of war damage claims against Germany and for return of vested assets, bases its new position, not on the requirements of international law, but on "the historic American policy of maintaining the sanctity of private property." See 37 Dept. of State Bulletin 306 (1957). *Cf.* note 3, above.

which the minds of reasonable men could and do differ. These policy issues are not involved in this inquiry. The question here is whether the interests of international law are well served by the appeals made to it in connection with certain presentations in support of each of these issues.

In a recent report[6] the Special Committee on Anti-Trust Laws and Foreign Trade of the Association of the Bar of the City of New York states:

> . . . A further basic factor contributing to the resentment of the nationals of other countries over the extraterritorial application of our antitrust laws is the apparent disregard by us of traditions and principles of public international law. International law represents the standards and practices of civilized nations developed as a means of avoiding the conflict between sovereign powers that would result from the attempted exercise of jurisdiction by one sovereign over acts committed within the jurisdiction of another sovereign. The jurisdictional principles of public international law represent an advance from the concept of jurisdiction based on the sovereign's physical power to control; they are based upon a more sophisticated concept of the society of nations which presupposes the ability of the international community to arrive at a workable arrangement for allocating jurisdiction over problems that overlap territorial boundaries. The attempted extraterritorial application of the antitrust laws not only may result in a violation of principles of international law, but also may cause disrespect for the law of those individuals who unexpectedly are held accountable to a "foreign jurisdiction."
>
> In the main, the principles of public international law provide that nations are limited in their jurisdiction to activities occurring within their physical boundaries. . . .[7]

While it is true that the objective of the Report is to support on grounds of desirable economic and security policy a proposal for legislative change in the antitrust laws to provide delegation of power to the Executive to authorize exemptions from the antitrust laws in certain types of international transactions where the President finds that the interests of the United States will be served thereby, an argument based upon international law as *lex lata* is definitely made. If the quoted assertion as to jurisdictional bases recognized in international law is correct, it obviously follows that the United States is a violator of international law when it seeks to apply its national laws against restrictive practices taking place abroad.

Similarly, when the argument is made that German and Japanese assets

[6] National Security and Foreign Policy in the Application of American Antitrust Laws to Commerce with Foreign Nations 8–9 (1957).

[7] The Report then proceeds (pp. 9–18) to examine the various possible bases upon which the United States could claim to exercise jurisdiction to apply its antitrust laws to conduct outside the United States and finds bases of jurisdiction to be dubious in law or exercises of jurisdiction undesirable or unfair in policy. As to the situation in law, *cf.* Fugate, Foreign Commerce and the Antitrust Laws, Ch. 2 (1958). The Report cited above states in its preface that the director of the study, Professor Kingman Brewster, took no part in the preparation of the Report and that his study will be published as a book, which ". . . will include Professor Brewster's own conclusions and recommendations, including his recommendations on the subject dealt with in this preliminary report."

should be returned because international law requires it, illegality under international law if they are not returned is explicit.[8]

Putting aside the issue whether it is wise to call too readily into question the propriety under international law of United States actions in situations where the assumptions as to what international law requires are debatable or dubious—and in the two situations under examination the range of dispute certainly justifies at least the former possibility—is there anything to be concerned about, if one is not a partisan as to the basic issues themselves?

From the standpoint solely of the institutional interests of international law it is submitted that there are at least three things to be concerned about:

(1) Overemphasis on a particular doctrinal point of view (such as that the territoriality principle is the sole, or at least the only major, basis of jurisdiction which international law recognizes) may perpetuate or extend error. This is probably the least serious objection of the three, for doctrinal error can always be corrected by research, the accumulation of the authorities, argument, and decision.

(2) International law tends to be degraded to the level of the "seductive cliché"[9] by vague, imprecise, unsupported resort in argument to certain supposed "principles." It would not be fair to draw a parallel to Dr. Johnson's observation about the resort to patriotism when other arguments have failed, but it will do international law no good for it to become too often a kind of incantation to be resorted to for general emotive effect. At worst such resort raises problems of candor and implies intellectual disrespect for the integrity of the international legal order. Normally, and without doubt in the situations under discussion, imprecise or incorrect appeals to supposed rules of international law have undesirable effects similar to those seen nationally in vague, uncritical appeals to concepts of substantive due process. The norm becomes so generalized, so unclear as a standard of conduct, as to cease to have normative significance. That is the end of the norm, and if carried very far, of the normative system under reference.

(3) The last thought above leads to the most important of these three considerations, *viz.*, overly optimistic assumptions as to what is international law, obscure the very real need for exploration of new lines of development, of working toward solutions not yet actually provided by international law. To illustrate: The assertion that international law forbids the application of national laws on economic regulation to conduct outside

[8] In the context of the nature of the struggle in World War II and with some recollection of the purely symbolic nature of the reparations settlement (at the insistence of the United States), that this argument is even made is little short of astonishing to the writer. Questions of doctrinal correctness aside, the only apparent reasons why there are not more violent reactions to the argument are (1) man's memory is only slightly longer than that of the gorilla; (2) the post-World-War II settlement planning and its relationship to wartime operations and planning have never adequately been described.

[9] Acknowledgment to Mr. Justice Frankfurter, writing in another context, hardly seems required.

the national territory deflects attention from the need which exists in international law for the development of new and better positive rules regarding the resolution of conflicts of jurisdiction.

As is well known, international law recognizes a number of jurisdictional principles; and these bases of jurisdiction may be claimed, in situations involving conduct having contacts with more than one state, by two or even more states. In general, international law does not contain any rule or set of rules which selects any one of the different bases of jurisdiction as the one which has paramount right to govern the conduct in question. A state does not lose a recognized power under international law to attach legal consequences to conduct under its law for the reason that another state also has a base of jurisdiction to prescribe its rule of conduct.

In a few areas, and to limited degrees even in those areas, general international law has worked out principles for the resolution of conflicts of jurisdiction. The "peace of the port" doctrine with respect to the exercise of either territorial or nationality jurisdiction to the exclusion of the other, where criminal conduct takes place aboard a visiting foreign commercial vessel, is almost exclusively illustrative of the development which has taken place, largely as a result of customary law and treaty law merging to develop a generally accepted rule as to priority in the exercise of jurisdiction.[10] What reconciliations there have been of conflicts of jurisdiction have left many important problems untouched. These problems need attention, since important matters of hardship (to persons caught between the conflicting demands of two states having bases of jurisdiction) and of tensions between states remain unsolved. It does not contribute to their solution to have them ignored by incorrect assumptions that they do not exist.

National policy as to the reach of the antitrust laws and on ex-enemy assets need not, of course, turn upon present international law or await the development of new international law. Both these cases are hard cases and, were international law to be made solely for their solution, it would perhaps be bad law. It is encouraging to note that out of these controversies the first necessary step to the development of good international law in the areas involved may come.[11] The first step is

[10] Treaties and reciprocal legislation have for some countries carried reconciliations of conflicting bases of jurisdiction into other areas, such as, for example, military service in the armed services of one country by resident nationals of the other. The choice-of-law rules of the conflict of laws also operate over the wide range of private interests to reduce actual conflicts in the exercise of jurisdiction. *Cf.* Stevenson, "The Relationship of Private International Law to Public International Law," 52 Columbia Law Rev. 568 (1952), and Jessup, Transnational Law, Ch. 3 (1957).

[11] See note 7 above. The American Law Institute's project for a re-study and restatement of the Foreign Relations Law of the United States has involved as yet unpublished research and analysis of Bases of Jurisdiction and of Conflicts of Jurisdiction. And see DeBevoise, "Treatment of Private Property of Foreign Nationals in Peace and War—Is a Code Desirable?", paper submitted to Oslo Conference, International Bar Association, July, 1956. On the enemy assets question the paper last cited excludes re-argument of the past and urges a look to the development of positive rules for the future.

the one in which the state of existing law and its underlying premises are clearly and accurately analyzed and the policy factors identified. Only after that could there develop the new and the improved rules of international law.

The task is one which needs all the friends of international law. The "old line" international law professionals must not be clannish. They must watch their communications to insure they are being understood. Above all, they must be careful not to let insistence on accuracy in stating the international law that *is*, be misunderstood as negativism or as complacency about the very serious lack of law in places where there should be law. Other friends of international law must be willing to face the facts about the law that *is* and go on from there in the work toward the development of more law.

The times seem right for this co-operative effort, not only because it is badly needed, but because several institutions [12] most important to the development of international law are at present engaged in planning searching inquiries into the rôle and future of international law in the affairs of men and states. The time for real friendship to international law is now.

COVEY T. OLIVER

[12] Within the United States, the American Bar Association has appointed a new, special committee headed by the Honorable Thomas E. Dewey to re-examine the whole relationship of the Association to the field of international public law and the law of international organizations. The Executive Council of the American Society of International Law recently appointed a special committee to recommend measures by which the Society might contribute more effectively to the end of an increased respect for international law in the conduct of international relations. See also Henry R. Luce, "Peace Is the Work of Justice," 30 Conn. Bar J. No. 4 (1956), and the refreshingly concrete proposals of American Bar Association President Rhyne in his address at the annual dinner of the Society, April 26, 1958.