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ANTITRUST CONSIDERATIONS IN THE ORGANIZATION AND OPERATION OF AMERICAN BUSINESS ABROAD

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I. INTRODUCTION

In recent years, the geographic dimensions of the world have become much less pronounced and global trade has flourished. The Second World War has affected not only the political climate in the United States, changing it from an essentially isolationist nation into a major political power, but also the character of American business. The most immediate and startling effect has been the restructuring of American industry brought about by a large and increasing number of acquisitions and mergers. This trend, starting in the forties, has continued to the present day and has often been characterized as the third great merger wave in the history of the United States. While most of these mergers have involved domestic corporations, many of the newly formed corporate alliances have brought together American and foreign firms. The United States businessman has ceased thinking of himself as a national shopkeeper and has adapted his war-acquired sophistication and knowledge to expanding his business beyond the territorial confines of this country. During the sixties, this extraterritorial expansion of American trade has produced many foreign joint business enterprises organized by American and foreign corporations. American trade with other countries has blossomed and an ever-increasing number of companies are becoming involved in foreign commerce.[1]

This internationalization of American trade has produced a concomitant extraterritorial expansion of the United States antitrust laws. Several postwar cases declare that the firm which establishes a foreign base of operations must comply with these laws, and have made it painfully clear to many American businessmen that their foreign activity can lead to antitrust violations whenever competition in United States commerce is substantially and directly affected. This article will

[1] The post-World War II merger activity is statistically presented in V. Mund, Government and Business 41, 51 (4th ed. 1965), which reports that the number of acquisitions and mergers in manufacturing and mining industries has increased from 219 in 1950, to 1018 in 1963. Statistics released by the Federal Trade Commission show this sharp increase in merger activity continuing. The FTC News Summary, March 2, 1966, reports that both the number and assets of large manufacturing and mining firms acquired in 1965 reached the highest levels on record. The report also indicates that some 2400 large firms control over 80% of all manufacturing and mining assets in the United States. The latest available statistics for the years 1966 and 1967 show the trend in merger activity continuing, with 1746 firms being acquired in 1966, and 2384 firms in 1967. 5 CCH Trade Reg. Rep. ¶ 50,195 (March 25, 1968).

According to FTC statistics, recording joint venture activity for the first time for the year 1965, American companies participated in 171 new ventures with 125 of the total involving the collaboration of United States and foreign companies for foreign operations. FTC News Summary, Feb. 27, 1967. In 1966 and 1967, American companies were involved in 218 and 171, respectively, joint ventures, of which 146 and 113, respectively, represented cooperation with foreign companies. Interview with Tranquilino B. Aquino, Supervisory Statistician, Bureau of Economics, Federal Trade Commission, March 27, 1968.

explore the antitrust considerations bearing upon the initial problem facing the American investor, that of determining the particular arrangements by which to conduct his foreign business.

Several methods and organizational structures are available. The American entrepreneur can conduct his business abroad either directly, through a "foreign" company which he owns in whole or in part, or indirectly, through some contractual arrangement. The "foreign" company may be established under American law or under the law of another nation. The contractual arrangements can take the form of a license of patent or trademark rights, an agency or distributorship agreement, a requirements contract or some other form of contract creating a relatively permanent or continuing relationship between the two companies.

Precisely which avenue to take depends upon a number of political as well as economic factors and is not by any means susceptible of easy analysis. Often the choice involves competing and contradictory considerations. For example, flexibility of internal control may suggest branch operations or a partnership connection. This choice would tend to assure the willingness of the United States Government to espouse the claims of its nationals before an international tribunal. The advantages and protection of limited liability, on the other hand, may suggest incorporation. Even when it is concluded that incorporation is more desirable, there is still the question whether this should be accomplished under United States law or the law of some foreign country. Alternative choices are not always freely available. Association with an existing or newly formed foreign business entity may be dictated by the need for local acceptance, both political and commercial. Buying into a foreign firm or establishing close connections with one by licensing of patent or trademark rights might present itself as the best way of entering the foreign market and achieving acceptance. Exchange controls, import restrictions or tax laws designed to favor local nationality may also dictate this choice. Not infrequently, local foreign incorporation is an absolute requirement of the foreign sovereign, sometimes coupled with the added requirement that a stated percentage of the share capital be owned by local nationals. It is perhaps unnecessary to note that all of these factors become more complicated when the market to be served falls within the territory of two or more sovereigns.

Since this article is concerned with the legality of, and antitrust implications resulting from, foreign establishment, the ensuing analysis is limited to problems which must be considered by one who seeks to expand his operations into foreign markets through the ownership of all or part of an extractive, manufacturing or service operation abroad. Other methods by which foreign business may be conducted will be discussed only insofar as they bear on the question of capital investment.

The analysis is divided into three parts. The first is a general discussion of threshold jurisdictional issues involved in the extraterritorial application of the antitrust laws and explores the problems resulting from distinctions between the export of capital and the export of goods. To simplify discussion, the remainder of the article divides foreign investments into two main types: first, those which are merely investments,[2] and second, those which are actual expansions of an American company into overseas operation. The former section deals with capital investments which fall short of a control establishment, and the investment defense embodied in Section 7 of the Clayton Act; the latter with substantive antitrust problems involved in the formation and operation of business establishments. In this last section we will classify the types of establishments as "branches," "subsidiaries," and "joint ventures." A "branch" is simply what the name implies: an overseas extension of an American company's operations without separate incorporation. A "subsidiary" is a separately incorporated extension of an American company into overseas markets. A "joint venture," while it may be a loose ad hoc arrangement of a partnership nature, will be treated as a separately incorporated entity established and controlled by more than one parent.[3]

II. General Problems

A. *Jurisdiction*

The power of Congress "to regulate commerce with foreign nations" is contained in Article 1, Section 8 of the Constitution. Pursuant to this authority, Congress has from time to time enacted several antitrust statutes proscribing activity which has a detrimental effect upon the foreign commerce of the United States.[4] The most important of these are the Sherman Act passed in 1890, the Wilson Act (Tariff) passed in 1894, and the Clayton and Federal Trade Commission Acts passed in 1914, each of which is expressly made applicable to foreign commerce.

[2] For discussion of "investment," see pp. 255-62 infra.

[3] For discussion of joint venture terminology, see pp. 282-84 infra.

[4] Sherman Anti-Trust Act, 15 U.S.C. §§ 1-7 (1964) (expressly declared applicable to "trade or commerce . . . with foreign nations"); Wilson Act (Tariff), 15 U.S.C. §§ 8-11 (1964) (declares the Sherman Act applicable to imports); Clayton Act, 15 U.S.C. §§ 12-27, 29 U.S.C. § 52 (1964) (specifically applies to both interstate and foreign commerce); Robinson-Patman Price Discrimination Act, 15 U.S.C. §§ 13-14, 21 (1964) (some sections limited to situations where the use, consumption or resale occurs in the United States, some expressly applicable to exports); Federal Trade Commission Act, 15 U.S.C. §§ 41-51 (1964). 15 U.S.C. § 45 is made particularly applicable to foreign commerce by 15 U.S.C. § 64 (1964). The Webb-Pomerene Act, 15 U.S.C. §§ 61-65 (1964), exempts certain types of export associations from the coverage of the Sherman Act.

While the above statutes fall within the category of what is generally referred to as antitrust statutes, reference should be had to 15 U.S.C. § 12 (1964) for the congressional definition of "antitrust laws," i.e., those whose violation gives rise to a private right of action for treble damages under 15 U.S.C. § 15 (1964).

Congress has passed other statutes under this same constitutional grant which also

Despite the age and number of these statutes, the question of the extent to which the courts will and should exercise jurisdiction under them over foreign acts and foreign nationals is still a matter of controversy. This jurisdictional problem is a large one, straddling the disciplines of political science and law, and has led to exhaustive comment by antitrust lawyers, government officials, authorities on international law and others.[5] In each case the courts must decide three questions: (1) whether Congress has exercised its constitutional power to regulate commerce so as to reach the specific extraterritorial conduct sought to be prohibited; (2) whether judicial exercise of jurisdiction over this conduct is consistent with the limitations imposed by our traditional due process concept of fair play and substantial justice;[6] and finally, (3) whether principles of public international law permit the exercise of this jurisdiction.[7] While the problem is too large for complete discussion here, it is also too large to be ignored altogether. A summary of the salient legal principles will provide a sufficient background for present purposes.

Despite some early confusion,[8] it now appears that under these

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contain antitrust provisions applicable to foreign commerce. See, e.g., Panama Canal Act, 15 U.S.C. § 31 (1964), prohibiting use of the Panama Canal by violators of the antitrust laws; Shipping Act, 1916, 46 U.S.C. §§ 814-15 (1964), specifically applying antitrust policy to agreements in the shipping industry.

[5] See Raymond, A New Look at the Jurisdiction in Alcoa, 61 Am. J. Int'l Law 558 (1967); Raymond, The Exercise of Concurrent International Jurisdiction: "Move with Circumspection Appropriate," 8 B.C. Ind. & Com. L. Rev. 673 (1967).

[6] See International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).

[7] Note, Extraterritorial Application of Federal Antitrust Laws: Delimiting the Reach of Substantive Law Under the Sherman Act, 20 Vand. L. Rev. 1030, 1033 (1967).

[8] The early confusion was caused by Mr. Justice Holmes' opinion in American Banana Co. v. United Fruit Co., 213 U.S. 347, 353 (1909), in which he stated: "[T]he acts causing the damage were done . . . outside the jurisdiction of the United States and within that of other states. It is surprising to hear it argued that they were governed by the [Sherman] act . . . ." Id. at 355.

The continuing validity of this decision has been called into question by the Supreme Court's recent decision in Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690 (1962). That case involved a private treble damage action brought against two American corporations, one of which was Union Carbide & Carbon Corporation (Carbide), and four wholly owned subsidiaries of Carbide, charging them with violating §§ 1 and 2 of the Sherman Act by conspiring to restrain, by monopolizing, and by attempting to monopolize trade and commerce in ferrovanadium and vanadium oxide. Among other things the complaint charged that one of Carbide's subsidiaries had been appointed by the Canadian Government as its exclusive wartime agent to purchase and allocate vanadium for Canadian industries. That company, it was alleged, acting under the control of its parent, entirely eliminated the plaintiff (Continental) from the Canadian market, and divided its business among the respondents. Both lower courts had held that petitioner was not legally entitled to recover for the destruction of its Canadian business. Even if the Carbide subsidiary had "acted for the purpose of entrenching the monopoly position of the respondents in the United States, it was acting as an arm of the Canadian Government . . . ." In reversing, the Supreme Court rejected respondents' reliance upon *American Banana* as misplaced "in the light of later cases in this Court." The Court noted that petitioner did not question the validity of any

laws the geographic location of the challenged activities and, at least under some circumstances, the nationality of the actors, are both immaterial when United States commerce is affected.[9] Dicta in several of the cases suggest that jurisdiction attaches whenever the proscribed

action taken by the Canadian Government or by its Metals Controller, nor did the case raise any question of the liability of the Carbide subsidiary which had acted as the agent of the Canadian Government since that company had not been served. According to the Court:

> What the petitioners here contend is that the respondents are liable for actions which they themselves jointly took, as part of their unlawful conspiracy, to influence or to direct the elimination of Continental from the Canadian market. As in *Sisal*, [274 U.S. 268 (1927)] the conspiracy was laid in the United States, was effectuated both here and abroad, and respondents are not insulated by the fact that the conspiracy involved some acts by the agent of a foreign government.

Id. at 706. Nor was it any defense that Carbide's subsidiary, "in carrying out the bare act of purchasing vanadium from respondents rather than Continental, was acting in a manner permitted by Canadian law." Id. at 707.

[9] Two years after the *American Banana* decision, the Court in United States v. American Tobacco Co., 221 U.S. 106 (1911), struck down under the Sherman Act an agreement executed in England between an American corporation and its British competitor because of its substantial impact upon competition in American commerce. Since then, the antitrust laws, and particularly the Sherman Act, have been applied to protect the foreign commerce of the United States in a number of cases, similar only in their complexity. The most important of these foreign commerce antitrust cases are: United States v. Pacific & Arctic Ry. & Navigation Co., 228 U.S. 87 (1913), and Thomsen v. Cayser, 243 U.S. 66 (1917) (involving foreign participation in a conspiracy formed in a foreign country to control shipping between the United States and foreign ports); United States v. Sisal Sales Corp., 274 U.S. 268 (1927) (conspiracy formed in the United States but effectuated abroad by obtaining discriminatory foreign legislation); United States v. Timken Roller Bearing Co., 83 F. Supp. 284 (N.D. Ohio 1949), aff'd, 341 U.S. 593 (1951) (cartel arrangements between an American corporation and its most important foreign competitor limiting competition *inter sese* in the United States and world markets); United States v. Singer Mfg. Co., 374 U.S. 174 (1963) (conspiracy formed in the United States and Europe between American, Swiss and Italian corporations); United States v. Holophane Co., 119 F. Supp. 114 (S.D. Ohio 1954), aff'd, 352 U.S. 903 (1956) (involving restriction of imports and division of world markets); United States v. National Lead Co., 63 F. Supp. 513 (S.D.N.Y. 1945), aff'd, 332 U.S. 319 (1947) (division of markets and patent-pooling arrangements between American corporation and its principal foreign competitors); United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945) (involving domestic monopoly, foreign cartel agreements, and common ownership of domestic and foreign subsidiaries); United States v. Imperial Chem. Indus., Ltd., 100 F. Supp. 504 (S.D.N.Y. 1951) (involving issues relating to conspiracy to restrain trade, international cartels, foreign joint ventures, and patent and process agreements); United States v. General Elec. Co., 82 F. Supp. 753 (D.N.J. 1949) (involving foreign cartel arrangements and illegal use of patent monopoly); United States v. General Elec. Co., 80 F. Supp. 989 (S.D.N.Y. 1948) (involving, *inter alia*, conspiracies to control world trade); United States v. Minnesota Mining & Mfg. Co., 92 F. Supp. 947 (D. Mass. 1950) (involving the extension of a Webb-Pomerene export association to a conspiracy to restrain trade); United States v. United States Alkali Export Ass'n, Inc., 86 F. Supp. 59 (S.D.N.Y. 1949) (illegal use of Webb-Pomerene export association to maintain domestic prices, international cartel, elimination of export competition, and conspiracy to restrain domestic trade); United States v. Scophony Corp. of America, 333 U.S. 795 (1948) (involving charges of conspiracy, monopolization and attempt to monopolize); Eastman Kodak Co. v. FTC, 7 F.2d 994 (2d Cir. 1925), aff'd, 274 U.S. 619 (1927) (involving unfair methods of competition and agreement restricting imports).

effects upon interstate or foreign commerce are present. It should be noted, however, that in each case there were present other jurisdictional elements, such as participation of American nationals, corporate presence of foreign nationals in the United States or the performance of unlawful activities within this country. Thus, it is doubtful whether the effects on United States commerce are alone a sufficient basis for conferring jurisdiction upon an American court. Nevertheless, it is true that American courts have assumed jurisdiction under the antitrust laws over acts committed and contracts executed abroad by American corporations or their foreign subsidiaries when they have found that such acts or contracts substantially and directly affected or interfered with American commerce.[10] And, under such circumstances, foreign nationals have been found to have violated American law.[11] Indeed, the lawfulness of the acts or contracts under local foreign law, and even the participation of agents of a foreign government has failed to immunize the conduct from antitrust condemnation.[12]

Almost any discussion of the jurisdictional reach of United States antitrust laws must center around the opinion of Learned Hand in

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[10] For example, in Thomsen v. Cayser, 243 U.S. 66 (1917), the Supreme Court upheld a treble damage verdict where the Sherman Act had been violated by a combination of steamship lines operating between the United States and South Africa. The conference members adopted uniform rates, gave rebates to shippers using only conference lines and employed "fighting ships" to meet lower rates of independent shippers. Jurisdiction had been obtained over American agents of the foreign participants. To find subject-matter jurisdiction, the Court focussed on the effects of the combination on the foreign commerce of the United States and affirmed the verdict for plaintiff even though the agreement had been made in a foreign country. The Court stated:

> It is contended that the combination, if there was one, was formed in a foreign country and that, therefore, it was not within the act of Congress; and that, besides, the principals in the combination and not their agents were amenable to the law. To this we do not assent. As was said by the Circuit Court of Appeals, the combination affected the foreign commerce of this country and was put into operation here. *United States v. Pacific & Arctic Ry. & Nav. Co.*, 228 U.S. 87. It, therefore, is within the law, and its managers here were more than simply agents—they were participants in the combination.

243 U.S. at 88. See also United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945).

[11] See, e.g., United States v. American Tobacco Co., 221 U.S. 106 (1911); United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945); United States v. Watchmakers of Switz. Information Center, Inc., 1963 Trade Cas. ¶ 70,600 (1962), jurisdiction established, 133 F. Supp. 40 (S.D.N.Y. 1955); United States v. General Elec. Co., 82 F. Supp. 753 (D.N.J. 1949).

[12] Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690 (1962); United States v. Sisal Sales Corp., 274 U.S. 268 (1927). But see American Banana Co. v. United Fruit Co., 213 U.S. 347 (1909). The foreign government's agent would appear to be entitled to immunity, but this may turn upon complex legal issues involved in the act-of-state and sovereign-immunity doctrines. See, e.g., Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1963). On the question of foreign governmental participation, see generally Graziano, Foreign Governmental Compulsion as a Defense in United States Antitrust Law, 7 Va. J. Int'l Law 100 (1967).

United States v. Aluminum Co. of America,[13] a case which constitutes the high water mark of extraterritorial antitrust enforcement. Although the case centered on the charge that the Aluminum Company of America (Alcoa) had monopolized the domestic aluminum ingot market, it also involved an important charge which made it necessary for the court to decide when the acts of foreign nationals "affect" the foreign commerce of the United States so as to fall within the purview of the Sherman Act and give American courts jurisdiction. Specifically, the Government alleged that Alcoa, through its Canadian affiliate, Aluminium Limited, had participated in an international cartel as a means of protecting its domestic position. Limited was incorporated in Canada "to take over [most of] those properties of 'Alcoa' which were outside the United States."[14] Instead of having Limited's stock issued directly to it, Alcoa had it issued to its common stockholders, thereby placing majority ownership of both corporations in the same group.

Limited combined with two German corporations and concerns from Switzerland, France and Great Britain to form a cartel, known as the "Alliance," which involved the formation of a Swiss corporation, also termed the "Alliance," to administer the agreement.[15] By the members' interpretation of the original agreement, imports into the United States were not included in the quotas fixed for the members. In 1936, however, the agreement was amended and the members contracted to include such imports in their quotas. The question before the court was whether either the original or amended agreement violated the Sherman Act. Judge Hand considered the original agreement terminated but concluded that the amended agreement was illegal under the Sherman Act. His resolution of this issue has become most crucial to the broad issue under discussion and deserves close analysis. He first indicated that "it is settled law—as 'Limited' itself agrees—that any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends; and these liabilities other states will ordinarily recognize."[16] Posing the double question whether Congress intended to attach liability for violation of the Sherman Act to the conduct of foreigners outside the United States, and, if so, whether the Constitution permitted it to do so, he refused to impute to Congress

> an intent to punish all whom its courts can catch, for conduct which has no consequences within the United States. Two situations are possible. . . . There may be agreements beyond

[13] 148 F.2d 416 (2d Cir. 1945).

[14] Id. at 439.

[15] Limited was served at its New York offices, but it does not appear that the other foreign corporations had been personally served.

[16] 148 F.2d at 443.

> our borders not intended to affect imports, which do affect them, or which affect exports. Almost any limitation of the supply of goods in Europe, for example, or in South America, may have repercussions in the United States if there is trade between the two.[17]

It was Judge Hand's opinion that the Sherman Act was not intended to cover these agreements. However, in considering the question of agreements which did not affect United States imports even though they were intended to do so, he said:

> That situation might be thought to fall within the doctrine that intent may be a substitute for performance in the case of a contract made within the United States; or it might be thought to fall within the doctrine that a statute should not be interpreted to cover acts abroad which have no consequence here. We shall not choose between these alternatives; but for argument we shall assume that the Act does not cover agreements, even though intended to affect imports or exports, unless its [sic] performance is shown actually to have had some effect upon them. Where both conditions are satisfied, the situation certainly falls within [the ban of the Act]. . . .[18]

The necessary intent was readily inferred from the record, but there was little evidence of any restrictive effect on imports. This failure of proof was not decisive, however, since Judge Hand ruled that once the intent to affect imports was proved, the burden of proof was shifted to Limited. Since the evidence was equally inconclusive on this score, the cartel, and Limited's participation in it, were unlawful. It is this latter aspect of Judge Hand's dual standard of legality, the shifting to the defendant of the burden of disproving effects once the element of intent is established by the Government, which will probably be decisive of the outcome of most foreign commerce Sherman Act cases.[19]

Despite its obvious appeal to antitrust enforcers and its possible international validity,[20] Hand's formula of proved intent plus territorial effects has obvious limitations. By itself, it does not supply a sufficient basis for jurisdiction in all circumstances. Consider, for

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[17] Id.

[18] Id. at 443-44.

[19] Donovan, The Legality of Acquisitions and Mergers Involving American and Foreign Corporations Under the United States Antitrust Laws—Part I, 39 S. Cal. L. Rev. 526, 533 (1966).

[20] See S.S. "Lotus," P.C.I.J. Ser. A, No. 10 (1927). See also Trautman, The Role of Conflicts Thinking in Defining the International Reach of American Regulatory Legislation, 22 Ohio St. L.J. 586 (1961).

example, the case of a large group of European companies maliciously and notoriously conspiring to keep competing American-made goods out of European markets. Here both an intent to affect the foreign commerce of the United States and an actual effect on such commerce presumably is present. A similar evil purpose and effect will presumably also exist should a large group of South American coffee companies enter into an agreement to limit coffee production and raise the price of coffee in world markets. Yet it is most unlikely that any United States court would exercise jurisdiction over these foreign companies, if they are entirely owned by foreigners and have performed all their actions in foreign countries without conspiring with any American nationals. Some additional territorial nexus connecting the foreign actors with the United States seems necessary before an American court will exercise jurisdiction over foreign nationals. Nevertheless, it is entirely clear that United States courts will continue to assert jurisdiction over the foreign actions of American nationals and their affiliates whenever they transgress the mores of our antitrust laws.

In commenting upon the applicability of the United States antitrust laws in the field of foreign commerce, one commentator has quite appropriately stated that "[t]he American businessman who returns to the home of his European forefathers, much like Naomi of the Old Testament, does not travel alone. Whither he goes, our antitrust laws go; and where he lodges, these laws also lodge." These antitrust escorts, he charges, "are more numerous than the solitary companion of the Book of Ruth," and "seldom emulate Ruth in helping to glean at the foreign harvest. At times, rather, they are responsible for substantial problems in his overseas operations."[21] Similar fears have been expressed by others and the matter has received considerable attention.[22] Some commentators have charged that the application of the antitrust laws in some post-World War II foreign trade cases[23] has

[21] Van Cise, The Application of the U.S. Antitrust Laws to The European Community, 6 Antitrust Bull. 145, 145-46 (1961).

[22] See generally K. Brewster, Antitrust and American Business Abroad (1958) [hereinafter referred to as Brewster]; W. Fugate, Foreign Commerce and the Antitrust Laws (1958) [hereinafter referred to as Fugate]; Legal Problems of International Trade: A Symposium, 1959 U. Ill. L.F. 105; Symposium on Extraterritorial Effect of the U.S. Antitrust Laws, 11 A.B.A. Sec. of Antitrust Law 65 (1957); Carlston, Antitrust Policy Abroad (Parts I & II), 49 Nw. U.L. Rev. 569, 589 (1954); Haight, International Law and Extraterritorial Application of the Antitrust Laws, 63 Yale L.J. 639 (1954); Oppenheim, Foreign Commerce Under the Sherman Act—Points and Implications of the Timken Case, 42 Trade-Mark Rep. 3 (1952); Whitney, Sources of Conflict Between International Law and the Antitrust Laws, 63 Yale L.J. 655 (1954).

[23] The cases which have caused particular concern are: Timken Roller Bearing Co. v. United States, 341 U.S. 593 (1951); United States v. Holophane Co., 119 F. Supp. 114 (S.D. Ohio 1954), aff'd, 352 U.S. 903 (1956); United States v. Minnesota Mining & Mfg. Co., 92 F. Supp. 947 (D. Mass. 1950).

had a definite deterrent effect upon American businessmen making investments or doing business abroad;[24] while others viewing the same evidence have come to quite the opposite conclusion.[25]

By establishing a foreign base of operations, the American businessman voluntarily subjects himself to the laws of the jurisdiction in which he locates himself. He is therefore subject to two different and perhaps conflicting bodies of law, whether he establishes himself in an underdeveloped country[26] or in an industrialized society.[27] If compliance with both legal systems proves impossible or even economically impractical, American investment abroad will be discouraged. For this reason, the criticism has been raised that American antitrust policy conflicts with the political and economic policy of the United States,[28] and the question has been asked whether it is wise for the United States to enforce competition in foreign commerce.[29]

There are almost as many points of view on the extent to which the antitrust laws should be applied to foreign commerce as there are commentators on the subject. In the absence of congressional action, the matter has been largely left in the hands of enforcement agencies and the judiciary,[30] but such ad hoc solutions lack predictability and and have been a source of concern to the practitioner who must advise

[24] Linowitz, Antitrust Laws: A Damper on American Foreign Trade? 44 A.B.A.J. 853 (1958). See also Kahn-Freund, English Contracts and American Anti-Trust Laws: The Nylon Patent Case, 18 Modern L. Rev. 65, 68-70 (1955); Whitney, Anti-Trust Law and Foreign Commerce, 11 Record of the Ass'n of the Bar of the City of N.Y. 134 (1956).

[25] Fugate, Damper or Bellows? Antitrust Laws and Foreign Trade, 45 A.B.A.J. 947 (1959). See Brewster, Extraterritorial Effects of the U.S. Antitrust Laws: "An Appraisal," 11 A.B.A. Sec. of Antitrust Law 65 (1957).

[26] It is argued that the economic plans of the underdeveloped countries conflict with the American antitrust laws because such countries, at the present stage of their development, are not concerned with competition. This is shown by the fact that many governments require competitors to unite and form a single economic unit. See Joint International Business Ventures 84, 86-94 (W. Friedmann & G. Kalmanoff ed. 1961).

[27] In recent years there has been a trend on the part of foreign countries, particularly the European nations, to enact antitrust legislation of their own. Although these laws are sometimes less strict than the American antitrust laws, they are not always so, and there is indeed the possibility of conflict. It is expected that such foreign statutes will create problems for American courts in applying our internal antitrust principles in the field of international trade. The statutes are collected in 1-5 Organisation for Economic Co-operation and Development, Guide to Legislation on Restrictive Business Practices Europe and North America (1964).

[28] It has been said that they may conflict with programs for national security and foreign aid programs. See Statement of the Department of State, Attorney Gen.'s Nat'l Comm. to Study the Antitrust Laws, Report 97 (1955) [hereinafter cited as Att'y Gen. Rep.]; Statement of the Commission on Foreign Economic Policy, id. at 95. See also American Chamber of Commerce in London, The American Antitrust Laws and American Business Abroad 17-21 (1955); Nebolsine, Analysis of Chapter II, "Trade or Commerce * * * With Foreign Nations," 7. A.B.A. Sec. of Antitrust Law 64, 67-68 (1955).

[29] Van Cise, supra note 21.

[30] Cooperation among the various executive departments may at least bring about uniformity of enforcement. See Att'y Gen. Rep. 92-98.

his client on the basis of many imponderables.[31] However, at least one commentator has concluded that

> the reasoned application and elaboration of the considerations involved are more safely entrusted to the Attorney General in the first instance and ultimately to the courts in the event of litigation than to the Congress. Legislative particularization in the antitrust field has not proved significantly helpful even when its difficulties were not, as here, compounded by problems of comity and jurisdiction.[32]

In approaching the problems of foreign establishment, it is important to remember that the antitrust laws are not concerned with the protection of foreign consumers or foreign competitors, but only with American consumers and American business opportunity. This follows from the fact that otherwise the jurisdictional basis of an effect on American commerce presumably is lacking.[33] Any adverse effects on the commerce of foreign nations or nationals, while they might engender some political problems for the Department of State, will not lead to antitrust responsibility.

B. *The Legality of Foreign Investment*

On the most elementary level of analysis, there are two basic methods by which an American manufacturer may expand the market for his commodities into foreign territories: He may increase the volume of goods he exports or he may invest capital in an existing or newly formed business producing goods abroad. In either case, his immediate, if not ultimate, goal is the same, namely, increased foreign trade. Yet, in result, the two methods differ, for when he chooses to establish a manufacturing operation in a foreign country, his action will probably result in a decrease in the United States export trade in the commodity involved.[34] This fact has given rise to antitrust implications not yet

[31] Dean, Extraterritorial Effects of the U.S. Antitrust Laws: "Advising the Client," 11 A.B.A. Sec. of Antitrust Law 88 (1957).

[32] Brewster, supra note 25, at 73. See also Trautman, supra note 20, at 627.

[33] This was apparently recognized by Mr. Justice Minton, while on the court of appeals, in Branch v. FTC, 141 F.2d 31 (7th Cir. 1944). The case involved an appeal from an FTC order issued to an individual conducting a correspondence school, directing him to cease and desist from disseminating false and misleading advertising in Latin America. The order was upheld on the ground that the FTC's action was aimed at compelling the defendant "to use fair methods in competing with his fellow countrymen," Mr. Justice Minton stating: "That the persons deceived were all in Latin America is of no consequence. It is the location of petitioner's competitors which counts." Id. at 34-35.

[34] This, of course, assumes that the American company had formerly produced goods in the United States and exported them. With the establishment of a foreign plant, the American concern no longer will export goods to areas supplied by its foreign plant. To this extent the export trade of the United States is reduced even though the actual volume of exports might remain unchanged or even increase because of normal

fully explored. However, certain language in *Timken Roller Bearing Co. v. United States*[35] and *United States v. Minnesota Mining & Mfg. Co.*[36] has given rise to the fear that the courts are favoring the export of goods over the export of capital in their interpretations of the Sherman Act.[37]

In *Timken*, the defendant, Timken Roller Bearing Company (American Timken), manufacturing 79 to 80 percent of United States domestic production of tapered roller bearing, had acquired a minority stock interest in its chief British competitor, which subsequently became British Timken, Ltd. Together they formed Société Anonyme Française Timken (French Timken) to manufacture and market tapered roller bearings in France. The three companies allocated their territories, fixed prices at which the products of one might be sold in the territory of another, cooperated to protect their markets and to eliminate outside competition, and participated in cartels to restrict American imports and exports.[38] The Court held the territorial restrictions were not reasonable steps taken to implement a valid trademark-licensing system and were violative of the Sherman Act.

One defense raised was that the international situation and exchange controls made it infeasible for American Timken successfully to sell its American made goods abroad and prevented it from engaging

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cyclical movements. This same type of "restraint" on United States commerce is not present where the American is in the business of investing capital rather than the business of producing goods or services. His foreign investment may limit domestic capital markets since it results in the movement of funds to foreign territories, but it does not produce any commodity restraints and hence does not directly affect the export of goods. To the extent that the investor finances an American manufacturer's establishment of foreign manufacturing operations, exports may be affected, but this is due to the use made of the funds by the borrower. Accordingly, the analysis in this section is limited to the American manufacturing or producing firm.

[35] 341 U.S. 593 (1951).

[36] 92 F. Supp. 947 (D. Mass. 1950).

[37] Att'y Gen. Rep. 78; Nebolsine, supra note 28; A.B.A. Comm. on Antitrust Problems in Int'l Trade, Report of the Subcomm. on Subsidiaries in Foreign Trade, 7 A.B.A. Sec. of Antitrust Law 242 (1955). See Carlston, supra note 22.

[38] As early as 1909, American Timken and British Timken's predecessor corporation had made comprehensive agreements providing for a territorial division of world markets for antifriction bearings. These agreements were somewhat modified and extended several times in succeeding years. When American Timken and one Dewar, an English businessman, succeeded in acquiring all the stock of British Timken in 1927, the cartel agreements were again substantially renewed. French Timken was brought into the cartel at the time of its formation in 1928. At the time of trial, American Timken owned 30% of British Timken, Dewar owned 24% and the balance was publicly held. All of French Timken's stock was equally owned by American Timken and Dewar. While the appeal in the case was pending, Dewar died. Under existing contracts, American Timken had the right to purchase Dewar's stock from his estate, but was prevented from doing so by the divestiture provisions contained in the decree entered by the district court. After a divided Supreme Court struck the divestiture provisions, American Timken purchased Dewar's stock and became the sole stockholder in French Timken.

in foreign commerce except through the operation of foreign plants. Mr. Justice Black, speaking for the Court, rejected this argument:

> This position ignores the fact that the provisions in the Sherman Act against restraints of foreign trade are based on the assumption, and reflect the policy, that export and import trade in commodities is both possible and desirable. Those provisions of the Act are wholly inconsistent with appellant's argument that American business must be left free to participate in international cartels, that free foreign commerce in goods must be sacrificed in order to foster export of American dollars for investment in foreign factories which sell abroad.[39]

The defense contention, Mr. Justice Black concluded, "would make the Sherman Act a dead letter insofar as it prohibits contracts and conspiracies in restraint of foreign trade. If such a drastic change is to be made in the statute, Congress is the one to do it."[40]

In *Minnesota Mining*, four American competitors and their associates, who collectively accounted for over 86 percent of United States exports of coated abrasives, combined to form an export association under the Webb-Pomerene Act[41] and to establish jointly owned factories in England, Canada and Germany. Generally speaking, the products manufactured abroad by defendants' jointly owned foreign subsidiaries replaced defendants' exports to the markets supplied by those subsidiaries, but United States imports were not affected. The court held that the defendants' joint ownership of foreign manufacturing subsidiaries coupled with their embargo on exports to the countries where they owned plants constituted a conspiracy to restrain the export trade of the United States and, hence, a violation of the Sherman Act.[42]

Here again, it was claimed that defendants discontinued their export trade because political and economic barriers made it impossible to maintain such trade profitably. In response to this argument, Judge Wyzanski stated:

> [I]f over a sufficiently long period American enterprises, as a result of political or economic barriers, cannot export directly or indirectly from the United States to a particular foreign country at a profit, then any private action taken to secure or interfere solely with business in that area, whatever else it may do, does not restrain foreign commerce in that area in violation of the Sherman Act. For, the very hypothesis is that

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[39] 341 U.S. at 599.
[40] Id.
[41] 15 U.S.C. §§ 61-65 (1964).
[42] 92 F. Supp. at 961.

> there is not and could not be any American foreign commerce in that area which could be restrained or monopolized.[43]

According to Judge Wyzanski, the central question was whether the "defendants could not have profitably exported from the United States a substantial volume of coated abrasives to the area supplied by their jointly owned factories located in England, Canada and Germany."[44] His review of the evidence led him to conclude that the defendants could have done so without establishing foreign plants:

> It is no excuse for the violations of the Sherman Act that supplying foreign customers from foreign factories is more profitable and in that sense is, as defendants argue, "in the interest of American enterprise" . . . . Financial advantage is a legitimate consideration for an individual non-monopolistic enterprise. It is irrelevant where the action is taken by a combination and the effect, while it may redound to the advantage of American finance, restricts American commerce. For Congress in the Sherman Act has condemned whatever unreasonably restrains American commerce regardless of how it fattens profits of certain stockholders. Congress has preferred to protect American competitors, consumers and workmen.[45]

The above quoted dicta from these opinions suggest that the export of goods is preferable to the export of capital, but this interpretation may not be an accurate reflection of judicial thought. Both judges were simply addressing themselves to the traditionally futile argument that an unreasonable restraint could be excused on the ground that it was commercially more expedient to restrain than to compete.[46] The decisions seem simply to have been intended to make it clear beyond doubt that the Sherman Act is applicable to any combination between an American firm and its foreign competitor or between a group of American competitors, whenever the combination has the proscribed effects on the foreign commerce of the United States. Nevertheless, because of the possible implication that production abroad in itself involves a restraint on actual or potential United States exports, these decisions have met with sharp criticism.[47] While there is

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[43] Id. at 958.

[44] Id. at 959.

[45] Id. at 962.

[46] See Brewster, supra note 22, at 77. In this connection, it is well to remember that the Government's complaint and argument in *Minnesota Mining* were aimed primarily at the unlawful extension of the Webb-Pomerene prerogatives beyond export trade and into the area of investment.

[47] Att'y Gen. Rep. 79-81; A.B.A. Comm. on Antitrust Problems in Int'l Trade, supra note 37, at 244-47; Carlston, supra note 22, at 718; Graham, Antitrust Problems of

some historical and sociological justification for this judicial suggestion,[48] it is difficult to perceive any legal basis on which the distinction can rest. Moreover, it is clear that the long-run political and economic welfare of the United States lies in the competitive allocation of American resources to investment both at home and abroad.[49] Unless American firms are free to operate manufacturing plants throughout the world, they can be effectively excluded from many markets. It can hardly be thought that forbidding American firms from operating foreign factories when they can export goods from the United States is in the best economic or political interest of the United States.

Drawing upon the same authority, some commentators have suggested that the antitrust laws may not apply to foreign investment at all.[50] Their thesis is largely premised on the declaration in *Minnesota Mining* that acts which interfere solely with business in an area where no American export trade is possible cannot restrain American foreign commerce for, by hypothesis, none was possible. Since Judge Wyzanski was referring to commodity exports, it is argued that his comment implies that only the flow of goods is commerce within the meaning of the foreign commerce clause of the Sherman Act. This thesis constitutes a departure form the position judicially adopted in enforcing the Sherman Act in domestic commerce,[51] and it also appears to be based upon a misreading and an overextension of Judge Wyzanski's comments. He was not distinguishing between commodity export and capital export but was applying the rule of reason to determine whether the combination of large American competitors to exploit foreign markets was fraught with unreasonably anticompetitive disadvantages.[52] Any attempt to read more than this into his comments seems unfounded.

Corporate Parents, Subsidiaries, Affiliates and Joint Ventures in Foreign Commerce, 9 A.B.A. Sec. of Antitrust Law 32, 47 (1956).

[48] In 1890, when the Sherman Act was enacted, the United States was concerned only with the investment of American capital at home. It was not concerned with American investment abroad. Foreign trade during that period was thought to consist entirely of imports and exports. See H. Faulkner, American Economic History 556 (7th ed. 1954); H. Thorelli, The Federal Antitrust Policy 54-163 (1955).

[49] See Att'y Gen. Rep. 79; Graham, supra note 47, at 47.

[50] See Brewster, supra note 22, at 76-79.

[51] When applied to domestic commerce, the Sherman Act has been held to include the movement of capital as well as trade in goods. See United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533 (1944). See also Comm. on Antitrust Problems in Int'l Trade, supra note 37, at 242: "[J]ust as the term 'commerce' in the domestic field includes the flow of capital as well as goods, so should it include the flow of American capital in foreign commerce." The Attorney General's Committee also concluded that "the words 'trade and commerce * * * with foreign nations' should be construed broadly to include not only the import and export flow of finished products, their component parts and adjunct services, but also, as in domestic commerce, capital investment and financing." Att'y Gen. Rep. 79-80.

[52] This interpretation is buttressed by Judge Wyzanski's statement that joint foreign

III. Investment Interests Without Business Participation —The Section 7 Investment Defense

Stock investments in existing enterprises vary greatly in nature and create differing relationships between the "acquired" and "acquiring" firms. Depending largely upon the amount of stock purchased and the existence and identity of other investors, stock acquisitions can create either control establishments—wholly owned subsidiaries, partially owned subsidiaries, and joint ventures—or non-control establishments—stock interests without control. The purchase of all of the stock of the "acquired" company will result either in the creation of a wholly owned subsidiary or an unincorporated branch, division or department.[53] Partial stock acquisitions can create any of the other types of investments.

The distinction between the partially owned foreign subsidiary and the foreign joint venture is one that can be made easily. The central concept in a joint venture is that of partnership, or a pooling of interests and resources for the accomplishment of specific objectives. The joint venture is an association of contributors which implies collaboration in some business activity.[54] It is this partnership concept which distinguishes the joint venture from the partially owned subsidiary. The term "partially owned subsidiary" will, therefore, be used to refer to those situations in which control of the foreign corporation is vested in a single American parent and the remainder of its stock is widely scattered and not held by any large single interest.[55] The other shareholders exemplify what is meant by the phrase "stock interest without control" or "pure investment." It is important *not* to think of a "subsidiary" as a corporation a majority of whose stock is owned by another corporation. There can be minority-owned subsidiaries as well as majority-owned subsidiaries. There can also be majority- and minority-owned joint ventures since there may be several collaborating partners and they can divide the equity in any manner they choose.

The minority-owned subsidiary or joint venture is distinguished from the pure investment not by the amount of stock held, but by

ventures by dominant United States firms might be illegal per se because of their inevitable tendency to dampen the rivalry of their partners in foreign markets, and also by his statement that such joint foreign ventures might also be illegal per se because of their similar inevitable tendency to reduce the zeal of the venturers for competition *inter sese* in the American market. 92 F. Supp. at 961-63.

[53] If the acquisition of all of the stock or assets of the foreign company is followed by its absorption into the American acquirer, the fourth type of control establishment—the unincorporated branch, division or department—is created. When the investor does not liquidate or consolidate the acquired firm with his own but retains its separate corporate personality, a wholly owned subsidiary results.

[54] See pp. 282-83 infra.

[55] Cf. Att'y Gen. Rep. 89-91.

the existence of parental control or active participation in the management of the enterprise. The requisite management ingredient can result from the organization or acquisition of the foreign corporation in a manner which legally places control in the American corporation. It may also result from contractual provisions among the shareholders which place management responsibility upon one of them.[56] Where control springs from contractual provisions, they must be ancillary to the transaction by which the American corporation becomes involved in the foreign company. The transactions might include licenses for the use of patents, trademarks, or secret process rights, or, perhaps, the transfers of loan capital or technology. Absent some lawful main purpose to which the transfer of control is ancillary, the agreement is simply a naked contract in restraint of trade, illegal under the Sherman Act if it substantially affects United States commerce.[57]

In most instances, the pure investment does not offer an acceptable means of participation in foreign markets to the American businessman who seeks to expand his operations into overseas territories. It is principally of interest only to those who are satisfied with passive financial participation in an overseas business firm. The device, however, is not completely without appeal to the businessman seeking to expand his own operations abroad. It can be used to great advantage as a temporary or preparatory device by one who is either presently unwilling or unable to acquire absolute or working control. Through the pure investment, the businessman is able to participate in a foreign market, and better able to determine whether he will later enter that market himself.

In any event, mere investment in a foreign corporation in no way violates the antitrust laws even though the foreign corporation may be one of the investor's competitors in the United States and world markets. This is made abundantly clear by the provision in Section 7 of the Clayton Act that it "shall not apply to corporations purchasing such stock solely for investment and not using the same by voting or otherwise to bring about, or in attempting to bring about, the substantial lessening of competition."[58] But neither the statute nor its legislative history aids in a definition of "investment." At what point does a stock interest cease to be held "solely for investment" and become used for other pusposes? Certainly, one who acquires and exercises control is doing more than investing, but there is no formula of a

[56] Devine, Foreign Establishment and the Antitrust Law: A Study of the Antitrust Consequences of the Principle [sic] Forms of Investment by American Corporations in Foreign Markets, 57 Nw. U.L. Rev. 400, 436 (1962).

[57] Id. See also pp. 322-30 infra. Another lawful main purpose might be the operation of the company by a management corporation.

[58] 15 U.S.C. § 18 (1964).

certain percentage of ownership plus a certain amount of representation on the board of directors which necessarily equals control in all instances. Nevertheless, it is clear that one who owns more than half of the voting shares of a corporation has control and therefore will be subject to Clayton Act standards.[59]

Beyond this there is little that can be said by way of generalization except to note that there are several domestic commerce cases in which minority stock acquisitions have been found violative of section 7.[60] The most important of these cases is *United States v. E.I. du Pont de Nemours & Co.*,[61] in which the Supreme Court held that the acquisition by E.I. du Pont de Nemours and Company, Inc. of a 23 percent stock interest in General Motors Corporation was unlawful because it was used to enable du Pont to become the dominant supplier of automotive fabrics and finishes to General Motors. Since the balance of General Motors' stock was widely held by the public, du Pont was obviously the controlling stockholder. This element, coupled with the fact that du Pont did not achieve its "commanding position" as a General Motors supplier until after the stock purchase[62] and with the evidence showing that its postacquisitional conduct was geared toward this end,[63] led to an easy rejection of the investment defense.

> The fact that sticks out in this voluminous record is that the bulk of du Pont's production has always supplied the largest part of the requirements of the one customer in the automobile industry connected to du Pont by a stock interest.

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59 In United States v. Jos. Schlitz Brewing Co., 253 F. Supp. 129 (N.D. Cal.), aff'd per curiam, 385 U.S. 37 (1966), the court found that Schlitz' control of Labatt enabled it to control General Brewing simply because of Labatt's 63.5% stock interest in General Brewing. Cf. Swift & Co. v. FTC, 8 F.2d 595 (7th Cir. 1925), rev'd on other grounds sub. nom. FTC v. Western Meat Co., 272 U.S. 554 (1926) (indicating that the purchase of all of the stock of a corporation is inconsistent with the concept of investment); United States v. Jerrold Electronics Corp., 187 F. Supp. 545 (E.D. Pa. 1960), aff'd per curiam, 365 U.S. 567 (1961).

On the theoretical level, majority stock ownership can be consistent with the concept of "investment" where the stock is not voted and where the majority shareholder allows another group to elect a majority of the board of directors and leaves the actual management and direction of the corporation entirely to that group. As a practical matter this situation is most unusual; it conceivably can arise only where there is a valid voting trust placing the voting privileges in someone totally independent of the "investor," but even then the efficacy of the arrangement is doubtful.

60 United States v. E.I. du Pont de Nemours & Co., 353 U.S. 586 (1957); United States v. Jos. Schlitz Brewing Co., 253 F. Supp. 129 (N.D. Cal.), aff'd per curiam, 385 U.S. 37 (1966); Briggs Mfg. Co. v. Crane Co., 185 F. Supp. 177 (E.D. Mich.), aff'd, 280 F.2d 747 (6th Cir. 1960); American Crystal Sugar Co. v. Cuban-American Sugar Co., 152 F. Supp. 387 (S.D.N.Y. 1957), aff'd, 259 F.2d 524 (2d Cir. 1958); Hamilton Watch Co. v. Benrus Watch Co., 114 F. Supp. 307 (D. Conn.), aff'd, 206 F.2d 738 (2d Cir. 1953).

61 353 U.S. 586 (1957).

62 Id. at 598-99.

63 Id. at 600-03.

> The inference is overwhelming that du Pont's commanding position was promoted by its stock interest and was not gained solely on competitive merit.[64]

The Court admitted that "considerations of price, quality and service were not overlooked by either du Pont or General Motors," and that "all concerned in high executive posts in both companies acted honorably and fairly, each in the honest conviction that his actions were in the best interests of his own company and without any design to overreach anyone, including du Pont's competitors . . . ."[65] These factors might have established the "wisdom of this business judgment" and the absence of any intent to restrain or monopolize trade, but they did not establish an "investment." Predatory intent was not an ingredient of the offense and the record "plainly revealed" that du Pont had "purposely employed its stock to pry open the General Motors market to entrench itself as the primary supplier of General Motors' requirements for automotive finishes and fabrics."[66]

Of greater interest to the present discussion, involving as it does the combination of American and foreign companies, is *United States v. Jos. Schlitz Brewing Co.*[67] There, Jos. Schlitz Brewing Company, the second-largest brewer in the United States, acquired a 39.3 percent stock interest in John Labatt, Limited, the third-largest Canadian brewer. Labatt had a partially owned American subsidiary which was a substantial competitor in the United States, particularly on the west coast.[68] The acquisition would have brought this company under the control of Schlitz. After determining that the acquired interest was sufficient for voting control and that Schlitz sought working control over Labatt throughout the negotiations,[69] the court determined there was no credible evidence to support the investment defense.[70]

Other cases in which minority stock interests have been successfully attacked under section 7 have involved percentages of ownership ranging from 22 to 24 percent.[71] In each of these cases the stock

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[64] Id. at 605.

[65] Id. at 606-07.

[66] Id. at 606.

[67] 253 F. Supp. 129 (N.D. Cal.), aff'd per curiam, 385 U.S. 37 (1966).

[68] Labatt owned 63.5 % of the stock of General Brewing Corporation. At the time of the acquisition, General Brewing was the largest beer producer in Hawaii and the second largest in California and in an area composed of eight western states; it ranked fourteenth nationally. Its position in these "sections of the country" made it a substantial competitior of Schlitz.

[69] 253 F. Supp. at 136, 138.

[70] Id. at 144.

[71] E.g., Briggs Mfg. Co. v. Crane Co., 185 F. Supp. 177 (E.D. Mich.), aff'd, 280 F.2d 747 (6th Cir. 1960) (22% stock interest); American Crystal Sugar Co. v. Cuban-American Sugar Co., 152 F. Supp. 387 (S.D.N.Y. 1957), aff'd, 259 F.2d 524 (2d Cir. 1958) (23% interest); Hamilton Watch Co. v. Benrus Watch Co., 114 F. Supp. 307 (D. Conn.), aff'd, 206 F.2d 738 (2d Cir. 1953) (24% interest).

acquired was less than a controlling interest and the majority stockholders were in full control of the corporation, determining its policies as they saw fit. Nevertheless, the courts held the acquisitions were not made "solely for investment" because their purpose was to obtain control. Recently, the Government obtained a consent order of divestiture where the percentage of ownership acquired was less than three percent.[72] These cases serve to illustrate that minority stock acquisitions, too small to carry with them control, can nevertheless fall within the ban of section 7.

The investment defense will fail whenever the evidence establishes a purpose to obtain control, in whole or in part, and the proscribed effects are present. But this does not mean that control is an element of the offense. The statute does not speak in terms of control; it condemns the *use* of the stock for the forbidden purposes. In every case where the courts have found the antitrust misuse, the postacquisitional conduct of the two firms has been stressed; so too has the intent of the acquirer. The courts have consistently viewed each case in its economic perspective, examining such factors as the absence of an investment portfolio, the degree of liquidity commensurate with an ordinary investment, the financial condition of the acquired firm, the amount paid for the stock, the ratio of the amount of stock acquired to that normally traded on the exchange and the thinness of either firm's market. Evidence that the minority stockholder received favored treatment following the purchase has become almost conclusive in vertical acquisition cases. In horizontal cases,[73] the courts have even recognized that mere investment in a competitor may adversely affect competition without offering any redeeming virtues. The district court opinions in these cases attest to a growing judicial disposition to accept the proposition that a stock purchase made with the intent of obtaining representation on the board of a competitor is not made "solely for investment," and is inconsistent with unrestrained competition.[74]

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[72] United States v. Newmont Mining Corp., 1966 Trade Cas. ¶ 71,709 (S.D.N.Y.).

[73] For explanations of horizontal and vertical relationships, see pp. 273-74 & note 117 infra.

[74] The cases cited, note 71 supra, all held that the stock acquisitions were not simply investments because of their attendant purpose of acquiring control or at least of achieving a "closer relationship" between the firms. But the opinions in each case go much further. By way of dictum or alternative holding, each judge suggested that the acquisition of a minority stock interest in a competing corporation which results, is intended to result, or is reasonably likely to result, in minority representation on the competitor's board of directors is inconsistent with unrestrained competition between the two corporations, and that this factor alone is sufficient to negate the investment defense. In *American Crystal Sugar*, District Judge Dawson pointed out that "[a]ny such representation would give the nominee of defendant an opportunity to be thoroughly acquainted with the business and plans of the [other] company and thereby to limit

Where the American firm is satisfied with merely passive financial participation in the foreign firm and does not insist upon the safety of absolute or working control, antitrust risks are minimal. They are not completely eliminated, however, because of the ever-present possibility that future management might seek to convert the investment into the forbidden use.[75] If future management does use the stock to acquire control it does not necessarily follow that the acquisition, lawful when made, becomes unlawful. The metamorphosis of a mere investment into the responsibility of control becomes significant only if the proscribed anticompetitive effects upon the commerce of the United States are present.

It has been suggested that participation in a control group might be compatible with the concept of an investment. Herbert Brownell, a former Attorney General of the United States, has stated that legality in such circumstances should depend solely upon a finding of active participation in the group.[76] To illustrate his position he cites the

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the effectiveness of the competition between them." 152 F. Supp. at 394. In *Hamilton Watch*, Chief Judge Hincks stated:

> I incline to the view that the acquisition if made only with intent to obtain minority representation constituted a violation of Section 7: having in mind . . . the practical considerations that confront the board of directors of any corporation in a competitive enterprise, I think it fairly inferable that minority representation, because of the opportunity thereby afforded to persuade or to compel a relaxation of the full vigor of Hamilton's competitive effort would come within the ban of Section 7.

114 F. Supp. at 317.

In affirming the decisions in these two cases, the Second Circuit cautiously withheld judgment on these suggestions. But the rather strong per curiam opinion of the Sixth Circuit in the *Briggs* case, commending the lower court for "an excellent opinion," indicates the probable future acceptance of the theory:

> The most serious ramification . . . is the "listening line" which Crane [the acquiring firm] would have in Briggs [the acquired firm]. As Chief Judge Levin stated "since the two companies are competitors, the Briggs Board would be unable to perform its proper functions in connection with the management of the company without divulging to a competitor confidential information with respect to the development of processes and techniques; plans for improvement of products and plans for sales and promotion campaigns." 185 F. Supp. 177, 181. Furthermore, with two sympathetic representatives on the Board, Crane will have driven the wedge in its attempts to gain control of Briggs' assets.

280 F.2d at 750.

Each of these cases involved suits by the corporation whose stock was being purchased against the corporation making the purchases and alleged a violation of § 7. In each, the plaintiff contended, among other things, that board representation would itself injure competition between the two companies and in the industry. This factor may have significantly influenced the courts. One must, therefore, be cautious in concluding that the intention to acquire minority representation will be accorded similar significance in a government suit where these specific charges by industrial firms will most probably be lacking.

[75] The validity of acquisition is tested in light of market conditions as they exist at the time of suit rather than at the time of acquisition. United States v. E.I. du Pont de Nemours & Co., 353 U.S. 586, 596-98, 607 (1957).

[76] Brownell, How to Conduct Foreign Business, 1962 N.Y. State Bar Ass'n Antitrust

example of an American corporate shareholder having one director on the five-man board of a foreign corporation. This director casts the tie-breaking vote on a proposal to establish world prices and divide world markets—an action clearly violative of the United States antitrust laws—by voting for cartelization. Posing the question whether the American corporation can be held liable solely because it placed its representative in this position, he concludes, "The answer is probably yes, but some would argue that additional circumstances must be present, such as knowledge of the proposed action on the part of the U.S. corporation coupled either with specific assent thereto or failure to object."[77]

The implication that the proferred argument might be tenable seems incorrect. Proof of specific assent or failure to object on the part of the American corporation is unnecessary. Not only was the stock voted to elect the director, but the director's action brought about the unlawful restraint. Certainly, this constitutes "using [the stock] . . . to bring about . . . the substantial lessening of competition." But what if the American corporation can demonstrate either a lack of knowledge or express objection to the action of its representative? It might be argued that liability should be avoided if the American stockholder did everything reasonable within its power to undo the effect of its nominee's act. This suggestion has merit only because the statutory requirement of "use" seems to imply some kind of premeditated action, some kind of conduct intended to accomplish the improper result. If this is so, the defense may exist, but its effectiveness depends on where the burden of proof is placed. As a general rule, it is easier to prove knowledge of a fact than ignorance of it. However, the realities of the situation demand that the burden be borne by defendant. To state the obvious, it is inconceivable that an American corporate stockholder in a foreign corporation will elect a director and then not care how he votes on specific proposals. It is far more realistic to presume that it had knowledge—at least *post facto* knowledge—of its representative's action. Moreover, the business documents which the Government would need to prove knowledge may well be hidden in the offices of the foreign corporation and not subject to subpoena since, by hypothesis, the American stockholder does not possess working control and cannot, therefore, be compelled to produce them. For these reasons, any decision placing the burden of showing knowledge upon the Government is unsound and might well emasculate the statutory proscriptions.

A modification in the facts of Brownell's hypothetical yields far more significant implications. The American corporation became en-

Law Symposium 88, 93, citing United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945).

[77] Id. at 93.

meshed in antitrust trouble only because its representative on the board of the foreign corporation voted to cartelize the world. If instead, he had voted against cartelization, it is difficult to conceive of any basis for holding the American corporate stockholder liable for any antitrust violation. True, the stock was voted, but it was not voted or otherwise used "to bring about, or in attempting to bring about, the substantial lessening of competition." Despite the opinions of the lower courts in the horizontal cases, the hypothetical situation so modified serves to suggest that participation in a control group may not lead to the negation of the investment defense.

As we have seen, the United States businessman may invest capital in foreign corporations in varying degrees. He may purchase all of the stock or a majority of the stock, or he may acquire some minority interest in the overseas firm. The minority interest, in turn, may be a controlling or noncontrolling interest. The potential antitrust consequences and the usefulness of the Clayton Act "investment" defense differ in each instance. It is clear that the purchase of all or a majority of the stock of a corporation is not simply an investment. The cases also make it clear that the acquisition of a controlling, though minority, stock interest is not a purchase "solely for investment." The status of other minority stock acquisitions is less clear. Present authority strongly suggests that an attendant intent to acquire control will remove these stock purchases from the simple investment category. Furthermore, there are some judicial suggestions to the effect that acquisitions made with the intent of achieving even minority representation on the board of directors of a competing corporation are not made "solely for investment." At the same time, however, there exists some reason for believing that an American corporation can lawfully acquire stock in a foreign corporation, even a competitor, nominate and elect representatives to its board, and thereby participate in its activities, without necessarily incurring antitrust liability as a result of the foreign firm's transgressions of the antitrust laws of the United States. There is as yet no clear-cut judicial definition of investment which conclusively resolves these borderline cases. On the positive side, it can be said that where the United States corporation neither has nor seeks control or representation, it will fit within the investment exemption of Section 7 of the Clayton Act.

It is not, however, the mere investor who creates antitrust problems in overseas investment; it is the investor who expands his operations overseas. He may do it by establishing an unincorporated enterprise or subsidiary, by buying a controlling interest in a foreign corporation, or by combining with others to establish a foreign operation. This kind of investor is clearly outside the investment exception.

His overseas activities are governed to a large extent by antitrust considerations, and it is he who is the subject of the remainder of this article.

IV. Investment Interests with Business Participation

A. *Establishment Problems*

As indicated above, control establishments can be segregated into four types: (1) the unincorporated foreign branch, division or department; (2) the wholly owned subsidiary; (3) the partially owned subsidiary; and (4) the joint venture. Distinct business reasons explain their existence and separate classification.

Overseas operation conducted through unincorporated branches, divisions or departments is not very popular. It has been used by a mere handful of American enterprises and then only sparingly. Its primary use generally has been for purposes of sampling a market or establishing a foothold. The principal explanation for this limited use of the unincorporated overseas establishment is probably to be found in the United States tax laws which influence most businessmen to discard the unincorporated structure after the initial period of loss operation has ended.[78] Other important considerations influencing the decision to incorporate would appear to be the existence of foreign import duties and restrictions, insulation of the parent from suit and the achievement of the benefits of limited liability and identification with a foreign country. For whatever reasons, a great many American corporations conduct their foreign business through subsidiaries, sometimes incorporated in the United States but more often incorporated abroad.[79] From the substantive antitrust viewpoint, it is immaterial whether the subsidiary is incorporated in the United States or in some foreign country.[80]

Frequently, the American businessman will find both the unincorporated foreign branch, division or department, and the wholly

[78] In many instances, tax considerations will play the primary role in influencing the decision as to which organizational structure will be used. The United States tax laws favor incorporation. The income of an unincorporated foreign branch or division of an American corporation is taxed directly by the United States at the time of accrual. The earnings of a foreign subsidiary, however, are not taxed until they are remitted to its American parent as dividends or their equivalent. Int. Rev. Code of 1954, §§ 901-06 (Supp. 1965-66). Until recently the establishment of a foreign-based company in a tax haven resulted in additional advantages. But this loophole has been closed. Id. §§ 951-64, 970-72, 1248-49 (1964).

For a detailed study of the problem, see E. Owens, The Foreign Tax Credit (1961); Tax Institute, Taxation and Operations Abroad (1960); Baker & Meek, Tax Problems of Doing Business Abroad: Some Practical Considerations, 1957 Wis. L. Rev. 75; Gooder & Wimmer, Taxation Advantages and Problems in Foreign Trade, 1959 U. Ill. L.F. 202; Hughes, Taxation of the Corporate Family, 9 A.B.A. Sec. of Antitrust Law 85 (1956).

[79] Devine, supra note 56, at 436.

[80] Id.

owned subsidiary forms of business organization unacceptable. This may be due purely to personal motives or to local requirements. Some foreign governments require local investment in foreign owned firms engaged in certain sectors of their economy. Others have adopted policies which make partial local ownership particularly desirable, such as preferential tax treatment or "buy national products" campaigns. Apart from these considerations regarding the dictates or wishes of the foreign sovereign, the American businessman may himself favor local participation to obtain desired local capital or attract qualified local personnel. Incentive programs and stock-option plans may be vital to the successful establishment of a new foreign company. In any event, whether partial ownership is required or desired, the result is the creation of a partially owned subsidiary or joint venture relationship. As we have seen, the distinction between these two forms of partially owned business structures depends upon the identity and character of the other investors.[81]

The antitrust legality of establishing any particular type of overseas operation has never been squarely presented in a decided case. Nevertheless, it is clear that the creation of a business enterprise does not of itself violate the law.[82] The litigated cases have inevitably involved much more than the mere fact of establishment; they have been colored by agreements between competitors to divide markets,[83] fix prices,[84] and engage in other anticompetitive behavior.[85] Thus, while these cases have not resulted in any clear-cut judicial decision on the legality of foreign establishments as such, they do make it clear that both the circumstances surrounding their creation and the use made of them may produce antitrust problems.[86] For example, where the formation of a foreign plant is the fruit of an underlying conspiracy or agreement to restrain trade or of an attempt to monopolize, it is unlawful. Similarly, the establishment of a foreign operation

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[81] See text accompanying notes 53-57 supra.

[82] United States v. Minnesota Mining & Mfg. Co., 92 F. Supp. 947, 962-63 (D. Mass. 1950). See also Brewster, supra note 22, at 182; A.B.A. Comm. on Antitrust Problems in Int'l Trade, supra note 37, at 243; Carlston, Antitrust Policy Abroad, 49 Nw. U.L. Rev. 569, 589 (1954); Fugate, Damper or Bellows? Antitrust Laws and Foreign Trade, 45 A.B.A.J. 947, 949 (1959); Nebolsine, Analysis of Chapter II, "Trade or Commerce * * * With Foreign Nations," 7 A.B.A. Sec. of Antitrust Law 64, 69-70 (1955); Oppenheim, Foreign Commerce Under the Sherman Act—Points and Implications of the Timken Case, 42 Trade-Mark Rep. 3, 7 (1952); Timberg, Competition—A Philosophy for Export, and for Defense Production, 21 Geo. Wash. L. Rev. 677, 682-83 (1953).

[83] See, e.g., Timken Roller Bearing Co. v. United States, 341 U.S. 593 (1951); United States v. Imperial Chem. Indus., Ltd., 100 F. Supp. 504 (S.D.N.Y. 1951).

[84] See, e.g., Timken Roller Bearing Co. v. United States, 341 U.S. 593 (1951).

[85] See, e.g., United States v. Minnesota Mining & Mfg. Co., 92 F. Supp. 947 (D. Mass. 1950).

[86] See Carlston, supra note 82, at 587-91.

is illegal if it results in an unlawful monopoly or constitutes an unfair method of competition.

1. *Monopolization and Attempts to Monopolize.*—Where either the foreign establishment or the corporate family as a whole is large or powerful, monopoly problems must be considered. Section 2 of the Sherman Act supplements section 1 in that it attempts to deal with the end-product of unreasonable restraints of trade, namely, monopoly. It specifically outlaws three practices: monopolization, attempts to monopolize and combinations or conspiracies to monopolize.[87] While

[87] "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor . . . ." 15 U.S.C. § 2 (1964).

Monopolization under § 2 consists of monopoly in the economic sense—that is, power to fix prices or to exclude competitors—plus a carefully limited ingredient of purpose or intent to use or preserve such power. Economic monopoly becomes illegal monopolization not only (1) if it was achieved or preserved by conduct violating § 1, but also (2) if it was, even by restrictions not prohibited by § 1, deliberately obtained or maintained. This element of deliberateness distinguishes the offense of monopolization from the economic concept of monopoly.

Section 2's prohibition of monopolization, therefore, does not permit condemnation because of size alone, United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377 (1956), United States v. United States Steel Corp., 251 U.S. 417, 451 (1920), nor even of dominance, United States v. Aluminum Co. of America, 91 F. Supp. 333, 346 (S.D.N.Y. 1950), although size and dominance are evidentiary facts to be taken into consideration. The courts have recognized that size is "an earmark of monopoly power," United States v. Griffith, 334 U.S. 100, 107 n.10 (1948), and "carries with it an opportunity for abuse," United States v. Swift & Co., 286 U.S. 106, 116 (1932), but they have repeatedly stated that mere size is not outlawed by § 2. Cf. United States v. Grinnell Corp., 384 U.S. 563 (1966), modifying 236 F. Supp. 244 (D.R.I. 1964).

It is generally stated that what § 2 proscribes is the possession of power to control market prices or to exclude competitors, provided such power was so obtained, maintained or used that an intent to exercise that power may be inferred. American Tobacco Co. v. United States, 328 U.S. 781 (1946). The intent to monopolize need not be a specific intent to achieve monopoly, United States v. Griffith, supra, but may be inferred from either lawful, United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945), United States v. United Shoe Mach. Corp., 110 F. Supp. 295 (D. Mass. 1953), aff'd, 347 U.S. 521 (1954), or unlawful activity, Lorain Journal Co. v. United States, 342 U.S. 143 (1951). It may not be inferred from monopoly power "thrust upon" a business organization by reason of superior skill, foresight or industry. United States v. Aluminum Co. of America, supra; American Tobacco Co. v. United States, supra; Union Leader Corp. v. Newspapers of N.E., Inc., 284 F.2d 582 (1st Cir. 1960), cert. denied, 365 U.S. 833, rehearing denied, 365 U.S. 890 (1961). The object of the statute here is to forbid market control achieved by erecting unnatural barriers which make it impossible for others to engage in competition. See United States v. E.I. du Pont de Nemours & Co., supra, at 390; American Tobacco Co. v. United States, supra, at 809; United States v. Aluminum Co. of America, supra. See also Att'y Gen. Rep. 43-60 (1955); J. Van Cise, Understanding the Antitrust Laws 11-12 (1963).

By its prohibition of attempts, § 2 seeks to reach action which tends toward monopoly. Proof of actual possession of the power to raise prices or exclude competitors is not required where an attempt, combination or conspiracy to monopolize is charged, rather than monopolization itself. However, a specific intent by the person or persons involved either to achieve the unlawful end or to conspire to do so must be shown.

a plurality of persons is necessary for a violation of section 1, section 2 can be violated by an individual. A single trader can violate the Act by either monopolizing or attempting to monopolize. Consequently the form of organization utilized to effectuate a foreign establishment is irrelevant under section 2 and monopoly problems may arise even when a foreign expansion is beyond the reach of section 1.

The foreign commerce cases offer little precedent for assessing the legality of a foreign investment under section 2. Indeed, even domestic monopolization precedent is sparse. With the exception of *United States v. Aluminum Co. of America*,[88] almost no cases have turned upon the legality of internal expansion as such. The *Alcoa* decision does, however, shed some light on possible judicial thinking. The case presented a charge that Alcoa, the sole United States producer of virgin aluminum ingot, had monopolized the domestic aluminum ingot market. Its control over the market stemmed from patent rights acquired around 1900. Alcoa maintained its monopoly position beyond the expiration of the patents by several specific practices later enjoined by consent order of the court entered in 1912.[89] Despite the injunction, Alcoa was able to perpetuate its monopoly by activities which, while they involved no "moral derelictions," were nevertheless "exclusionary." In commenting upon the "deliberateness" by which Alcoa had maintained its monopolistic position, Judge Learned Hand stated:

> It was not inevitable that [Alcoa] should always anticipate increases in the demand for ingot and be prepared to supply them. Nothing compelled it to keep doubling and redoubling its capacity before others entered the field. It insists that it never excluded competitors; but we can think of no more effective exclusion than progressively to embrace each new opportunity as it opened, and to face every newcomer with new capacity already geared into a great organization, having

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Times-Picayune Publishing Co. v. United States, 345 U.S. 594 (1953); United States v. Columbia Steel Co., 334 U.S. 495, 531-33, rehearing denied, 334 U.S. 862 (1948). Such an intent may be spelled out either from clear-cut documentary proof or from circumstantial evidence. United States v. Columbia Steel Co., supra; Interstate Circuit, Inc. v. United States, 306 U.S. 208 (1939). Unfair competitive practices, such as those forbidden by § 5 of the Federal Trade Commission Act and the objectionable practices mentioned in the Clayton Act can serve as proof of the intent necessary to support a charge of attempting to monopolize. Moreover, it is as unlawful to attempt to monopolize by excluding small potential competitors from the market as it is to drive out of business large, established concerns. See, e.g., Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 213 (1959); International Salt Co. v. United States, 332 U.S. 392, 396 (1947); Forgett v. Scharf, 181 F.2d 754, 757 (3d Cir.), cert. denied, 340 U.S. 825 (1950). See also Att'y Gen. Rep. 61-62; J. Van Cise, supra, 11-13 (1963).

[88] 148 F.2d 416 (2d Cir. 1945).

[89] Id. at 422-23.

the advantage of experience, trade connections and the elite of personnel.[90]

It is true that *Alcoa* expressly condemns only preclusive activity by one already enjoying a monopoly position, and does not purport to consider the antitrust significance of normal internal expansion. Nevertheless, it warns any dominant firm in domestic or foreign commerce that it runs the risk of monopolizing by "embracing each new opportunity" and this includes foreign opportunities.[91]

Thus, foreign expansion can lead to a charge of monopolizing or attempting to monopolize either the United States import[92] or export[93] trade in a commodity because it may give a dominant firm

[90] Id. at 431. Judge Hand continued: "Only in case we interpret 'exclusion' as limited to manoeuvers not honestly industrial, but actuated solely by a desire to prevent competition, can such a course, indefatigably pursued, be deemed not 'exclusionary.' So to limit it would in our judgment emasculate the Act; would permit just such consolidations as it was designed to prevent." Id.

[91] Brewster, supra note 22, at 189.

[92] There is no question but that United States imports are a "part of trade or commerce . . . with foreign nations" subject to monopolization under § 2. The principal case on the point is United States v. Sisal Sales Corp., 274 U.S. 268 (1927). In *Sisal*, two American corporations and a Mexican corporation were alleged to have gained control over the supply of sisal in Mexico by means of discriminatory Mexican legislation. The defendant Mexican corporation, which had been financed by three American banking corporations, became the sole exporter of sisal. The complaint charged that defendants had secured a monopoly in the supply of sisal abroad, and in the domestic stocks of sisal produced abroad, as well as monopolizing its importation and sale with the consequent power to fix and raise prices of sisal within the United States. The Supreme Court upheld the complaint as stating a cause of action under §§ 1, 2 of the Sherman Act, saying it was "plain enough that appellees are parties to a successful plan to destroy competition and to control and monopolize the purchase, importation and sale of sisal." Id. at 274. The monopolization here was of the supply abroad. It directly affected United States imports and was an act done by American and foreign corporations. Cf. United States v. Singer Mfg. Co., 374 U.S. 174 (1963) (conspiracy formed by American, Swiss and Italian corporations in the United States and Europe involving the transfer of patent rights for the purpose of excluding or restraining Japanese competition in the United States and Europe). See also Sanib Corp. v. United Fruit Co., 135 F. Supp. 764, 766 (S.D.N.Y. 1955), in which the court, relying on *Sisal*, held that a conspiracy partly effectuated in a foreign country was subject to the United States antitrust laws. See also Wilson Act (Tariff), 15 U.S.C. §§ 8-11 (1964).

[93] It is clear that the United States export trade is subject to monopolization, and that the same rules apply as to a monopolization in interstate commerce. There is no need to show that the domestic trade therein has also been monopolized. Apparently, the courts have accepted this without question, relying on the statutory language "to monopolize any part of the trade or commerce . . . with foreign nations." Fugate, supra note 22, at 160.

There is no clear-cut case on the point under discussion. In cases involving the monopolization of United States exports, the Government has also charged a violation of § 1. Invariably, the courts have disposed of the cases under the § 1 count and thus found it unnecessary to decide the § 2 allegations. In United States v. National Lead Co., 63 F. Supp. 513 (S.D.N.Y. 1945), aff'd, 332 U.S. 319 (1947), the Government had charged that an agreement to divide territories among foreign producers, participated in by one dominant American producer and aided and abetted by another dominant producer, had resulted in complete exclusion of imports and an elimination of export

the power to foreclose others from an appreciable foreign outlet or source of supply.[94] In assessing the import of section 2, however, the central question hinges on the formulation of standards for delineating the geographic area in which the market power of the defendant is to be measured. The judiciary has not yet spoken and the issue remains unresolved but some notable authorities have offered their suggestions and a significant discourse is developing.

Kingman Brewster, Jr. has suggested that monopoly in foreign commerce should be measured not against individual foreign markets but against foreign markets as a whole, that is, in terms of competitors' alternatives generally.[95] Under this theory, the fact that an American corporation has acquired monopoly power in a single foreign country or region does not necessarily mean it has violated the law. Professor Brewster's theory, based as it is on the sum total of available distributive and resource opportunities, suggests that an even broader geographic market may be appropriate in section 2 cases involving foreign commerce. For if the "area of effective competition" delineates the boundaries of the relevant market,[96] there is no reason to confine it geographically to foreign territories. Theoretically, the market can just as well include all or part of the domestic market in the commodity involved. Should this test be adopted, alternative domestic and foreign outlets or sources of supply must be taken into account and the impact of even the largest expansion on United States commerce may well be negligible. As the size of the market is thus expanded, it becomes increasingly less likely that any firm could possess the requisite

trade except to countries of the Western Hemisphere. The court found this violative of § 1 and did not decide whether § 2 was also violated. The same approach was used in United States v. Minnesota Mining & Mfg. Co., 92 F. Supp. 947 (D. Mass. 1950). It is to be expected that foreign trade cases charging violations of both §§ 1, 2 of the Sherman Act will be handled in the same way in the future.

[94] In general, the Supreme Court has said that as to § 2 an "appreciable part" or "appreciable segment" of trade or commerce is subject to monopolization. United States v. Yellow Cab Co., 332 U.S. 218, 225 (1947); Standard Oil Co. v. United States, 221 U.S. 1, 61 (1911). The applicability of these decisions to foreign commerce problems, however, is unclear. Their significance will have to be carefully considered in light of the Supreme Court's decision in United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377 (1956). There, although both the Government and the defendant agreed that cellophane was a "part of commerce" within the meaning of § 2, the Court, in defining the relevant market, stated that "commodities reasonably interchangeable by consumers for the same purposes make up that 'part of the trade or commerce,' monopolization of which may be illegal." Id. at 395. As to what "part" of commerce is subject to monopolization, what constitutes the control necessary to cause a substantial effect in foreign trade, and the requisite intent, see generally Brewster, supra note 22, at 84-88; Fugate, supra note 22, at 150-61; Hale & Hale, Monopoly Abroad: The Antitrust Laws and Commerce in Foreign Areas, 31 Texas L. Rev. 493 (1953); Oseas, Antitrust Prosecutions of International Business, 30 Cornell L.Q. 42 (1944).

[95] Brewster, supra note 22, at 188-89.

[96] See United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377 (1956) (primarily concerned with the delineation of the product market).

power to establish prices or exclude competitors. Unless a single territory constitutes virtually the entire export market or source of supply for a particular commodity, alternative export markets will still be available to United States competitors, and alternative sources of supply will still be available to United States customers. In a market of wide geographic dimensions, the impact on United States commerce with foreign nations must certainly be slight. Consequently, adherents of the theory that monopoly in foreign commerce should be measured against foreign markets as a whole conclude that the occasion for obtaining or maintaining monopoly by overseas investment is probably limited to firms already in antitrust trouble at home.[97]

It is important to observe this total-foreign-market thesis in its proper economic perspective. The total international market in a commodity may well be larger than the widest possible market. American businessmen are not free to buy and sell all over the world. The United States Government has repeatedly forbidden or restricted trade with certain countries. For example, United States exporters are not permitted to sell goods on the list of strategic products to Communist countries. Similarly, the policies and actions of some foreign governments also operate to curtail United States trade. Often, United States companies are excluded from foreign countries as a result of trade embargoes or other official trade barriers, such as import quotas or discriminatory tariffs. Finally, certain facts of economic life, such as concentration or vertical integration in foreign markets, effectively preclude American trade in many areas. For these reasons, it cannot be said that the largest possible American foreign trade market for any given commodity is conterminous with the total foreign market for that commodity.[98]

Not everyone has enthusiastically endorsed Brewster's theory of measuring monopoly in foreign commerce in terms of competitors' alternatives generally. Other authorities have adopted a different approach and their analysis suggests that isolated foreign trade areas may constitute the relevant market in foreign commerce monopolization and merger cases.[99] Support for this proposition is found in a long line of interstate commerce cases which indicate that economic consequences within limited isolated local or regional markets may provide a sufficient basis for predicating antitrust violations.[100] If this approach is carried over into foreign commerce cases, it may be recognized that each foreign country or region constitutes a separate trade area, with

[97] Brewster, supra note 22, at 188-89.

[98] See Donovan, The Legality of Acquisitions and Mergers Involving American and Foreign Corporations Under the United States Antitrust Laws—Part I, 39 S. Cal. L. Rev. 526, 550-52 (1966).

[99] See id. at 552-56.

[100] See id. at 553-56.

different governmental and economic barriers constituting it a separate foreign market worthy of antitrust protection. Brewster argues against this approach, claiming that domestic-commerce-regional-market principles are inapposite to foreign trade. His contention appears to be based upon the premise that local markets are singularly appropriate to domestic commerce cases since "[t]he local or regional consumers anywhere in the country deserve the benefits of competition even if there is ample competition in other markets."[101] American consumers, he suggests, are not similarly deprived of the benefits of competition by anticompetitive combinations abroad which do not affect United States domestic commerce. This may be true, but the question remains whether consumer benefit is the only end sought to be served by antitrust laws in general and the Sherman Act in particular. While the consumer is the ultimate and chief beneficiary of a free enterprise system, it cannot be said that he is its only intended beneficiary. Congress has repeatedly proclaimed, and the courts have repeatedly recognized, another important political or social goal of antitrust legislation, namely, the desire to protect small businessmen and the right of merchants freely to engage in business within a relatively small local region of the United States—often an area small as a single city or even a part of a city.[102] Quite obviously, this latter policy is most clearly fostered by recognition of multiple foreign markets and most clearly frustrated by acceptance of a total-foreign-market concept. There is no reason why legitimate antitrust goals should be less decisively protected in foreign—import or export—commerce than in domestic commerce.

While market delineation problems are formidable, other significant issues exist which may seriously curtail the impact of section 2 upon the expansive activity of United States firms, even those which clearly dominate the relevant market. These firms do not run afoul of the law unless they deliberately acquire or maintain monopoly power; the accidental monopolist is not an outlaw. The dominant firm might be able to avoid liability by showing its dominant position was, to use Judge Hand's language in *Alcoa*, "thrust upon" it by the thinness of the market, local compulsion, inherent economic advantages of location, or superior skill, foresight, and industry.[103] "A market may, for exam-

[101] Brewster, supra note 22, at 187.

[102] See, e.g., Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959); United States v. Yellow Cab Co., 332 U.S. 218 (1947).

[103] See Union Leader Corp. v. Newspapers of N.E., Inc., 284 F.2d 582 (1st Cir. 1960); United States v. Aluminum Co. of America, 148 F.2d 416, 429-31 (2d Cir. 1945); United States v. United Shoe Mach. Corp., 110 F. Supp. 295, 341, 344 (D. Mass. 1953).

Judge Wyzanski considers this very unlikely. See United States v. Grinnell Corp., 236 F. Supp. 244 (D.R.I. 1964), modified, 384 U.S. 563 (1966).

> [I]t is the highly exceptional case, a *rara avis* more often found in academic groves than in the thickets of business, where monopoly power was thrust upon

ple, be so limited that it is impossible to produce at all and meet the the cost of production except by a plant large enough to supply the whole demand."[104] In such circumstances section 2 is not violated,[105] for "[t]hose who do not seek, but cannot avoid, the control of a market" appear to possess a recognized defense to a section 2 complaint.[106]

Finally, where a foreign government grants a monopoly[107] to an American firm, it would seem that there is no antitrust violation unless there is an underlying conspiracy[108] or unless the firm procures the action of the foreign government with the intent of excluding American competitors.[109] Such activity could constitute an attempt to monopolize and, therefore, be a violation of section 2 even though it does not result in monopoly power.[110]

2. *Acquisitions and Mergers.*—Where the overseas expansion is accomplished by acquisition of a going concern, the investor must consider the possibility of liability under both the Sherman Act and the

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an enterprise by the economic character of the industry and by what Judge L. Hand in Aluminum called "superior skill, foresight and industry." Id. at 248.

[104] United States v. Aluminum Co. of America, 148 F.2d 416, 430 (2d Cir. 1945).

[105] Union Leader Corp. v. Newspapers of N.E., Inc., 284 F.2d 582 (1st Cir. 1960).

[106] United States v. Aluminum Co. of America, 148 F.2d 416, 430-31 (2d Cir. 1945).

[107] A foreign government would obviously be free to grant patent, trademark or other exclusive franchises, without subjecting the holder of the franchise to liability under the United States antitrust laws. Moreover, some countries regularly insist upon local monopolization. On the question of trademark rights under foreign law, see Steele v. Bulova Watch Co., 344 U.S. 280 (1952); Vanity Fair Mills, Inc. v. T. Eaton Co., 234 F.2d 633 (2d Cir. 1956); Ramirez & Feraud Chili Co. v. Las Palmas Food Co., 146 F. Supp. 594 (S.D. Cal. 1956), aff'd per curiam, 245 F.2d 874 (9th Cir. 1957), cert. denied, 355 U.S. 927 (1958). As to the treatment of foreign patent and trademark rights utilized by members of a conspiracy to restrain trade, see Timken Roller Bearing Co. v. United States, 341 U.S. 593 (1951); Hazeltine Research, Inc. v. Zenith Radio Corp., 239 F. Supp. 51 (N.D. Ill. 1965); United States v. Imperial Chem. Indus., Ltd., 100 F. Supp. 504 (S.D.N.Y. 1951); United States v. General Elec. Co., 82 F. Supp. 753 (D.N.J. 1949); United States v. General Elec. Co., 80 F. Supp. 989 (S.D.N.Y. 1948); United States v. National Lead Co., 63 F. Supp. 513 (S.D.N.Y. 1945), aff'd, 332 U.S. 319 (1947).

[108] Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690 (1962); United States v. Sisal Sales Corp., 274 U.S. 268 (1927).

[109] Brewster, supra note 22, at 95-96; Fugate, Antitrust Law and International Trade, 1959 U. Ill. L.F. 387, 395-96; Devine, Foreign Establishment and the Antitrust Law: A Study of the Antitrust Consequences of the Principle [sic] Forms of Investment by American Corporations in Foreign Markets, 57 Nw. U.L. Rev. 400, 419 (1962).

[110] It is entirely possible that economies of scale and operation, or risks of foreign operations, might justify an explicitly exclusive franchise or concession. Such arrangements could be upheld as having a normal business purpose rather than condemned as a scheme to circumvent the law. United States v. Columbia Steel Co., 334 U.S. 495 (1948). The finding of a "normal business purpose" would negate the element of specific intent which *Columbia Steel* makes crucial to an attempt to monopolize. Brewster, supra note 22, at 190-91.

Clayton Act.[111] Foreign acquisitions have figured prominently in the past in conspiracy and monopolization cases under Sections 1 and 2 of the Sherman Act,[112] but there has never been a case under that Act based solely upon a "foreign" merger situation. Recently, however, a small handful of acquisitions involving United States and foreign corporations have been prosecuted under the Clayton Act. Since only one of these cases has resulted in a decision on the merits,[113] we must rely for the present upon analogies drawn from interstate commerce cases.

a. *Under the Sherman Act.* Experience with domestic merger cases has accentuated the Sherman Act's limitations and demonstrated its inadequacies in curbing corporate amalgamations. As the Supreme Court's famous decision in *United States v. Columbia Steel Co.*[114] illustrates, the standard of reasonableness applied under the Sherman Act has been rather lenient. As a result of that case, courts were required to look at several factors, such as the strength of the remaining competition, the probable development of the industry, changes in consumer demand and the purpose or motive of the parties.[115] This

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[111] Section 7 of the Clayton Act does provide that it will not

> prevent a corporation engaged in commerce from causing the formation of subsidiary corporations for the actual carrying on of their immediate lawful business, or the natural and legitimate branches or extensions thereof, or from owning and holding all or a part of the stock of such subsidiary corporations, when the effect of such formation is not to substantially lessen competition.

15 U.S.C. § 18 (1964). The precise significance of this provision is uncertain. The legislative history of § 7 affords no insight into the proper construction, and it has not been the subject of either judicial or governmental inquiry.

[112] E.g., Timken Roller Bearing Co. v. United States, 341 U.S. 593 (1951); United States v. Imperial Chem. Indus., Ltd., 100 F. Supp. 504 (S.D.N.Y. 1951); United States v. National Lead Co., 63 F. Supp. 513 (S.D.N.Y. 1945), aff'd, 332 U.S. 319 (1947).

[113] United States v. Jos. Schlitz Brewing Co., 253 F. Supp. 129 (N.D. Cal.), aff'd per curiam, 385 U.S. 37 (1966).

[114] 334 U.S. 495 (1948). The Court held that the acquisition of the largest independent steel fabricator on the West Coast by the largest steel producer in the United States did not violate either §§ 1 or 2 of the Sherman Act.

[115] The standard formulated by the Court in *Columbia Steel* for determining the legality of mergers under the Sherman Act is as follows:

> If such acquisition results in or is aimed at unreasonable restraint, then the purchase is forbidden by the Sherman Act. In determining what constitutes unreasonable restraint, we do not think the dollar volume is in itself of compelling significance; we look rather to the percentage of business controlled, the strength of the remaining competition, whether the action springs from business requirements or purpose to monopolize, the probable development of the industry, consumer demands, and other characteristics of the market. We do not undertake to prescribe any set of percentage figures by which to measure the reasonableness of a corporation's enlargement of its activities by the purchase of the assets of a competitor. The relative effect of percentage command of a market varies with the setting in which that factor is placed. (Footnote omitted.)

Id. at 527-28. It has been pointed out by at least one observer that "[t]his is more a denial of a standard than it is the formation of one." Brewster, supra note 22, at 199.

multiple-factors test, since it is so broad and requires consideration of so many unwieldy factors, has little deterrent effect.

The latest Sherman Act merger decision in *United States v. First Nat'l Bank*[116] has formulated a somewhat harsher per se market-share test of illegality for horizontal mergers.[117] Such mergers now apparently restrain trade unreasonably whenever the firms involved are such

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[116] 376 U.S. 665 (1964). In this case, the Supreme Court held that the merger of the largest and the fourth largest commercial banks in Fayette County, Kentucky, violated § 1. The Court expressly rejected a defense based upon the *Columbia Steel* decision stating that *Columbia Steel* should be confined to its unique facts and concluded: "Where, as here, the merging companies are major competitive factors in a relevant market, the elimination of significant competition between them constitutes a violation of § 1 of the Sherman Act." Id. at 672-73. Mr. Justice Harlan in his dissent complained that this sweeping rule in effect condemns mere bigness.

It is still too early to assess the effect of the decision on the continuing validity of *Columbia Steel*. Thus far it has been interpreted as rejecting the more complex *Columbia Steel* test in favor of an easier per se illegality rule based simply upon the finding that significant competition *inter sese* has been or would be eliminated by the merger. Comment, The Supreme Court, 1963 Term, 78 Harv. L. Rev. 143, 266-69 (1964); Note, 52 Ky. L.J. 863 (1964); Note, 1964 U. Ill. L.F. 667. In this connection it is interesting to note that Justices Brennan and White concurred in United States v. First Nat'l Bank, 376 U.S. 665 (1964), "solely on the conclusion that the factors relied on in . . . [*Columbia Steel*] as applied to the facts of this case, clearly compel the reversal." Id. at 673.

[117] Throughout the remainder of this article, combinations will be referred to as being either "horizontal," "vertical" or "conglomerate." These terms are not always helpful; often they serve as a source of confusion. Nevertheless, because they have become an accepted part of antitrust vocabulary, they will be used here.

A horizontal merger is generally defined as the merger of two competitors. But there is some dispute as to the meaning of the term "competitor." It is generally agreed that companies manufacturing the same products or products which are close substitutes are competitors if they distribute them in the same market. When their products are distributed in different territories, however, it is claimed by some that they are not competitors and that, therefore, this market-extension merger is not horizontal, but instead a mixed conglomerate combination. A similar controversy arises in connection with mergers of companies producing different but related products because they can be produced with much the same facilities, sold through the same distribution channels, or made a part of the same research and development efforts. Often acquisitions of this type are made by a company which seeks to fill its product-line offering of complementary, if not competitive, goods. It has been claimed that these product-extension mergers are not truly horizontal, but are mixed conglomerate mergers.

A vertical merger is defined as the merger of two companies, one of which sells a product which the other company buys. The term "forward vertical acquisition" refers to the acquisition of a customer by a supplier, while the term "backward vertical acquisition" refers to an acquisition of a supplier by a customer.

The term "conglomerate merger" is the catch-all category which is defined to include all mergers neither horizontal nor vertical.

Apart from definitional problems involved in classifying fringe-area mergers, these classifications encounter further difficulties because they focus upon the character of the relationship between the merging companies rather than on the nature of the competitive effects likely to be produced. As a result, they often hinder, rather than aid, analysis. For example, many horizontal acquisitions have both vertical and horizontal effects because one or both of the merging companies is vertically integrated. Competition on the horizontal level is necessarily affected first because of the elimination of previously existing *inter sese* competition and secondly because rivals are now faced

"major competitive factors" in the relevant market that their combination eliminates "significant competition between them." The newer *First Nat'l Bank* test is limited to horizontal merger situations, and thus, the courts presumably must still apply the *Columbia Steel* standards to determine the validity of vertical and conglomerate mergers.[118] Moreover, it appears that the *Columbia Steel* test will also be applied to many horizontal mergers involving American firms and their foreign competitors. Elimination of significant competition between the combining firms might ipso facto have adverse effects upon foreign consumers or foreign competitors, but a more penetrating analysis is needed to establish the requisite injury to United States consumers or United States business opportunity.

If the approach of the courts in interstate commerce cases controls the disposition of "foreign" commerce acquisition cases under the Sherman Act,[119] it can be safely said that size is an important factor and that "foreign" mergers involving small or medium size companies will generally be permitted.[120] Difficulties arise only when the smaller acquisitions are made in seriation. Accordingly, the analysis of the economic consequences likely to flow from the more important generic types of mergers presented herein presupposes participation of companies which are, or have become, large enough to restrain trade in the relevant market. At the same time, no attempt has been made to indicate which companies have sufficient size or power to restrain competi-

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with a single unit having the combined strength or market power of its two constituents. This last mentioned factor can also produce significant vertical repercussions since the purchasing or supply power previously enjoyed by two independent firms is now concentrated in one decision maker. The vertical merger of a customer and a supplier similarly produces competitive effects on both levels of competition. Former suppliers of the acquired firm are foreclosed by a forward vertical acquisition and former customers of a supplier are foreclosed by a backward vertical acquisition. In either case, the acquiring company has bettered its competitive position vis-à-vis its rivals since it has acquired either an assured outlet or source of supply. Recognition of the existence of these possible effects on two distinct levels of the market structure is far more helpful to an assessment of the competitive impact of particular mergers than is the determination and proper labelling of the precise relationship the companies have to each other.

118 While it is possible that a somewhat similar per se test based upon the volume of commerce involved could be developed for assessing the validity of vertical and conglomerate mergers under the Sherman Act, no such test has as yet been judicially formulated.

119 There is no reason to believe that it will not. Indeed, if a different approach is adopted, it will be the result of a judicial accommodation recognizing the dissimilarities between the commercial factors present in interstate commerce and those involved in international trade, and accordingly, international mergers would be treated more leniently than domestic mergers.

120 The analysis assumes that the merger reflects a normal business purpose and that it was not made with the express or implied intent or purpose of restraining trade or acquiring a monopoly, since this fact alone would be sufficient to invalidate the merger under *Columbia Steel* even though no serious anticompetitive effects are likely to result. United States v. Columbia Steel Co., 334 U.S. 495, 531-32 (1948).

tion unreasonably since this obviously depends upon the particular market and circumstances involved in each case.[121]

Proceeding first to a consideration of horizontal mergers, the clearest violation is the acquisition of a foreign firm which is a substantial actual or potential competitor in the American market or a sizable exporter of goods to the United States.[122] Corporate absorption of these companies affect domestic commerce in the same way and to the same extent as any comparable merger of two American firms. If imports are substantially restrained or if too much business is consolidated in the hands of the resulting firm, the merger can be prosecuted under the *First Nat'l Bank* formula.[123] Condemnation may also result when there are no restrictive effects upon imports. Indeed, a violation can exist even though the volume of United States imports increases and the foreign firm continues to ship to this country. There is no assurance that the foreigner's export policy will remain unchanged over the years. Its domestic partner, whether the acquiring or the acquired company, will always be in a position to influence the volume of these imports and it is axiomatic that the combined enterprise will not act to the detriment of either of its members. This factor alone provides a sufficient basis for disallowing the merger if the threatened injury is substantial. Moreover, the combination may also have vertical repercussions since the American company might become the distributor of the

121 The two banks involved in United States v. First Nat'l Bank, 376 U.S. 665 (1964), were the first and fourth largest commercial banks in the relevant geographic market. Their combination would have given the resulting firm more than fifty percent of the market, thus making it larger than all of the other competing banks combined and three times as large as the next largest competitor. Quite obviously, mergers of this magnitude are not likely to occur in many industries today. How much smaller the companies can become and still satisfy the *First Nat'l Bank* formula can be determined only by future litigation which probably will never arise due to the fact that § 7 has been made fully applicable to bank mergers. See United States v. First City Nat'l Bank, 386 U.S. 361 (1967) (interpreting the Bank Merger Act of 1966, 12 U.S.C. § 1828(c) (Supp. II 1965-66)); United States v. Philadelphia Nat'l Bank, 374 U.S. 321 (1963) (interpreting the Bank Merger Act of 1960, 12 U.S.C. § 1828 (c) (1964)).

Under the *Columbia Steel* test, size is not a singularly important criterion but market shares are still significant. See Donovan, supra note 98, at 535-64.

122 United States v. First Nat'l Bank, 376 U.S. 665 (1964), involved banks which were substantial actual competitors at the time of the merger. While the applicability of the theory of that case to potential competition remains unsettled, it is an extension which in all probability will be made. See Donovan, supra note 98, at 543.

123 United States v. Jos. Schlitz Brewing Co., 253 F. Supp. 129 (N.D. Cal.), aff'd per curiam, 385 U.S. 37 (1966) (attack under § 7 of the Clayton Act of an acquisition involving a Canadian corporation which, though it was not a substantial exporter to the United States, did have an American subsidiary providing a significant source of competion in the western portion of the United States). The analysis in the text is supported by recent governmental enforcement policies adopted with respect to international acquisitions having restrictive effects within the United States. See, e.g., United States v. Mobay Chem. Co., 1967 Trade Cas. ¶ 72,001 (W.D. Pa. March 20, 1967); Donovan, supra note 98. at 547; Donovan, The Legality of Acquisitions and Mergers Involving Foreign Corporations Under the United States Antitrust Laws—Part II, 40 S. Cal. L. Rev. 38, 78-82.

foreign firm's product in the United States. Other American competitors of the domestic partner, including former distributors of the foreign firm's product, might be foreclosed from a substantial source of supply and could even be driven out of the business of importing the commodity involved.[124] So too, former American suppliers of the domestic partner might be prevented from continuing to supply its needs. Where the merger produces these postulated vertical effects, the acquisition may unduly restrain the opportunities of competitors to obtain or market their products and may therefore be unlawful even under the more lenient *Columbia Steel* multiple-factors test.

On the other side of the coin, both vertical and horizontal mergers of American and foreign corporations can also lead to export restraints. The combination may produce a company which enjoys a monopoly or near-monopoly position in a particular foreign territory or country. Falling short of such a commanding position, the enterprise might nevertheless achieve a position of considerable influence over consumers and competitors in the foreign trade area. The effect on United States foreign commerce is obvious: rival American exporters will be unable to compete in the foreign region. Indeed, they might even be excluded entirely. As a practical matter, these extreme consequences are highly probable because of the proclivity of many foreign governments, particularly those in developing nations, to prefer monopoly to competition. In these extreme, but not abnormal, circumstances, the merger will most assuredly restrain American export opportunity, but the question remains whether the restraint is substantial. Even if we assume that a comparable domestic acquistion will unquestionably violate the Sherman Act, it does not necessarily follow that the international acquisition is unlawful. Here, as in the monopoly area, the pivotal inquiry centers on the relevant market in which to measure the substantiality of export restraints. If each foreign country is recognized as possessing different and unique economic and governmental trade barriers constituting it a separate export market worthy of antitrust protection, the merger can easily be proscribed. But the appropriate market need not be so narrowly drawn. If the

[124] Given the proper circumstances, this result is highly probable, for as the writer has already explained:

> Where the commodity involved was produced under foreign patents held by the overseas firm, thus enabling it to control the distribution of the product produced by others, the merger could make it more difficult for rival importers to obtain the necessary goods with which to compete in the domestic market. This restriction might also occur where the foreign production of the commodity is limited or largely consumed in foreign markets so that only small quantities are available for importation into the United States. Under such circumstances the rivalry of competing American importers is seriously curtailed, and, if the supply is scarce, they could even be forced out of business.

Donovan, supra note 98, at 548.

hypothetical merger is tested against the total foreign market or some portion of the domestic and foreign market in the commodity, it will seem insubstantial. It will be illegal only if the single foreign country involved represents virtually the entire export market for the particular commodity. As we have seen, resolution of this pivotal market-definition problem awaits judicial action.[125]

The merger most likely to restrain United States commerce unreasonably is the acquisition of a foreign raw material supplier by a domestic fabricator. This vertical merger can have disastrous effects within the United States for, in industries where domestic raw material supply is short, rival fabricators are dependent largely upon foreign production. The lawfulness of the acquisition, therefore, depends upon the volume of this foreign production and its availability to rival American fabricators. Often, while total output is high, little is available since much production is either tied up by vertical integration in the industry or excluded by export restrictions.

To this point we have considered international acquisitions as Sherman Act problems. Perhaps in this respect the analysis is misleading, since any merger of American and foreign corporations which substantially lessens competition or tends to monopoly in the United States will, in almost every case, be attacked under Section 7 of the Clayton Act.[126] Sherman Act standards do, however, retain their vitality due to the existence of considerable doubt as to the applicability of the Clayton Act to export restraints.

b. *Under the Clayton Act.* Merger experience in domestic commerce under Section 7 of the Clayton Act presents a stark contrast to the picture developed under the Sherman Act. Substantive tests of legality embodied in section 7 are far more stringent than those judicially employed under the Sherman Act. While the latter's prohibitions are limited to corporate alliances which *restrain* trade—actual or potential—in a manner which is "unreasonable" in light of the surrounding circumstances, section 7 cuts much deeper. It forbids acquisitions and mergers which *may* substantially lessen competition or tend to create a monopoly.[127] This standard has led to several Supreme Court deci-

[125] The various arguments urged in support of each of these competing market-definition theories are presented in Donovan, supra note 98, at 550-59.

[126] For a discussion of the jurisdictional criteria of § 7, limiting its scope of applicability to acquisitions and mergers, see Donovan (Part II), supra note 123, at 41-47.

[127] Section 7 provides, in pertinent part, that:

> No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corportaion engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

sions within the past six years holding that mergers which only slightly increase the market share of the acquiring firm sometimes produce the prohibited result.[128] In one case, the Court forbade a supplier's acquisition of a customer representing 1.2 to 1.6 percent of the market;[129] in another, it decided that a horizontal merger which added only 1.3 percent to the acquirer's share of the market violated the statute.[130] These decisions have made it painfully clear to many businessmen that mergers involving small companies which do not even raise threshold problems under the Sherman Act can, nevertheless, violate the Clayton Act. For this reason, external corporate expansion into overseas markets must be made with Clayton Act prohibitions in mind.

The existence of unsettled and perplexing jurisdictional problems obscures the potential impact of section 7 upon international mergers. The recent district court decision in the only case involving a merger of United States and foreign corporations which has resulted in a decision on the merits, is not particularly helpful. The court simply assumed without discussion that section 7 applied.[131] Consequently, there is no decisive judicial precedent. In this vacuum, emphasis must be placed upon the language of the statute itself and its place in the legislative scheme of preserving unrestrained competition.

The word "commerce" is defined in Section 1 of the Act to cover "trade or commerce among the several states and with foreign nations."[132] Since Congress did expressly impose territorial limitations on sections 2[133] and 3,[134] it may be argued that its failure so to limit sec-

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15 U.S.C. § 18 (1964). The acquisition of the stock or assets of one or more corporations is also covered and declared unlawful under such circumstances.

The legislative history of the 1950 amendments to the statute makes it clear that the section is intended to strike down mergers beyond Sherman Act regulation. The salient points in the congressional history are summarized and discussed in Donovan (Part II), supra note 123, at 48-54, and in Bok, Section 7 of the Clayton Act and the Merging of Law and Economics, 74 Harv. L. Rev. 226, 233-38 (1960).

128 FTC v. Procter & Gamble Co., 386 U.S. 568 (1967); United States v. Pabst Brewing Co., 384 U.S. 546 (1966); United States v. Von's Grocery Co., 384 U.S. 270 (1966); FTC v. Consolidated Foods Corp., 380 U.S. 592 (1965); United States v. Penn-Olin Chem. Co., 378 U.S. 158 (1964); United States v. Aluminum Co. of America, 377 U.S. 271 (1964); United States v. El Paso Natural Gas Co., 376 U.S. 651 (1964); United States v. Philadelphia Nat'l Bank, 374 U.S. 321 (1963); Brown Shoe Co. v. United States, 370 U.S. 294 (1962).

129 Brown Shoe Co. v. United States, 370 U.S. 294 (1962).

130 United States v. Aluminum Co. of America, 377 U.S. 271 (1964).

131 United States v. Jos. Schlitz Brewing Co., 253 F. Supp. 129 (N.D. Cal.), aff'd per curiam, 385 U.S. 37 (1966).

132 15 U.S.C. § 12 (1964).

133 Id. § 13 prohibits a seller from discriminating in price between or among different purchasers, except under certain justifying circumstances, but only in situations "where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States . . . ."

134 Id. § 14 is limited in the same way as § 13.

tion 7 was intentional, and indicative of an intent to have that section apply to "foreign" mergers. This interpretation is compatible with, and bolstered by, the statute's pervasive prohibition of both partial and complete stock or asset acquisitions having anticompetitive effects in this country. The crucial consideration in section 7 cases is not the location or nationality of the parties or even the type of commerce which is injured, but the situs of the merger's effects. Because many mergers of American and foreign firms will injuriously affect competition in the United States, it seems clear that their international aspect affords no immunity.

Since the statute covers only some corporate alliances and apparently requires that the acquired firm be "engaged also in commerce," not all acquisitions are subject to it.[135] Many foreign business enterprises may not qualify as "corporations" and many more may not be "engaged" in United States commerce. While it would seem that the acquisition of a foreign firm which had not theretofore been directly or indirectly buying from or selling to United States firms falls outside the purview of the statute, this is not entirely clear.[136] Difficult and unresolved questions will arise whenever it appears that the foreign company would have entered the stream of United States commerce. Although the word "engaged" denotes a present participation in American commerce, analogous interstate commerce cases provide a basis for concluding that the "'engaged also in commerce" clause of section 7 requires that the acquired firm be only potentially engaged in commerce.[137]

The most serious obstacle to the use of section 7 to regulate mergers of American and foreign nationals is the statutory requirement that the acquisition have the prohibited effects "in any section of the

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135 The statute applies only to acquisitions by a corporation of the stock or assets of another corporation. Thus, mergers involving other kinds of business enterprises are not covered. Moreover, the scope of the act is further limited by the fact that not all corporate acquisitions are covered. The particular status of both the acquiring and the acquired corporations is important. In the first place, stock acquisitions may be made by corporations which are not "engaged in commerce" and asset acquisitions may be made by corporations which are not "subject to the jurisdiction of the Federal Trade Commission." In the second place, it is clear that asset acquisitions are free from prohibitions unless the acquired corporation is "engaged also in commerce" and, while there is some room for disagreement, it appears that the acquired corporation must qualify in the same way in the case of stock acquisitions. See Donovan (Part II), supra note 123, at 43-44.

136 If the statute is interpreted as not regulating these mergers, the requirement gives rise to an interesting situation. It is theoretically possible, though perhaps improbable, that the acquisition of a foreign firm not "engaged also in commerce" can cause a substantial injury to United States commerce and therefore violate the Sherman Act but not the Clayton Act.

137 See United States v. Penn-Olin Chem. Co., 378 U.S. 158 (1964); Donovan (Part II), supra note 123 at 43-47. See also the Government's complaint in United States v. Gillette Co., 5 Trade Reg. Rep. ¶ 45,068 (D. Mass. Feb. 14, 1968).

country." This provision undoubtedly makes section 7 territorially introspective. Nevertheless, it is clear that international acquisitions which substantially reduce the volume of imports produce "effects" within the United States and are therefore subject to proscription. It is also clear that mergers of American and foreign firms which eliminate actual or potential competition in a domestic market affect the character and intensity of competition in a "section of the country."[138] In neither case does the effect upon American consumers differ from that of a domestic merger simply because the competition eliminated is of foreign rather than domestic origin and takes the form of imports.[139] Nor is a restrictive effect upon imports essential to the finding of anti-competitive results within the United States. Similar adverse consequences upon domestic competition will follow from a "foreign" acquisition which greatly enhances the position of an already dominant American firm vis-à-vis its domestic rivals. This accretion of power will almost always result from a merger concentrating a significant volume of commerce in the hands of the combining corporations,[140] from one which leads to collaborative production or marketing operations in the United States,[141] or from an acquisition of an advantageous foreign source of supply or technology not freely available to competing enterprises.[142]

At this point, it should be clear that the very factors which lay the jurisdictional base for the implementation of section 7 also serve to establish the violation. Since the economic consequences likely to flow from the various kinds of international acquisitions producing injuries to United States internal commerce remain constant regardless of the statute under which they are attacked, the analysis of their competitive impact under the Sherman Act is equally pertinent here. The point of differentiation lies in the dissimilarities between the legal standards and the quanta of proof relevant under the two statutes.

Any similarity of Sherman and Clayton Act goals disappears in the case of an acquisition whose restrictive effects are limited solely to the export commerce of the United States. At first glance, it certainly seems strange that a statute designed to protect competition within a section of the United States, can be interpreted as protecting American exporters from activities in foreign commerce. Yet the argument has been

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[138] United States v. Jos. Schlitz Brewing Co., 253 F. Supp. 129 (N.D. Cal. 1966), aff'd per curiam, 385 U.S. 37 (1966). See also the Government's complaints in United States v. Gillette Co., 5 Trade Reg. Rep. ¶ 45,068 (D. Mass. Feb. 14, 1968), and United States v. Aluminium Ltd., 5 Trade Reg. Rep. ¶ 45,064, at 52,585 (D.N.J. 1964).

[139] Brewster, supra note 22, at 192.

[140] Cf. United States v. Jos. Schlitz Brewing Co., 253 F. Supp. 129 (N.D. Cal.), aff'd per curiam, 385 U.S. 37 (1966).

[141] Cf. United States v. Mobay Chem. Co., 1967 Trade Cas. ¶ 72,001 (W.D. Pa. March 20, 1967).

[142] Brewster, supra note 22, at 192.

made and is not without foundation. Stripped to its essentials, it is predicated upon the fact that American businessmen produce export goods in the United States and therefore any acquisition which forecloses them from a substantial segment of their total foreign market causes production adjustments and therefore produces effects within a "section of the country." Professor Brewster has presented the issue and offered his suggestions. He postulates the hypothetical case of a dominant American supplier of semifinished materials who acquires an interest in all the dominant European fabricators of his product, who, in turn, represent virtually the entire export market. To Professor Brewster the separate lines of argument are clear:

> The government might contend that putting United States competitors at a substantial export disadvantage lessens competition among producers for export. These handicapped producers operate their export business in the United States and in a "section of the country" that could be considered sufficient to comply with the requirement. The defendant would argue, plausibly, that, under the [Clayton]Act, the commerce monopolized or in which competition is lessened must itself be in a section of the country. Since in our hypothetical case the commerce restrained is export commerce, it does not fall within the statutory bounds.[143]

"Given the legislative purpose to protect the little competitor as well as the consumer," Professor Brewster concludes, "it would seem to us that the government has the better of the argument."[144]

Subsequent judicial developments may prove Brewster's reaction correct, but his thesis must first successfully entomb some pulsating objections. His hypothetical premises logically lead to the conclusion that fewer corporations are producing goods for export. But does this mean that *competition* has been injured? The answer depends upon the definition one accords to the term. Traditionally, competition involves a tripartite arena in which two or more sellers vie for the favor of a buyer, or two or more buyers battle for the favor of a seller.[145] In Brewster's hypothetical, the only such market is in Europe, a foreign market not a section of the United States. To the extent that section 7 is interpreted to protect "competition" in "markets" where there is

[143] Id. at 193.

[144] Id.

[145] Webster defines "competition" as "the effort of two or more parties to secure the custom of a third party by the offer of the most favorable terms . . . ," and as "a market condition in which a large number of independent buyers and sellers compete for identical commodities, deal freely with each other, and retain the right of entry and exit from the market . . . ." Webster's Third New International Dictionary 464 (1963). "Competitor" is defined as "one that is engaged in selling or buying goods or services in the same market as another." Id.

commercial intercourse among sellers and buyers, its introspective nature requires that this market be located in the United States.

Ultimately, the Supreme Court will be required to decide policy questions and determine the meaning of the term "competition" and how to protect it. If the Court favors the use of section 7 to preserve export opportunity for American businessmen, Brewster's "production-competition" theory provides a base. Under it, the statute's reach will extend around the world and competition in foreign markets will be regulated by American jurists as a means of regulating the production of goods in this country.

3. *The Joint Venture*

a. *In General.* "The central concept in the joint international business venture is that of a partnership" or a "pooling of interests and resources for the accomplishment of a specific objective."[146] It has been said that "partnership has two sides—technical and emotional. On the technical side, it is a joining of contributors; on the emotional side it is a feeling of united cooperative effort."[147] The joint venture therefore combines the management and direction of two previously independent parties. It differs from a merger in that the participants retain their original identity, personality, and interests apart from their joint activity.[148] Chairman Paul Rand Dixon of the Federal Trade Commission has noted that: "In simplest terms, a joint venture is formed whenever two or more people pool their financial resources and skills and engage in some business activity."[149] An American corporation, therefore, participates in a joint venture whenever it joins with another party to engage in some business activity.

The antitrust implications are complicated by the fact that there are several types of joint ventures in foreign trade. They may be of a temporary or a permanent nature. They encompass at one extreme a loose ad hoc association limited to a particular undertaking and covering a relatively short period of time, and at the other, joint, partial stock ownership over an extended period.[150] Joint international business enterprises of any type may take the form of a contractual arrangement, but more frequently a joint company is incorporated as the vehicle because the participants customarily seek to limit their liability

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146 Joint International Business Ventures 5, 6 (W. Friedmann & G. Kalmanoff ed. 1961).

147 Id.

148 Devine, supra note 109, at 439.

149 Address by Hon. Paul Rand Dixon, Chairman, Federal Trade Commission, before The Economic Club of Detroit, Detroit, Mich., March 12, 1962, as reprinted in 195 Com. & Fin. Chron. 2216 (1962).

150 Whipple, Problems of Combination—Integration, Intracorporate Conspiracy and Joint Ventures, 1958 N.Y. State Bar Ass'n Antitrust Law Symposium 34, 50.

and confer upon their enterprise a legal personality independent from that of its parents.[151] The American venturer may have a majority interest, a minority interest, a half interest or some equal partial interest. In his operations, he may combine with other American companies, with foreign companies or with both. The other participants may or may not be actual or potential competitors of the American venturer or of each other. The joint venture may be newly formed or may be the result of partial acquisitions in existing enterprises. The joint operations may be commercial, industrial or extractive, or a combination of all three, integrated from raw material to consumer sales.[152] The market served by the joint operation may be in the United States, a single foreign country, or any combination of countries.[153] The legality of joint international business operations is, of course, affected by this multiplicity of relevant factors and "much may turn on who joins, what is joined, and especially, what market is served by the joint enterprise."[154]

Because of the nature of the topic under discussion, this article is primarily concerned with the more permanent rather than the temporary type of joint venture and, accordingly, the analysis will focus on it. For present purposes, it is sufficient to state that the legality of both types will be governed by the same rules and that the obvious differences between the two is one of degree and makes the temporary type relatively secure from antitrust attack.[155]

At the outset it must be realized that there are restraints inherent in every joint venture, just as there are restraints inherent in every contract.[156] With specific reference to joint ventures in foreign commerce, Professor Brewster has pointed out:

> Basically, there are two possible theoretical anticompetitive tendencies of jointness. First, the possibility that the competitive potential of the joint enterprise will be curbed in order to protect the existing markets of the partners; second, the possibility that the partners themselves will be less likely to compete with each other because of their joint undertaking.[157]

There is also the possibility that the new firm will adversely affect the competitive situations of third parties. These dangers are similar to those which necessarily exist in every instance of collaboration among competitors. The mere fact that there are such dangers is not in itself

151 Fugate, supra note 22, at 255.
152 Brewster, supra note 22, at 200.
153 Id.
154 Id.
155 Whipple, supra note 150, at 51.
156 Id. at 52.
157 Brewster, supra note 22, at 202.

sufficient reason for condemning contracts or other joint business arrangements among competitors, as long as they are designed to accomplish a legitimate objective.[158] As a result, it has been said that "[t]he legality of joint ventures will depend on the purpose and nature of the enterprise, the situation of the partners, and their place in the market. In short . . . illegality turns on unreasonableness and is well outside the area of per se violations."[159] In assessing the validity of joint ventures these considerations must be kept in mind. It is also important to realize that we are dealing with a field where the law is largely unformulated.[160]

b. *The Purpose of the Joint Venture and the Restricted Area of Per Se Illegality.* The litigated cases make it clear that any joint venture which is the product of an unlawful conspiracy to restrain trade is illegal regardless of its actual effect upon competition. But the difficult

[158] E.g., Maple Flooring Mfrs. Ass'n v. United States, 268 U.S. 563 (1925); Board of Trade v. United States, 246 U.S. 231 (1918); Standard Oil Co. v. United States, 221 U.S. 1 (1911); Denison Mattress Factory v. Spring-Air Co., 308 F.2d 403 (5th Cir. 1962). See also Whipple, supra note 150, at 52. But see United States v. Sealy, Inc., 388 U.S. 350 (1967).

[159] Brewster, supra note 22, at 206.

[160] What few cases there are indicate that

> a joint venture, or the ownership and operation of a joint company, even among competitors in foreign commerce, is not unlawful per se, but becomes unlawful if its purpose and effect is to restrain or monopolize interstate or foreign trade. On the other hand, activities otherwise unlawful, such as price-fixing or division of markets, are not justified merely because they are carried on through the medium of a joint venture or joint company.

Fugate, supra note 22, at 257. See, e.g., United States v. National Lead Co., 332 U.S. 319, 363 (1947); United States v. American Tobacco Co., 221 U.S. 106 (1911); United States v. Imperial Chem. Indus., Ltd., 100 F. Supp. 504, 557 (S.D.N.Y. 1951). Cf. Timken Roller Bearing Co. v. United States, 341 U.S. 593 (1951).

In each of these cases, *Timken* possibly to the contrary notwithstanding, the joint venture was declared illegal not because it was shown to have unreasonably restrained trade, but because of an illegal purpose of the collaborators. The approach of the several judges in first discerning the illegal purpose and then condemning the joint venture indicates that foreign joint undertakings will be treated in the same manner as any other instance of collaboration among competitors. The proper standard is whether, in light of all the facts, the inherent restraints add up to an undue limitation on competition, either because of some ferreted-out illegal scheme or because of the absence of justification for the collaborative undertaking. This conclusion is supported by the express refusal of the *Timken* Court to sustain the divestiture order entered by the district court. Its unwillingness to do so, after having found the joint enterprise unlawfully organized, indicates that it saw nothing inherently wrong in the formation of a jointly owned foreign company to engage in manufacturing and distribution operations overseas. The Court was willing to permit the continued existence of such joint operations abroad because it felt its injunctive powers were sufficient to undo the restraint placed upon American commerce by the illegal cartel agreements. The Court was apparently influenced by the fact that American Timken had both the contractual right and the desire to buy out the British interests in French Timken, thus converting it into an individual venture. See note 38 supra. The Court's reaction in this regard suggests the importance of motive and business purpose, one of the touchstones in United States v. Columbia Steel Co., 334 U.S. 495 (1948).

question presented in every case is determination of the precise purpose of the collaborators.[161] It is inherent in the nature of the transaction that the joint venture will not compete with its parents and its parents will not compete with it. This is true whether the joint venture stands in a conglomerate, vertical or horizontal relationship to its parents.[162]

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[161] Compare the majority opinions with the dissents in United States v. Sealy, Inc., 388 U.S. 350 (1967), United States v. Penn-Olin Chem. Co., 378 U.S. 158 (1964), and Timken Roller Bearing Co. v. United States, 341 U.S. 593 (1951).

[162] It is almost impossible satisfactorily to classify joint ventures as being either "horizontal," "vertical" or "conglomerate" for all purposes. As pointed out in note 117, supra, there is disagreement over the meaning of these terms which makes difficult the classification of mergers under these categories. The problem is even more pronounced with respect to joint ventures since it involves the *inter sese* commercial relationship of three, rather than two, parties. After determining the precise relationship between the parents and the proper label to be ascribed to it, it becomes necessary to decide the manner in which their joint creature is related to them, individually and collectively. Often, it is imposible to classify them under any labels. Some classification is, however, possible.

Certainly, one can safely label as "horizontal" the collaboration of two or more actual competitors in the formation of a third company to manufacture and sell the same product, or a product which is a close substitute for the product produced by them in the same geographic market or markets in which they had previously competed. And it has been suggested that the term "horizontal" could be used to describe this type of collaboration where the market to be jointly exploited is one in which one or more, but not all, of the parents had previously operated. See Comment, 37 N.Y.U.L. Rev. 712 (1962). Viewing the total arrangement in its proper economic context, this extended classification seems eminently correct since the end result is substantially the same—collaboration of competing concerns in the joint production and marketing of a competing product in a market previously served by one or more of the organizers on an individual basis. The same reasoning suggests that "horizontal" activities exist when the joint enterprise is formed to produce or market a product produced by one or more but not all of its parents. Accordingly, the term "horizontal joint venture" will be used herein to describe these three types of collaboration.

While there is room for much disagreement, it would seem that the combination of actual competitors jointly to manufacture and sell a competing product in a new market (that is, a market not previously served by them) should also be considered a "horizontal joint venture." Nevertheless, for purposes of clarity, collaborations of this kind will be referred to as "horizontal market extension joint ventures." Similarly, where two or more actual competitors combine to produce and market a product new to their operations, the cumbersome term "horizontal product extension joint venture" will be used in order to focus clearly on the precise economic activity which is the subject of the competitors' collaboration. The word "horizontal" in both of these terms denotes the relationship of the parents, namely, that they are actual competitors in some products in some markets; the phrases "market extension" and "product extension" denote relation between them and their jointly owned enterprise.

It can be argued that these terms are too narrowly defined since they exclude situations in which the collaboration is between companies which are potential competitors only. It may be true that their collaboration is just as "horizontal" as that of actual competitors, and the "trustbuster" would certainly so conclude. But it is important to ask what is meant by the term "potential competitors." If by this is meant companies which produce "competing" products but do not market them in the same geographic areas, they have been properly excluded since their combination produces a substantially different competitive impact upon the market. It is more appropriate to refer to these latter combinations as involving companies which are potential competitors only. At the same time, it is important to note that several types of joint

There cannot be any competition *inter sese* in the conglomerate and vertical situations because the creature does not produce or sell products which are the same as, or close substitutes for, those produced and sold by its parents. Competition cannot exist in the horizontal situation because the parents will not allow it. The very existence of the collaborative undertaking implies at least an understanding that there will be no competition between the parents and their joint subsidiary. It follows that if the test of illegality were the existence of a noncompetition agreement, all joint ventures will be unlawful.[163] The courts have recognized this fact and have not gone so far as to seize upon this restraint to find a violation. Yet, at the same time, they have also been cognizant of the fact that a corporate joint venture can serve as a convenient cloak for illegal collaborative activity.[164] For example, two companies which wish to divide a particular territory but know they cannot lawfully do so by means of a naked agreement may accomplish the desired result by pooling their resources, forming a jointly owned company to exploit that market, and dividing the profits between them.

On the surface, it might be said that every horizontal joint venture is of this type. In assessing their validity, however, the courts have delved into the surrounding circumstances to ferret out the true purposes of the collaborators. It is important to note that, in each of the cases where joint ventures were held illegal, the court first found the existence of an underlying illegal conspiracy.[165]

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ventures threatening injury to potential competition only have been included within each of the above-defined terms.

Note 117, supra, defined the "vertical" merger as involving the merger of two companies, one of which supplies or consumes a product purchased or sold by the other. This same type of relationship may exist between the joint venture and its parents and thus there are "vertical joint ventures." Where this relationship exists, the parents, quite obviously, are engaged in the same type of operation and stand in a horizontal relationship to each other. Accordingly, the term "horizontal-forward vertical joint venture" refers to the situation where the creature purchases the product supplied by its parents; the term "horizontal-backward vertical joint venture" refers to the converse situation, where the parents purchase the product supplied by their creature. The same terms absent the introductory word "horizontal" denote the situation that exists when the joint venture stands in a vertical relationship with only one of its parents. It is immaterial to the definition of these terms that the parents may not have been engaged in actual competition with each other. Whenever it is necessary to draw any distinctions respecting vertical joint ventures on this account, the text will clearly so indicate.

The term "conglomerate joint venture" will here be used to denote the collaboration of noncompeting, vertically unrelated companies to form a new company to produce products dissimilar to any produced by any of the parents.

[163] Hale, Joint Ventures: Collaborative Subsidiaries and the Antitrust Laws, 42 Va. L. Rev. 927, 933 (1956).

[164] See cases cited note 160 supra. See also United States v. Sealy, Inc., 388 U.S. 350 (1967); United States v. Minnesota Mining & Mfg. Co., 92 F. Supp. 947 (D. Mass. 1950).

[165] See authorities discussed note 160 supra.

This approach shows that mere establishment of a jointly owned and managed foreign company is, of itself, evidence of nothing illegal. Before a joint venture will be condemned as being conceived in sin, the unlawful purpose must first be established by extrinsic evidence. Where the parent companies have competed in a particular region and discontinue their operations when they later form a joint company to operate in that same region, the inference of a purpose to divide the market is virtually conclusive.[166] The same conclusion might also be drawn where the collaborators were pre-venture potential competitors in the market served by their creature.

Almost any assessment of the purpose and nature of joint ventures and of the evidentiary value of various circumstances in collaborative undertakings must center on an evaluation of Judge Wyzanski's singularly important *Minnesota Mining* decision.[167] There, it will be recalled, four major American competitors and their associates combined to form an export association under the Webb-Pomerene Act[168] and to establish jointly owned plants overseas. With few exceptions, the products manufactured abroad by defendants' jointly owned foreign subsidiaries replaced their exports to the markets supplied by those plants. The joint foreign subsidiaries were held unlawful:

> Prima facie there could hardly be a more obvious violation of § 1 of the Sherman Act than for American manufacturers controlling four-fifths of the export trade of an industry to agree not to ship to particular areas but to do their business there through jointly owned foreign factories. It is, in statutory language, a "combination * * * or conspiracy, in restraint of trade or commerce * * * with foreign nations."[169]

The collaborative undertakings had restrained the foreign commerce of the joint venturers themselves and of their competitors. With regard to the latter, it was said: "The restraint has consisted in the effect of defendants' jointly owned foreign factories' precluding their American competitors from receiving business they might otherwise have received from the markets served by these jointly owned foreign factories."[170]

After having decided the case on these grounds Judge Wyzanski

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166 Cf. Timken Roller Bearing Co. v. United States, 341 U.S. 593 (1951).

167 United States v. Minnesota Mining & Mfg. Co., 92 F. Supp. 947 (D. Mass. 1950).

168 15 U.S.C. §§ 61-65 (1964).

169 92 F. Supp. at 961.

170 Id.

> It may be that the American competitors would not have received all or most of the business of these subsidiaries. . . . But such speculation is unnecessary. When a dominant group of American manufacturers in a particular industry combine to establish manufacturing plants in a foreign area to which the evidence shows that it is legally, politically and economically possible for some American enterprises to export products in reasonable volume, then it

went afield to suggest that a combination of dominant American manufacturers to establish joint factories solely to serve the international trade of a foreign country is a per se violation under the interstate commerce clause of the Sherman Act.[171] The basis for this possible per se illegality was explained:

> The intimate associate of the principal American producers in day-to-day manufacturing operations, their exchange of patent licenses and industrial know-how, and their common experience in marketing and fixing prices may inevitably reduce their zeal for competition *inter sese* in the American market.[172]

After thus noting that a combination of producers to unite in manufacturing in foreign countries, unlike a combination of producers to unite in export, does not have the protection of the Webb-Pomerene Act or any other act of Congress, Judge Wyzanski continued:

> It may, therefore, be subject to condemnation regardless of the reasonableness of the manufacturers' conduct in the foreign countries. In this aspect the reasonableness of the foreign conduct would, like the reasonableness of domestic price-fixing, be irrelevant. Joint foreign factories like joint domestic price-fixing would be invalid *per se* because they eliminate or restrain competition in the American domestic market. That suppression of domestic competition is in each case the fundamental evil, and the good or evil nature of the immediate manifestations of the producers' joint action is a superficial consideration.[173] (Citations omitted.)

The logical extension of this line of reasoning is that "[t]he location of the commerce served by the joint enterprise, the degree of restraint, and the business justifications would all be irrelevant. Neither jurisdictional nor substantive defenses would avail."[174] Due to the absence of subsequent cases raising the same or similar issues, the dictum has been neither adopted nor rejected. Consequently, it remains to frighten off would-be venturers.

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is not necessary in an injunction suit brought by the Government to show that particular American competitive enterprises could have exported profitably to that area. The showing of the combination together with the showing of the possibility of profitable American exports in reasonable volume proves a violation of § 1 of the Sherman Act.

Id. at 961-62.

171 Id. at 963.

172 Id.

173 Id.

174 Brewster, supra note 22, at 210.

in Foreign Trade has suggested an alternative approach to the problem:

> In extreme cases, where dominant companies are involved, the probabilty of subsequent illegal conduct may perhaps be so strong as to justify ruling the joint subsidiary illegal at birth. But before this is done, there should be a finding of at least a substantial probability that the joint venture will result in such types of anticompetitive conduct, and a finding that the parties are of such relative size that the impact of this conduct on U.S. foreign commerce will be substantial. And in the case of foreign joint ventures remote possibilities of future anticompetitive results may well be offset by the special conditions of foreign commerce, such as the need for sharing the heavier risks involved and the practical need for "local" participation. When facts such as these can be proven, they justify a considerably more liberal attitude toward the formation and operation of joint ventures in foreign commerce than toward joint ventures at home.[175]

It has been previously indicated that possible anticompetitive effects are inherent in every instance of collaboration among competitors. Nevertheless, the mere fact that joint business arrangements among competitors provide a potential forum for illegal restraints has generally not been found sufficient, in and of itself, to warrant a conclusion of illegality.[176] The pivotal question has always been whether the feared restraints have in fact resulted. The *Minnesota Mining* dictum, of course, charts a different course and will probably not withstand the test of time. In any event, it should be noted that *Minnesota Mining* involved all the dominant members of the industry, and that the jointness was complete as to technology, manufacturing, price and export policy. This collection of factors makes it unlikely that the precise situation will ever rise again.[177]

Besides its per se illegality dictum, *Minnesota Mining* also causes concern because of its holding that competition between the participants in foreign trade was eliminated through an *implied* agreement among them not to export to foreign countries which were being supplied by their jointly owned foreign factories.[178] Judge Wyzanski recognized that the American export trade could be equally adversely affected if each of the partners separately invested in foreign

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[175] Comm. on Antitrust Problems in Int'l Trade, Report of the Subcom. on Subsidiaries in Foreign Trade, 7 A.B.A. Sec. of Antitrust Law 242, 257 (1955).

[176] See authorities cited note 158 supra and accompanying text.

[177] Brewster, supra note 22, at 210.

[178] See Fugate, supra note 22, at 263, to the effect that this was an implied rather than an express agreement.

factories. However, he distinguished the situation on the ground that joint action forms the basis for a conspiracy while individual action does not, saying, "[S]uch suppositious individual action would, it is true, be a restraint[179] upon American commerce with foreign nations. But such a restraint would not be the result of a combination or conspiracy."[180]

Despite the rather clear implication contained in this language, it is possible that the joint ownership of foreign factories did not provide the raison d'être for Judge Wyzanski's finding of an implied export embargo. His statement must not be taken out of context. It must be remembered that prior to the formation of the jointly owned foreign factories, the partners had each engaged individually in the export of coated abrasives, and at the time they formed the joint ventures they also formed and dominated a Webb-Pomerene association through which they collaboratively funnelled all their exports. Moreover, as jointly owned foreign factories were progressively acquired, almost no exports were made by the export association to the countries supplied by these factories. The situation might not have been viewed in the same light if it had not been for this combination of factors. This seems a logical and proper inference from Judge Wyzanski's earlier statement:

> To achieve the restraint they have not merely established jointly owned foreign factories. They have also by a concert of action conformed to arrangements not to export from the United States to those areas. These arrangements have included the temporary or permanant decisions of the Export Company not to ship to areas where Durex subsidiaries could ship or sell more profitably; the formal agreement from May 1929 through October 1948 of each of the American manufacturing defendants not to export except through the Export Company; and the practice of all of these manufacturing defendants since that date to refrain from making individual exports . . . . Such a concert constituted a conspiracy within the intendment of § 1 of the Sherman Act.[181]

Furthermore, Judge Wyzanski's finding of a restraint on the foreign commerce of the defendants' American competitors indicates that he viewed defendants' actions as unreasonably exclusionary. Perhaps an exclusionary effect upon nonmember competitors might not have existed if there had been individual, rather than joint, investment in

[179] This assumption that there would be a restraint upon American commerce if there had been separate individual foreign investment has been questioned. See Brewster, supra note 22, at 87-88.

[180] 92 F. Supp. at 962.

[181] Id. at 961.

foreign factories. Individual investment might not have led to a united export policy since members could still independently have competed abroad and, despite the existence of the export association, might not have restrained nonmembers since the size of the foreign establishments and their attendant market power might not have been as great.

If this explanation of *Minnesota Mining* is correct, then that case is not as inhibitive a precedent as it seems. In any event, the future vitality of the decision appears to be limited to situations where the participants in the joint venture are the dominant elements in the entire industry.[182] The same anticompetitive effects on United States commerce could hardly have occurred without this element of dominance. If only two of the original nine parties had jointly organized and managed a company in a single foreign country, then presumably the exports of the others would not have been restrained by the agreements to refrain from shipping to that country.[183] Likewise, if the partners in a foreign joint venture had been two smaller firms, the effect upon United States commerce in general, and particularly any exclusionary effect on their American competitors, might be far less pronounced than the effect of a single large firm's foreign investment.[184] If this is so, then it would follow that joint foreign manufacturing and marketing is not illegal simply because two or more firms are involved and inevitably refuse to export in competition with their joint "subsidiary."[185] Where there is no dominance, the restraint on exports is not unreasonable simply because the joint enterprise will be protected against its parents' exports.[186] Perhaps this might also be true when the joint venture is used as a market for its parents' exports. In these circumstances, it has been suggested that the test should be "whether, but for the jointness, the exports would have been substantially different or greater."[187]

It is important to realize that almost any conclusion in this area is tenuous. All that can be deduced from the sparse case law is that joint ventures in foreign commerce, particularly those intended to engage in manufacturing and marketing abroad, are not per se illegal, even though restraints are necessarily inherent in every joint venture. They become illegal only when, in light of all the facts, the inherent restraints add up to an unreasonable limitation on competition. Even where significant restraints are present, the courts in applying the

182 The defendants in *Minnesota Mining* had, at one time, accounted for over 86% of the American exports of coated abrasives. 92 F. Supp. at 951.

183 Brewster, supra note 22, at 214.

184 Id.

185 Id.

186 Id. at 215.

187 Id. at 216.

rule of reason may find them reasonable because of the ability of the partners to show some justification for their combination. On the other hand, the absence of any demonstrated justification may lead a court to the conclusion that a particular restraint is unreasonable.

c. *The Joint Venture and the Rule of Reason.* The reasonableness of joint venturing activities under the Sherman Act depends largely upon who is collaborating with whom and for what end and, most significantly, upon the necessity for their collaboration. Certainly, conglomerate joint ventures are far less susceptible to attack and more easily justified than other types of joint ventures because of their less pronounced potential danger to competition. On the other hand, it is almost impossible to justify the combination of actual competitors in the formation of a joint subsidiary to market their competing products in an area they previously supplied.

We have already looked at the language of *Minnesota Mining* suggesting that the combination of major present competitors in a horizontal joint venture is justified only when it can be demonstrated that it is impossible to conduct foreign business by any other means. Another authority has offered a somewhat different and less harsh approach: "Here it would be necessary to show at least that one of the companies cannot practically go it alone, and that only a major competitor is able and willing to participate in the joint project and join in providing the capital, know-how or other assets necessary for successful operation of the newly created concern."[188]

It has been suggested that a combination of American competitors to open up a new "market" may enjoy kinder treatment.[189] This is undoubtedly true since the collaboration may be permitted if either of the venturers is able to show inability to go it alone. But it is important in this regard to distinguish between geographic market extensions and product market extensions. A particularly heavy burden will be placed upon the proponents to justify their collaboration where the joint venture produces and sells the same products as do the parents. A somewhat less, but still substantial, burden of justification will exist where the companies compete only in other products since here either one of the venturers acting alone may lack not only the financial assets but also the technological resources to sustain independent entry. Nevertheless, internal restraints can still develop. A close examination of the methods of production involved and a comparison of the customers, territories and salesmen of the participants might indicate an overly restrictive operation.[190] Finally, even

[188] Comm. on Antitrust Problems in Int'l Trade, supra note 175, at 256.

[189] Carlston, Antitrust Policy Abroad, 49 Nw. U.L. Rev. 569, 588 (1964).

[190] Freed, in Two Panel Discussions: New Frontiers in Section 7 Enforcement and Joint Ventures and the Sherman Act, A.B.A. Sec. of Antitrust Law 33 (1953).

where the two companies are not competitors at all, it is still necessary to explore the potentiality of their rivalry and the evolution of the joint idea. If the product is a close and logical extension of their existing product lines and fits within the capital resources, technical capabilities and marketing operations of each partner, the possibility of lone venture becomes highly probable and a serious need for justification arises.[191]

In measuring the economic impact of these joint ventures, the size of the collaborators is most important. In this connection it is important to note the statement of Chairman Dixon of the Federal Trade Commission: "Obviously, neither the Department of Justice nor the Federal Trade Commission is concerned about mergers or joint ventures between or among companies whose share of the market is too small to make any impact upon the competitive conditions within the industry. . . . What may be socially desirable when sponsored by small companies usually has markedly different economic consequences when engaged in by industrial giants."[192] Chairman Dixon's statement furnishes a guideline, but it remains difficult to predict the standards by which "small companies" will be distinguished from "industrial giants."

While there never has been any judicial utterance to the effect, it seems that the antitrust consequences of joint operations on the part of American firms which are not competitors—actual or potential—are not as severe. Still, the reasonableness of the collaboration may well turn on the size and market power of the companies involved and their ability or inability to develop the market individually.[193] *United States v. Pan American World Airways, Inc.*[194] may be viewed as such a case. There the court approved the combination of Pan American World Airways, Inc. and W.R. Grace and Company to form Pan American Grace Airways, Inc. (Panagra), to engage in air transportation in certain countries on the west coast of South America. Pan American was a leading airline and Grace a leading shipper.

Though the two companies were each involved in freight and passenger transportation, the court did not treat them as competitors. Prior to the joint venture Pan American's activities in South America were largely confined to the east coast, and Grace's to the west coast. The district court recognized the limited market for air transport in the area, the heavy capital investment required to construct the neces-

191 Id. at 34-35.

192 Address by Hon. Paul Rand Dixon, supra note 149, at 2217.

193 Devine, Foreign Establishment and the Antitrust Law: A Study of the Antitrust Consequences of the Principle [sic] Forms of Investment by American Corporations in Foreign Markets, 57 Nw. U.L. Rev. 400, 442 (1962).

194 193 F. Supp. 18 (S.D.N.Y. 1961), rev'd on grounds not here relevant, 371 U.S. 296 (1963).

sary landing fields and other facilities, and the United States Government policy of granting only one overseas air mail contract for each individual route. These inhibiting factors made the operation of more than one airline in the area infeasible. The court also noted that Pan American and Grace were particularly well suited to join their efforts because of the complementary nature of their own operations. Grace had established facilities on the west coast that could be used to great advantage for the new airline's operation. "Grace also had widespread commercial contacts, a respected trade name and considerable influence in the countries along the proposed route."[195] Pan American, on the other hand, "was further advanced than any other American company in the carriage of foreign air mail, and had the technical aviation skill which Grace lacked at that time."[196] The court concluded that "[t]he union of their physical and technical resources assured the maximum possibilities of success in instituting and carrying on a pioneering venture, useful to the community which did not theretofore exist."[197]

The district court did conclude, however, that Pan American's subsequent limitations on Panagra's activitites constituted a violation of the antitrust laws. A decree was entered directing Pan American to show cause why it should not be ordered to divest itself of its stock interest in Panagra. Grace, on the other hand, had exercised no such pressure to limit Panagra's activities to the South American market. In finding Grace had not engaged in any illegal conduct, the court said, "Grace's stock ownership in Panagra cannot be said to have such a 'pernicious effect on competition and lack of any redeeming virtue' as to conclusively presume that ownership to be an unreasonable restraint on trade and commerce."[198]

The *Pan American* decision was reversed on appeal by the Supreme Court on the ground that primary jurisdiction lay in the Civil Aeronautics Board. Because of this basis for the decision the Supreme Court's opinion is not helpful. The district court's opinion, however, illustrates a judicial willingness to permit major noncompeting companies to form jointly owned foreign ventures when there is need for their collaboration.

The status of vertical joint ventures is unclear. There is as yet no law on the subject, but the horizontal joint venture and related merger cases provide analogous precedent on which the possible standards of legality can be predicted. Where the parents combine in a horizontal-vertical joint venture to form either a joint supply or marketing sub-

195 193 F. Supp. at 32.
196 Id.
197 Id. at 32-33.
198 Id. at 48.

sidiary two distinct anticompetitive consequences may result: First, their association may forestall independent expansion of the same type and hence produce internal restraints; second, their joint undertaking may greatly increase their market position vis-à-vis their competitors and thereby produce external injuries to competition. When resulting competitive effects in either situation are substantial, an unreasonable restraint of trade may exist. The validity of the joint enterprise will probably be determined by the application of the same tests used in determining the legality of mergers under the Sherman Act coupled with the added requirement of demonstrated need for collaboration.

The status of other vertical joint ventures is even more uncertain. There is no indication of possible judicial thinking on the antitrust consequences of the formation of a jointly owned foreign enterprise by American firms having a customer-supplier relationship to each other. The situation would normally arise when a marketing outfit seeks to expand into overseas territories and obtains part of the necessary capital from its domestic supplier. Here the joint venturers are not competitors, and, therefore, their overseas collaboration cannot possibly have the repercussion of limiting domestic competition *inter sese*. However, the foreign establishment may foreclose competitors of the producer from a substantial market outlet, and may very well have injurious effects in the United States by foreclosing competitors of the marketing concern from a significant portion of the producing firm's production. If this is the case, the joint foreign venture might unreasonably restrain American commerce under the standards of legality formulated in the merger cases. Absent this result, these vertical ventures will be permitted.

Thus far, the analysis has centered exclusively on joint activities involving only United States companies. To this extent, it overlooks one of the features characteristic of postwar developments in United States commerce. In recent years, the joint venturing activities of American companies have generally involved participation of foreign firms. These "international" joint ventures differ from their domestic counterparts in that they do not pose the same threat to competition in United States commerce. The internal restraint likely to result from a domestic joint venture is reduction in the vigor of competition between its American parents; in the international joint venture, it is the intensity of competition between American and foreign companies. Because of this difference it might appear that the interest of the United States is less pronounced in the latter instance and, accordingly, that international collaborations should be judged less severely. There is little in the cases supporting this theory and much suggesting its rejection. *Timken* is a prime illustration of the Court's position that the

antitrust laws are designed to protect American competition from unreasonable restraints, whether effectuated by combinations of American and foreign corporations or by American interests alone. *Timken* and the other international joint venture cases, however, all turned on the existence of an underlying per se unlawful conspiracy to restrain trade. In none of these cases were the courts squarely presented with the issue of the validity of international joint ventures in and of themselves. The district court's opinion in *United States v. Imperial Chem. Indus., Ltd.*[199] does, however, provide some assistance. There, the court indicated that distinctions can be drawn between foreign joint ventures formed to exploit a market in which either or both parents were established or had a foothold and joint ventures formed to develop virgin territories. After noting that joint ventures—in domestic or foreign commerce—"become unlawful only if their purpose or their effect is to restrain trade or to monopolize,"[200] the court stated:

> It is also clear that absent this wrongful purpose or harmful effect there is nothing *per se* unlawful in the association or combination of a single American enterprise with a single local concern of a foreign country in a jointly owned manufacturing or commercial company to develop a foreign local market. But the proof here shows an American concern, already established in a foreign local market, and a British concern, which has a foothold in the same foreign local market, combining to form a jointly owned company to the end that the same foreign market may be developed for their mutual benefit and profits divided on an agreed basis.[201]

In context, these statements clearly indicate that foreign and domestic joint ventures are governed by the same rules. This undoubtedly is true since both must be lawful in conception and operation. But the foreign joint venture may require an accommodation to be made on the question of the reasonableness of its operation in order to account for the exigencies of foreign trade. On this point, the "international" aspects of collaborative activity on the part of American and foreign corporations could become particularly important. The *ICI* opinion on remedies contains some language suggesting that it may.[202] Under the divestiture decree du Pont and ICI were permitted to continue their Chilean joint venture even though its purpose was unlawful.[203] The court pointed out that du Pont's American competitor was

199 100 F. Supp. 504 (S.D.N.Y. 1951).

200 Id. at 557.

201 Id.

202 United States v. Imperial Chem. Indus., Ltd., 105 F. Supp. 215 (S.D.N.Y. 1952).

203 This company was Compania Sud-Americana de Explosivos, referred to by the court as CSAE. It was organized by du Pont and ICI in 1921 to manufacture and sell

no longer a joint owner of the company, its interest having been purchased by du Pont, and that the joint company functioned solely to meet the requirements of a local market in a foreign country, producing only a single product which could neither be imported into the United States nor exported from the United States to Chile.[204]

Further support for the theory that collaborative foreign ventures

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explosives in the northern part of Chile and in Bolivia. Du Pont's stated motive for joining with ICI in the project was the desire to retain its existing position in the area. The Chilean government wanted a military powder factory in Chile, was willing "'to give facilities in the commercial business to any manufacturers willing to help them with the military project'" and had increased import duties on explosives by 50%. Id. at 243. The court stated: "Had CSAE been organized with the sole purpose of meeting these existing conditions, there would have been no violation of our anti-trust laws." Id. But it was also formed and used to block entry by competing concerns, including two United States corporations. One of the American corporations, Atlas Powder Company, had already made significant inroads into the market and was brought into CSAE as a 15% stockholder in recognition of this fact. The remaining stock was equally divided between du Pont and ICI. 100 F. Supp. at 564-65. The three partners turned over their Chilean and Bolivian import business in commercial explosives to CSAE which immediately became enmeshed in the operation of the "South American Pooling Agreement" by which du Pont and ICI agreed to share equally the net profits from their South American sales of explosives and blasting supplies. Atlas continued as a shareholder of CSAE for 20 years and then sold its interest to du Pont.

[204] It is unclear how much weight should be accorded the fact that there was only a single American investor. The court's observation must be placed in context. The record failed to disclose whether du Pont made the purchase to obtain additional foreign tax credits or because it believed the joint ownership by two United States concerns in a company producing one of their major products was contrary to the Sherman Act. Du Pont's precise motive in making the acquisition was "important," the court said "in determining the extent of the relief required" since "a purpose to cease violating the law" should receive some weight. 105 F. Supp. at 244. Du Pont was entitled to the benefit of the doubt and the court therefore felt compelled to find that its purpose was to conform to the law. It then continued:

> In either case, we take the facts as presented—Atlas is out of the company; ICI and du Pont are the sole owners; it operates but one plant in Chile; it functions solely to meet the requirements of a local market in a foreign country; it deals in one product; exportation by the company to the United States is not feasible; the possibilities of presently encouraging exports from the United States in this field to this market are doubtful and remote save as to raw materials . . . .

Id. The court also reasoned that changing economic conditions brought about by World War II made improbable the early revival of the cartel which had flourished prior to the war. For these reasons, it felt injunctive measures designed to confine the Chilean company's operations to its postwar product line and to prevent future allotment of its raw material purchases would suffice. It may be that the court's emphasis on the presence of a single American investor was not intended to indicate any difference in result had there been two. It would seem that the Chilean market would be just as local and limited and the possibility of United States foreign trade in the area just as remote whether the joint venture was purely "international" or had added domestic participation. At the same time, the statement could have great significance. The court certainly took the facts as it found them. When its action is coupled with the statement made in its earlier opinion, that there is nothing per se unlawful about the combination of a *single* American firm with a *single* foreign firm to jointly develop a foreign local market, this could be taken to mean that "international" joint ventures will be permitted in situations where domestic foreign ventures will not be allowed.

by American and foreign firms may be deemed less anticompetitive than comparable domestic foreign ventures can be extracted from the report of the American Bar Association's Subcommittee on Subsidiaries in Foreign Trade. The study concludes that joint investment by a nondominant United States corporation and a foreign company can be justified by a showing of inordinately heavy risks which neither of the venturers is individually prepared to take, or a showing of complementary contributions which neither partner could provide alone, such as the local experience, facilities and distributing organizations of one partner and the capital and know-how of another.[205] Additionally, it states:

> Justification for joint investment by an American firm with a local partner would be clear if the foreign country concerned itself insists on the participation of local investors or penalizes foreign ownership by tax or other regulatory statutes, or if the participation of local companies is necessary or highly advantageous in the assembling of a management and labor force, in providing local capital and sales outlets, and in dealing with the local government authorities and the local financial and business communities.[206] (Footnotes omitted.)

d. *The Impact of the Clayton Act on the Joint Venture.* Foreign joint ventures must also consider the Clayton Act philosophy designed to maintain structurally competitive markets. In *United States v. Penn-Olin Chem. Co.*,[207] the Supreme Court held that domestic ventures are subject to the proscriptions of section 7. Two United States corporations, Olin Mathieson Chemical Corporation and Pennsalt Chemical Corporation, had combined to form a new company, Penn-Olin Chemical Company, to engage in the production and distribution of sodium chlorate in the southeastern portion of the United States. Since Penn-Olin had no existence prior to its formation, the defense argued that it was not "engaged also in commerce" at the time of the "acquisition" as required for section 7 jurisdiction. Speaking for the Court, Mr. Justice Clark employed some legal gymnastics in order to hurdle this obstacle:

> The test, they say, is whether the enterprise to be acquired is engaged in commerce—not whether a corporation formed as the instrumentality for the acquisition is itself engaged in commerce at the moment of its formation. We believe that this logic fails in the light of the wording of the section and

[205] Comm. on Antitrust Problems in Int'l Trade, supra note 175, at 255-56.
[206] Id.
[207] 378 U.S. 158 (1964).

> its legislative background. The test of the section is the effect of the acquisition. Certainly the formation of a joint venture and purchase by the organizers of its stock would substantially lessen competition—indeed foreclose it—as between them, both being engaged in commerce. . . . Moreover, in this case the progeny was organized to further the business of its parents, already in commerce, and the fact that it was organized specifically to engage in commerce should bring it within the coverage of § 7.[208]

Justice Clark then pointed out that Penn-Olin had been engaged in commerce long before the case had actually come to trial.[209] This was deemed significant because the economic effects, the "crucial question" under section 7,[210] are to be measured at the time of trial and not merely at the time of acquisition.[211] Whatever one may think of the logical frivolity of Justice Clark's opinion, none of his colleagues expressly challenged his interpretation.[212] Thus, there is little doubt that international joint ventures which adversely affect commerce within a "section of the country" will violate section 7. Only close analysis of *Penn-Olin* reveals the extent to which collaborative overseas expansion will produce the adverse effects upon competition in the United States and thereby violate the statute.

Olin and Pennsalt were both large chemical companies. Prior to their collaboration, Pennsalt had commercially produced and marketed sodium chlorate, principally in areas other than the southeast portion of the United States. Olin, on the other hand, had never manufactured the product, but did purchase large amounts of it for internal consumption and had acted as Pennsalt's sales agent in the Southeast under pre-venture contracts. Olin was quite familiar with this product for another reason: It had developed a patented pulp-bleaching process which required the use of sodium chlorate, and this process was used by the entire pulp and paper industry. Olin's process created an expanding demand for sodium chlorate throughout the United States and principally in the Southeast where the heaviest concentration of purchasers was located. Both Pennsalt and Olin independently considered the feasibility of constructing a sodium chlorate plant in the area, but neither had made a final decision when they formed Penn-Olin. At this time, the sodium chlorate industry was con-

208 Id. at 167-68.

209 Id. at 168.

210 See pp. 277-82 supra.

211 378 U.S. at 168.

212 Justice Douglas filed a dissenting opinion, joined in by Justice Black, in which he expressly agreed with the Court on this point. Justices White and Harlan also dissented; White wrote no opinion and Harlan merely indicated he would affirm the lower court.

centrated nationally in the hands of three companies, two of which dominated the southeast markets; new firms had not entered the industry for at least a decade.

The Supreme Court agreed with the district court that the record established no violation of the Sherman Act, but reversed its ruling on the Clayton Act count. The lower court had allowed the collaboration because it was unable to find that both Pennsalt and Olin probably would have entered the market as independent competitors.[213] In the Supreme Court's view, this interpretation of the statute was too narrow, for it failed to take into account the competitive realities of the market:

> Certainly the sole test would not be the probability that *both* companies would have entered the market. Nor would the consideration be limited to the probability that one entered alone. There still remained for consideration the fact that Penn-Olin eliminated the potential competition of the corporation that might have remained at the edge of the market, continually threatening to enter. . . . The existence of an aggressive, well equipped and well financed corporation engaged in the same or related lines of commerce waiting anxiously to enter an oligopolistic market would be a substantial incentive to competition which cannot be underestimated.[214]

Addressing itself to this latter issue, the Court characterized the industry as rapidly expanding and found this particularly true of the southeast market, where approximately one-half of the total national production of sodium chlorate was consumed. New plants were needed in the area but few companies possessed the resources, technical know-how or inclination to enter the market and challenge the two oligopolists already firmly entrenched in the market. Its analysis of the record led the Court to believe that either Olin or Pennsalt could have entered at a reasonable profit. Each consumed large quantities of sodium chlorate in the production of other chemicals and each enjoyed a good reputation and business connections with the major consumers of sodium chlorate in the area. Moreover, the Court found that each "company had compelling reasons for entering" and that "right up to the creation of Penn-Olin, each had evidenced a long-sustained and strong interest in entering the relevant market area . . . ."[215] The evidence thus suggested a strong likelihood of independent entry by both companies. In the words of the Court, the "array of probability certainly reaches the prima facie stage,"[216] yet the Justices were

[213] 378 U.S. at 172-73.
[214] Id. at 173-74.
[215] Id. at 175.
[216] Id.

not disposed to upset the district court's holding to the contrary. Instead, over the vigorous objections of Justices Douglas and Black, the Court remanded for further findings as to the reasonable probability of lone entry by one and the competitive influence which might be exerted by the other's presence at the edge of the market. The two dissenters felt, first, that the additional findings were unnecessary and, second, that the Supreme Court was as competent as the trial court to make them.[217]

In remanding, the Court stated that the same considerations apply to joint ventures as to mergers and noted generally some factors by which the trial court might assess the probability of a substantial lessening of competition:

> the number and power of the competitors in the relevant market; the background of their growth; the power of the joint venturers; the relationship of their lines of commerce; the competition existing between them and the power of each in dealing with the competitors of the other; the setting in which the joint venture was created; the reasons and necessities for its existence; the joint venture's line of commerce and the relationship thereof to that of its parents; the adaptability of its line of commerce to noncompetitive practices; the potential power of the joint venture in the relevant market; an appraisal of what the competition in the relevant market would have been if one of the joint venturers had entered it alone instead of through Penn-Olin; the effect, in the event of this occurrence, of the other joint venturer's potential competition; and such other factors as might indicate potential risk to competition in the relevant market.[218]

As thus interpreted, section 7 will have its clearest impact on foreign joint ventures which threaten to lessen competition in United States imports. Cases can easily be imagined where two or more American competitors combine jointly to form and manage a foreign extractive or manufacturing operation to supply them with the raw materials or products they further process and sell. These joint foreign establishments can affect competition within the United States in the same way and to the same extent as comparable domestic joint ventures. Similar internal effects upon United States commerce can result from "international" joint ventures which foreclose actual or potential foreign companies from this country.

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[217] The two Justices viewed the joint venture as a corporate guise to cloak a division of markets, since it had been formed on the eve of competitive projects in the southeastern market. Id. at 180-81.

[218] Id. at 177.

While it is clear that section 7 possesses the potential for significant impact on joint ventures producing import restraints, its probable role in regulating foreign joint ventures affecting United States export trade is uncertain. Previously, it was pointed out in the discussion of acquisitions and mergers that the jurisdictional criteria of section 7 may prevent the application of Clayton Act standards to export restraints.

Even if it is assumed that the statute is applicable to export restraints, the *Penn-Olin* approach is not appropriate. Apart from considerations as to the evolution of the joint venture idea and the reasons and necessities for its existence, the several lines of inquiry suggested by the Court all relate to the pre-venture and postventure status of competition in the market served by the joint enterprise. These criteria can easily be applied to joint ventures threatening import competition, but it is difficult to apply them to export restraints for they focus on the competitive effects of the arrangement in a foreign market served by the joint enterprise rather than in a "section of the country" where competition in the production of goods for export is affected. Professor Brewster's production-competition theory implementing the statutory language of section 7 requires examination of the residual effects of joint foreign investment upon the structure of domestic competition. In this respect, the element of foreclosure of rival United States exporters from sizeable foreign markets suggests itself as the most fertile avenue of exploration.

B. *Problems of Operation*

1. *Conspiracy*

a. *In General.* It is basic to the law of conspiracy that a person cannot conspire with himself. This is but another way of saying that there must be at least two persons or entities to constitute a conspiracy. When this principle is transferred to the realm of corporate life and antitrust activity, difficult and unresolved problems arise with respect to the question whether components within the same business enterprise constitute separate entities capable of conspiring with one another.

The problem arises in two distinct contexts. Business may be conducted either through a single corporate structure with unincorporated branches, divisions or departments, or through a multicorporate family where individual corporate members each conduct a portion of the overall business of the economic enterprise. The constant factor present in every case is that the corporate person cannot act at all except by and through its human personnel—be they directors, officers, employees or agents—and acts done within the scope of their authority constitute the action of the corporation. The corrolary to this principle is that the separate identities of the corporation and its personnel are

merged, with the concomitant result that action taken is performed by by a "single trader." The situation involving the multicorporate structure simply adds the variable that one corporation, a subsidiary, may act for another, its parent. Often action taken within the corporate structure of either enterprise operates to regulate the freedom of action and hence the trade of its component members as well as to impose restraints on outside firms. The question presented is what antitrust significance is to be ascribed to this activity.

The question is highly complex and the answer obscure. Much depends upon the precise statute involved and the substantive offense charged. For example, Section 2 of the Sherman Act not only forbids combinations and conspiracies to monopolize, but also makes it a substantive offense to monopolize or attempt to monopolize any part of the trade or commerce among the several states or with foreign nations. In its latter aspects, it can be violated by a single trader and it is clear that the corporate personnel who are responsible for the monopolization may be held guilty of a conspiracy to monopolize, for: "It has long been the law that where a corporation commits a substantive crime, the officers and directors who participated in the illicit venture are guilty of criminal conspiracy."[219] The same reasoning leads to the conclusion that a multicorporate family can be guilty of an illegal conspiracy where the monopoly scheme is effectuated by a parent corporation and its subsidiaries.[220]

Section 1 of the Sherman Act, on the other hand, is a substantially different kind of statute. It does not declare restraint of trade a substantive offense but condemns only contracts, combinations and conspiracies to restrain unreasonably the interstate or foreign commerce of the United States. Accordingly, it does not follow as a matter of logic that the concerted activity of corporate personnel on behalf of their corporation or of subsidiaries on behalf of their parent constitutes a violation of section 1. Indeed, it is generally conceded that concerted action by the members of a single business enterprise is not a contract, combination, or conspiracy within the meaning of the statute. But this conclusion is deceptively simple for considerable problems arise in defining "the business enterprise" and the courts have held that members of the same economic enterprise may possess legal capacity to conspire with each other in violation of section 1.

Conspiracies involving intrafamilial actors can arise in any of three situations:

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[219] S. Oppenheim, Federal Antitrust Laws, Cases and Comments 284 (1959), citing Egan v. United States, 137 F.2d 369 (8th Cir.), cert. denied, 320 U.S. 788 (1943), Minisohn v. United States, 101 F.2d 477 (3d Cir. 1939), and Barron v. United States, 5 F.2d 799 (1st Cir. 1925).

[220] Id.

(a) conspiracy between a corporation and its branches, divisions, departments, or employees or between the corporation's branches, divisions, departments or employees acting on its behalf;

(b) conspiracy between a parent and its subsidiaries or between two or more subsidiaries; and

(c) conspiracy between two or more corporations, the stock of each of which is owned by the same natural person or persons.[221]

These three are commonly lumped together and indiscriminately called either "intracorporate" or "intraenterprise" conspiracies. This grouping has, however, caused some confusion, for it fails to recognize basic distinctions between the first situation—involving only one corporate entity—and the last two—involving more than one corporation. It will therefore not be used here. A distinction shall be drawn between the "intracorporate" conspiracy on the one hand and the "intraenterprise" conspiracy on the other. The first situation, since it involves only one entity will be referred to as the "intracorporate" conspiracy; since both the second and third involve the combination of two or more corporations and raise essentially the same issues, they will be referred to collectively as "intraenterprise" conspiracies.

b. *Intracorporate Conspiracy*. There is little federal authority discussing the intracorporate conspiracy problem.[222] The Supreme Court has yet to decide whether a corporation has the capacity to conspire with its employees or component parts, or whether they have the capacity to conspire among themselves, in violation of Section 1 of the Sherman Act.[223] The question has, however, come before the lower

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[221] This categorization is based upon Att'y Gen. Rep. 30 (1955).

[222] There are cases under state antitrust laws upholding the validity of a charge that a corporation and two or more of its officers can conspire in restraint of trade. The leading case is Standard Oil Co. v. State, 117 Tenn. 618, 100 S.W. 705 (1907). It involved an appeal by Standard Oil Company and its officers from a conviction for "making an unlawful contract . . . for the purpose and with a view to lessen full and free competition in the sale of coal oil . . ." in violation of the Tennessee antitrust law. Id. at 626, 100 S.W. at 706. The court held that a corporation and its officers "can both be considered and counted in the two or more necessary to constitute an unlawful conspiracy." Id. at 667, 100 S.W. at 717. Additional cases are collected in Kramer, Does Concerted Action Solely Between a Corporation and its Officers Acting on its Behalf in Unreasonable Restraint of Interstate Commerce Violate Section I of the Sherman Act? 11 Fed. B.J. 130, 135 n.10 (1951).

[223] In Schine Chain Theatres, Inc. v. United States, 334 U.S. 110 (1948), the Supreme Court sustained the district court's finding that the defendants, a corporation, its officers and subsidiaries, had conspired with each other and with outsiders, saying: "The concerted action of the parent company, its subsidiaries, and the named officers and directors in that endeavor was conspiracy which was not immunized by reason of the fact that the members were closely affiliated rather than independent." Id. at 116.

federal courts and appears to be fairly well resolved. While a few early decisions found capacity did exist,[224] the weight of more recent authority is opposed to use of the intracorporate conspiracy doctrine.[225] In *Nelson Radio & Supply Co. v. Motorola, Inc.*,[226] the plaintiff distributor brought a treble damage action against his former supplier, alleging that the latter's termination of plaintiff's franchise for his refusal to agree not to deal in the products of a competitor violated both Section 1 of the Sherman Act and Section 3 of the Clayton Act.[227] The complaint charged that the defendant corporation conspired with its president, sales manager, officers, employees, representatives and agents, who were actively engaged in the management, direction and control of the affairs and business of the corporation. In affirming the

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While this language could be interpreted as an implied recognition of the validity of the intracorporate conspiracy doctrine, such an interpretation is certainly tenuous. It can just as well be argued that the Supreme Court was here approving the intraenterprise conspiracy, not the intracorporate conspiracy doctrine, especially since the Court cited United States v. Yellow Cab Co., 322 U.S. 218 (1947) and United States v. Crescent Amusement Co., 323 U.S. 173 (1944), both of which involved intraenterprise conspiracies. At best, the *Schine* language is ambiguous and cannot be read as either approving or rejecting the intracorporate conspiracy doctrine.

[224] Patterson v. United States, 222 F. 599 (6th Cir.), cert. denied, 238 U.S. 635 (1915), upheld the conviction and sentences of corporate personnel charged with conspiracy in restraint of trade and conspiracy to monopolize. The corporation was not named as a defendant. The employees had engaged in predatory practices including business libel and larceny. In the course of its opinion, the court said:

> The section [§ 2 of the Sherman Act] includes conspiracies between competitors, or between the officers and agents of a competitor on its behalf against a competitor. But it is not limited to such conspiracies. It includes also conspiracies between any persons, whoever they may be, against any other person. It is not essential that the execution of the conspiracy be of any benefit to the conspirators. It is sufficient that it will be in restraint of another's interstate trade or commerce. . . . Clearly, then, a conspiracy between the officers and agents of one competitor on its behalf in restraint of a single interstate sale or shipment of another competitor is covered by it.

222 F. at 618-19.

In White Bear Theatre Corp. v. State Theatre Corp., 129 F.2d 600 (8th Cir. 1942), plaintiff brought a treble damage action against a corporation and its officers, operating the only theatre in town, for conspiring to monopolize and attempting to obtain a monopoly of "first-run" pictures in the town. Without discussion of the point here involved, the court reversed a judgment for the defendants and remanded the case for a new trial.

[225] Gordon v. Illinois Bell Tel. Co., 33 F.2d 103 (7th Cir.), cert. denied, 379 U.S. 909 (1964); Mackey v. Sears, Roebuck & Co., 237 F.2d 869 (7th Cir. 1956); Nelson Radio & Supply Co. v. Motorola, Inc., 200 F.2d 911, 914 (5th Cir. 1952), cert. denied, 345 U.S. 925 (1953); South End Oil Co. v. Texaco, Inc., 237 F. Supp. 650 (N.D. Ill. 1965); Schoenberg Farms, Inc. v. Denver Milk Producers, Inc., 231 F. Supp. 266 (D. Colo. 1964); Herren Candy Co. v. Curtiss Candy Co., 153 F. Supp. 751, 755 (N.D. Ga. 1957); Marion County Co-Op. Ass'n v. Carnation Co., 114 F. Supp. 58, 62-63 (W.D. Ark. 1953), aff'd, 214 F.2d 557 (8th Cir. 1954); Brehm v. Goebel Brewing Co., 1953 Trade Cas. ¶ 67,431 (W.D. Mich. 1953); Arthur v. Kraft-Phenix Cheese Corp., 26 F. Supp. 824 (D. Md. 1937).

[226] 200 F.2d 911 (5th Cir. 1952), cert. denied, 345 U.S. 925 (1953).

[227] Id. at 912.

district court's dismissal of the complaint, the court looked at the "unique group of conspirators" and said:

> It is basic in the law of conspiracy that you must have two persons or entities to have a conspiracy. A corporation cannot conspire with itself any more than a private individual can, and it is the general rule that the acts of the agent are the acts of the corporation.[228]

Noting the absence of an allegation that the officers, agents and employees were actuated by any motives personal to themselves, the court concluded they were acting only for the defendant corporation. It also recognized that the acts of the corporate officers may bring a single corporation within Section 2 of the Sherman Act, but it explained that "this is not because there exists in such circumstances, a conspiracy to which the corporation is a party" but because their acts may constitute "an attempt to monopolize." Additionally, the court admitted that a corporation may conspire with its subsidiaries but stated this was so because the combination involved separate corporate entities. Finding neither situation present, the court concluded:

> [I]t appears plain to us that the conspiracy upon which plaintiff relies consists simply in the absurd assertion that the defendant, through its officers and agents, conspired with itself to restrain its trade in its own products. Surely discussions among those engaged in the management, direction and control of a corporation concerning the price at which the corporation will sell its goods, the quantity it will produce, the type of customers or market to be served, or the quality of goods to be produced do not result in the corporation being engaged in a conspiracy in unlawful restraint of trade under the Sherman Act.[229]

The *Nelson* decision was not, however, unanimous. Judge Rives

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[228] Id. at 914. The Clayton Act count was also dismissed because the plaintiff's distributor-franchise agreement had already expired at the time the defendant corporation ceased doing business with plaintiff:

> Section 3 of the Clayton Act, by its express terms, covers only leases, sales, or contracts actually made on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods of a competitor of the lessor or seller. There is nothing whatever in the Act to suggest that it cover a situation where the manufacturer refuses to make a sale or enter into a contract, and it has been stated time and again that a manufacturer has the unquestioned right to refuse to deal with anyone for reasons sufficient to himself. [Citing United States v. Colgate & Co., 250 U.S. 300 (1919), and other cases] . . . . The plaintiff has not been injured as a result of a contract, either express or implied, which sought to prevent him from dealing in the goods of any competitor of the defendant.

Id. at 915-16.

[229] Id. at 914.

regarded the action of the defendant corporation in coercing its dealers into agreeing not to deal in the goods of a competitor as a restraint of trade and a clear violation of the Clayton Act. Under such circumstances he felt it wrong to protect the defendant with "the cloak of immunity of a single corporate entity."[230] The majority, he complained, would have no trouble in sustaining the sufficiency of the complaint if two corporate entities had been involved: for example, if one corporation manufactured the equipment and a subsidiary or separate corporation attended to its sales and distribution. This, he argued, was paying too much attention to form and not enough to substance.[231] "At long last a method has been found to flout the purposes of the antitrust laws and to deny the victims any recourse to the courts."[232]

The two opinions in *Nelson* amply depict the conflict on the intracorporate conspiracy issue. What is overly formalistic to one side is clear black-letter law to the other. Consequently, the intracorporate conspiracy doctrine has been sharply criticized by some[233] and approved by others.[234] As indicated above, however, the present weight of judicial authority seems to be opposed to the doctrine.

The Justice Department has generally refrained from bringing charges of conspiracy against a single corporation[235] and has even conceded in oral argument that the Sherman Act is not applicable.[236] Recently, however, Chief Judge Pence of the United States District Court for the District of Hawaii applied the doctrine to the unique facts of *Hawaiian Oke & Liquors, Ltd. v. Joseph E. Seagram & Sons*,

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230 Id. at 916.

231 Professor Handler has used the same reasoning to come to exactly the opposite conclusion—to hold it possible for a parent to conspire with its subsidiary while recognizing the impossibility of the intracorporate conspiracy "is to sacrifice substance for mere form." Handler, Contract, Combination or Conspiracy, 3 A.B.A. Sec. of Antitrust Law 38, 47 (1953).

232 200 F.2d at 916.

233 See, e.g., Adelman, Effective Competition and the Antitrust Laws, 61 Harv. L. Rev. 1289, 1314-17 (1948); Rahl, Conspiracy and the Antitrust Laws, 44 Ill. L. Rev. 743, 763, 765 (1950).

234 See, e.g., Kramer, supra note 222; Note, 72 Harv. L. Rev. 920, 1000-05 (1959).

235 But see United States v. Times-Picayune Publishing Co., 105 F. Supp. 670 (E.D. La. 1952), rev'd, 345 U.S. 594 (1953), and United States v. Lorain Journal Co., 92 F. Supp. 794 (N.D. Ohio 1950), aff'd, 342 U.S. 143 (1951), in both of which the Department of Justice charged conspiracies solely between a corporation and its officers. In *Lorain Journal*, the district court found for the Government under an alternative § 2 charge and refused to decide the § 1 question. In *Times-Picayune*, the Government dropped the § 1 conspiracy charge before the final argument in the district court. See also Schine Chain Theatres, Inc. v. United States, 334 U.S. 110 (1948).

236 In his dissenting opinion in Timken Roller Bearing Co. v. United States, 341 U.S. 593, 606 (1951), Mr. Justice Jackson pointed out that the Government "admitted that if Timken had, within its own corporate organization, set up separate departments to operate plants in France and Great Britain, as well as in the United States, 'that would not be a conspiracy.'" Id. For the exchange between Court and counsel regarding this matter see 19 U.S.L.W. 3292-93 (1951).

Inc.[237] The case presented an issue of first impression since it dealt with the validity of an alleged horizontal conspiracy among the unincorporated divisions of a single corporation to boycott the plaintiff. The court distinguished the line of cases dismissing intracorporate conspiracy complaints on the ground that they concerned themselves solely with the vertical relationship between the parent and its divisions. In this context it made sense to say that a corporation and its unincorporated divisions are but one entity in a court of law. Historically and legally a corporation is deemed a person "and normally so personified as if a man, a creature with but one brain, one medium of thought and action . . . ."[238] But all corporations are not, in fact, persons with one brain, one nerve center at which decisions are reached. Some corporate structures consist of a parent and incorporated subsidiaries, each one an entity capable of conspiring with others and with each other:

> The question, then, is what, if any, magic occurs when the paper partition is removed. Is a business group which chooses to organize as a single corporation with unincorporated divisions automatically cast in the form of a normal person? Or may we have a corporate "person" in the form of a multiheaded Siva, or as portrayed by Dali or Artzybasheff?[239]

To Judge Pence, the answer was simple: "There is nothing sacrosanct about the 'unincorporated' aspect of corporate divisions. To hold otherwise would give businessmen the power to avoid the proscriptions of the antitrust laws by the fortuitous employment of alert legal counsel."[240] The critical question is factual and depends upon the ability of the division to act independently in the relevant business activity:

> Is each facet of the unincorporated division's operation in fact, for all purposes, controlled and directed from above, or is it endowed with separable, self-generated and moving power to act in the pertinent area of economic activity? This is the key question. If the division operates independently in directing the relevant business activity, then it is a separate business entity under the antitrust laws.[241] (Footnote omitted.)

To the extent that one is willing to accept the propriety of the intraenterprise conspiracy doctrine which states that corporate entities within the same business enterprise can conspire among them-

237 5 Trade Reg. Rep. (1967 Trade Cas.) ¶ 72,186 (D. Hawaii July 24, 1967).
238 Id. at 84,261.
239 Id.
240 Id. at 84,262.
241 Id. at 84,261-62.

selves, *Hawaiian Oke* must be accepted. Whenever unincorporated branches, divisions or departments function in the same manner as subsidiaries possessing and exercising distinct control over specific business functions, it is foolish to seize upon the lack of incorporation in one instance and its presence in another to deny and affirm conspiratorial capacity and action. The important point to note is that *Hawaiian Oke* expressly disaffirms vertical conspiracies between the parent and its divisions and thus poses no threat to normal centralized planning activity.

Quite apart from *Hawaiian Oke* there is another instance in which the elements of a conspiracy may be found within the internal operations of a corporation. In *Nelson*, the court expressly intimated that a conspiracy may exist between a corporation and its officers or agents who are actuated by motives personal to themselves and act in other than their normal capacity while performing services for the corporation.[242] Strictly speaking, conspiracies of this kind are not intracorporate conspiracies since they depend upon the corporation's collaboration with independent persons. Nevertheless, they are closely analogous to intracorporate conspiracies and are generally discussed in connection with the doctrine since they involve the internal combination of actors within the corporate structure.

An unorthodox conspiracy case of this genre was presented to the Supreme Court in *Poller v. Columbia Broadcasting Sys., Inc.*[243] A national broadcasting company cancelled its affiliation contract with the plaintiff, the owner of a local television station, and purchased the station of the plaintiff's competitor. The plaintiff sued the corporation, its unincorporated division, and two divisional officers, alleging that they had unlawfully conspired to put him out of business. The district court granted the corporation's motion for summary judgment, apparently on the ground that as there was but one corporate entity there could be no finding of conspiracy.[244] In the view of the Supreme

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[242] In *Nelson*, the court noted that it was not "alleged affirmatively, expressly, or otherwise, that these officers, agents, and employees were actuated by any motives personal to themselves" and concluded that "[o]bviously, they were acting only for the defendant corporation." It later stated, "In the absence of any allegation whatever to indicate that the agents of the corporation were acting in other than their normal capacities, plaintiff has failed to state a cause of action based on conspiracy under Section 1 of the Act." 200 F.2d at 914. See also Gordon v. Illinois Bell Tel. Co., 330 F.2d 103, 107 (7th Cir.), cert. denied, 379 U.S. 909 (1964); Schoenberg Farms, Inc. v. Denver Milk Producers, Inc., 231 F. Supp. 266, 269-70 (D. Colo. 1964); Marion County Co-Op. Ass'n v. Carnation Co., 114 F. Supp. 58, 63 (W.D. Ark. 1953), aff'd, 214 F.2d 557 (8th Cir. 1954).

[243] 368 U.S. 464 (1962). rev'g 284 F.2d 599 (D.C. Cir. 1960) and 174 F. Supp. 802 (D.D.C. 1959).

[244] The basis of the court's opinion is unclear. It simply reasoned that under the doctrine of United States v. Colgate & Co., 250 U.S. 300 (1919), and the termination clause of the plaintiff's affiliation contract, the defendant corporation was within its

Court, however, the question was not whether a corporation could conspire with itself, but whether there had been a conspiracy between the corporation and certain independent parties.[245] One of the persons whom the Supreme Court suggested as a possible conspirator was a management consultant who had been acting as a special agent of the corporation.[246] The Court felt that the status of this person as an independent actor or special agent or employee of the corporation should have been submitted to the jury. Thus, under *Poller*, a corporation's capacity to conspire with its agents or employees depends on the relationship of an individual to the corporation in a given situation—a relationship to be determined as a matter of fact rather than of law. The difficult problem in the language of the *Nelson* and *Poller* cases lies in determining the extent of its applicability. It has been suggested that a finding of separability of persons can be made where the acts of the board of directors or the officers are ultra vires, for in such a situation the directors or officers are certainly not acting within the scope of their authority, and an even stronger case would exist where the corporation is legally powerless to authorize or ratify such activity.[247] But this position is untenable. Consider, for example, the case of the corporate officers who think they are acting on behalf of the corporation but whose actions are ultra vires. It certainly cannot be said that they intended to act on their own behalf or on behalf of anyone other than the corporation. Though their actions may be outside their authority and beyond the corporation's power of ratification, they are still actions done on behalf of the corporation. In these circumstances, it is difficult to see how there is, or could be, in fact or law, any severability of persons.

The corporate official who intends to act on behalf of the corporation cannot be treated as an outsider for the simple reason that he asserts no independent interest or position. A different situation is posed

rights in cancelling plaintiff's contract and in purchasing the facilities of plaintiff's competitor, so long as it did not engage in any conspiracy to put plaintiff out of business. The court must have held that there was no conspiracy but it never said so. It is therefore impossible to know the precise reasons why the court felt there was no conspiracy.

[245] 368 U.S. at 469. "It is argued that CBS cannot conspire with itself. However, this begs the question for the allegation is that independent parties, *i.e.*, Holt and Bartell, conspired with CBS and its officers." Id. (footnote omitted).

[246] Holt, who was considered by the Court to be a possible conspirator, had been retained by CBS, the corporate defendant, to obtain an option to purchase the television station of plaintiff's competitor. If the FCC amended its multiple ownership rules so as to enable CBS to purchase additional television stations, Holt was to assign his option to CBS if CBS so elected. If the FCC did not amend its rules, or if CBS did not elect to take up Holt's option, then it was contemplated that Holt would operate as an affiliate station in the CBS television network.

[247] Devine, Foreign Establishment and the Antitrust Law: A Study of the Antitrust Consequences of the Principle [sic] Forms of Investment by American Corporations in Foreign Markets, 57 Nw. U.L. Rev. 400, 415 (1962).

by the corporate official who acts both on behalf of the corporation and in his own interest. But here too, his actions are still basically corporate acts, at least under the corporate opportunity and related doctrines of corporate law requiring corporate personnel to place the corporate good above their own.[248] Perhaps the only situation where there is a true factual severability of persons exists when the corporate official acts *solely* in his own behalf but somehow manages to induce corresponding corporate action. It is doubtful whether these situations occur with any regularity or, indeed, that they occur at all. If they do, they most probably involve the collaboration of two or more corporate officials who, it would seem, are merely using the corporation to accomplish their personal ends. Under these circumstances there is no more a meeting of the corporate mind with the minds of the individual actors than there would be if two corporate officers murdered their company's chief competitor. Without some meeting of the corporate and individual minds there is no conspiracy involving the corporation. Even the implied conspiracy cases based upon consciously parallel business practices do not claim that conscious parallelism alone is a legal substitute for conspiracy.[249] In the hypothetical posed here it is questionable whether there exists any corporate consciousness at all, and, since only one corporation is involved, it is also doubtful whether there is any parallelism within the meaning of the conscious parallelism doctrine.

The problem with the intracorporate and related conspiracy doctrines has been quite properly placed in its proper economic perspective:

> All concerted action by two natural persons could be a "combination," but this reading would be socially inconvenient and historically surprising. So long as the business enterprise is regarded as an individual economic unit, it must be permitted to act. To say that a single corporation acting unilaterally cannot "combine" with itself is necessarily to say that it cannot "combine" with its officers or employees who are its only means for acting.[250]

While there is thus considerable difficulty in finding a basis on which it can be claimed that a corporation has "combined" with its own officers or employees, there is no such difficulty in finding a conspiratorial relationship between the corporation and an outside agent. The

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248 See H. Ballantine, Corporations §§ 66-71 (rev. ed. 1946).

249 Compare United States v. Masonite Corp., 316 U.S. 265 (1942), and Interstate Circuit, Inc. v. United States, 306 U.S. 208 (1939), with Theatre Enterprises, Inc. v. Paramount Film Distrib. Corp., 346 U.S. 537 (1954), and Delaware Valley Marine Supply Co. v. American Tobacco Co., 297 F.2d 199 (3d Cir. 1961).

250 P. Areeda, Antitrust Analysis 236 (1967).

outside agent, unlike the usual officer or employee "may have distinct and independent interests that permit him to 'combine' with his principal."[251]

On the basis of present authority it seems clear that no antitrust liability results from the exercise of normal central management control within the corporation. The single corporate enterprise is relatively free from internal conspiracy problems. Indeed, at least one source has concluded:

> When a company conducts its business through branches, divisions, or departments rather than separately incorporated subsidiaries, business arrangements between those branches, divisions, or departments ordinarily go unchallenged under the antitrust laws. In effect, unincorporated components are free to agree among themselves as to the price at which they will sell, the territories in which they will sell, and the classes of customers to whom they will sell.[252]

Hawaiian Oke marks the sole departure from this principle. That case, as we have seen, involved the abnormal situation where divisions both possessed independent marketing discretion and acted on their own without direction from above. Even if its validity is conceded, it clearly poses no threat to foreign expansion and no barrier to the exercise of normal management control within a single corporate enterprise.[253]

c. *Intraenterprise Conspiracy*. Where the overseas establishment is accomplished by the acquisition or formation of a wholly or partially owned subsidiary corporation a substantially different problem arises because there are here two legally separate entities. The threshold conspiracy problem arises when the American parent formulates policy for the multicorporate family as a whole. Its centralized planning activities will be designed to maintain noncompetitive peace within the family. Hence its directives will usually have the effect of dividing territories, fixing prices, and regulating production among its con-

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[251] Id. at 237.

[252] H. Blake & R. Pitofsky, Cases and Materials on Antitrust Law 435 (1967).

[253] See Brewster, supra note 22, at 181 where it is stated:

> If such foreign expansion is done by a branch or division of the American corporation without separate incorporation, there is no basis for liability under section 1, even though it is contemplated and in fact works out to divide territories, fix prices, and regulate output internally so that the home office and the foreign branch do not disturb each other's markets. There is only one legal entity, and it takes at least two to make a conspiracy.

See also United States v. Minnesota Mining & Mfg. Co., 92 F. Supp. 947, 962 (D. Mass. 1950), where the court stated its decree would expressly allow the American corporation individually to establish and operate foreign factories.

stituents in a manner that will assure they will not disturb each other's markets. Although these arrangements unite components within a single business enterprise, they differ from those previously discussed simply because they exist between two or more legally separate "persons." Under the admonition that the antitrust laws are concerned with substance not form, the courts have sometimes held that a parent can combine with its subsidiaries and the subsidiaries can conspire among themselves. Because the intraenterprise conspiracy doctrine has apparently become an established part of antitrust law, there is the possibility that foreign operations conducted through a wholly or partially owned subsidiary will result in violations of the Sherman Act.

While there are no foreign commerce cases expressly applying the intraenterprise conspiracy doctrine, there is no reason to distinguish between foreign and domestic corporations on this point. Moreover, there is language in both the majority and minority opinions in *Timken Roller Bearing Co. v. United States*[254] which indicates that the doctrine applies in foreign commerce cases. In *Timken*, American Timken owned one-third of British Timken, and they in turn each owned 50 percent of the stock of French Timken. Mr. Justice Black, speaking for the Court, first found that the agreements between American Timken, British Timken, and their jointly owned subsidiary, French Timken, unreasonably restrained trade and then said: "The fact that there is common ownership or control of the contracting corporations does not liberate them from the impact of the antitrust laws."[255] In his dissent, Mr. Justice Jackson interpreted the Court's opinion to apply

> the well-established conspiracy doctrine that what it would not be illegal for [American] Timken to do alone may be illegal as a conspiracy when done by two legally separate persons. The doctrine now applied to foreign commerce is that foreign subsidiaries organized by an American corporation are "separate persons," and any arrangement between them and the parent corporation to do that which is legal for the parent alone is an unlawful conspiracy.[256]

Justice Jackson felt that this result placed too much weight on labels.

Mr. Justice Black's statement on behalf of the majority was not essential to the decision of the case before the Court nor to any analysis of its holding. Not only was American Timken's ownership of British Timken during the period complained of less than a majority, but the record showed, and the district court had held, that American Timken, British Timken, and French Timken were not only "legally separate"

254 341 U.S. 593 (1951).
255 Id. at 598.
256 Id. at 606-07.

entities, but were in fact separately controlled.[257] Moreover, the stock acquisitions in the foreign companies were probably illegal in themselves.[258] Nevertheless, Supreme Court dicta and dissenting opinions' interpretations of majority opinions cannot be taken lightly. The implications of the *Timken* language must be considered by all who would conduct overseas operations through the means of foreign subsidiaries or joint ventures. For this reason, an examination of the domestic precedents giving rise to the intraenterprise conspiracy doctrine should be made.

The notion first appeared in *United States v. General Motors Corp.*,[259] where the court disapproved of the tying of General Motors Acceptance Corporation financing to General Motors automobiles.[260] There, the court stated that where subsidiaries operate as separate legal entities—having different charter powers, different officers, separate bank accounts and contracts with each other—they cannot escape the Sherman Act by insisting that they are in effect a "single trader."

Next came *United States v. Crescent Amusement Co.*,[261] where the Supreme Court, in sustaining a divestiture order entered by the district court, remarked that the affiliation of the defendants induced joint action, and said that "[c]ommon control was one of the instruments in bringing about unity of purpose and unity of action and in making the conspiracy effective."[262]

The intraenterprise theory gained further impetus in *United States v. Yellow Cab Co.*,[263] where the Supreme Court said:

> The test of illegality under the Act is the presence or absence of an unreasonable restraint on interstate commerce.

[257] United States v. Timken Roller Bearing Co., 83 F. Supp. 284, 311 (N.D. Ohio 1949).

[258] P. Areeda, supra note 250, at 239.

[259] 121 F.2d 376 (7th Cir.), cert. denied, 314 U.S. 618 (1941).

[260] A violation of Section 3 of the Clayton Act was not charged because financing falls outside the purview of that section's prohibition of tying arrangements on "goods, wares, merchandise, machinery, supplies or other commodities." 15 U.S.C. § 14 (1964).

[261] 323 U.S. 173 (1944). This was an action brought against nine affiliated companies operating motion picture theaters in some 70 small towns in Alabama, Arkansas, Kentucky and Tennessee, certain officers of these companies, and eight major distributors of motion picture films, charging them with violations of §§ 1, 2 of the Sherman Act. Crescent Amusement Company, the principal exhibitor, owned 50% of the stock of two of the defendant exhibitors, and, prior to 1937, two-thirds of the stock of another, which at the time of the suit was being run as a partnership by the majority stockholders of Crescent. One of the majority stockholders of Crescent was also the record holder of all of the stock of another exhibitor, Rockwood Amusement Company, which, in turn, owned 50% of the stock of two other defendant exhibitors. Rockwood itself was actually being run as a "virtual branch" of Crescent. Another 1944 case which raised intraenterprise conspiracy issues is United States v. Bausch & Lomb Optical Co., 321 U.S. 707, 723 (1944).

[262] 323 U.S. at 189.

[263] 332 U.S. 218 (1947).

> Such a restraint may result as readily from a conspiracy among those who are affiliated or integrated under common ownership as from a conspiracy among those who are otherwise independent. Similarly, any affiliation or integration flowing from an illegal conspiracy cannot insulate the conspirators from the sanctions which Congress has imposed. The corporate interrelationships of the conspirators, in other words, are not determinative of the applicability of the Sherman Act.[264]

The Court found the common ownership and control of the various corporations irrelevant to any Sherman Act considerations.[265]

Despite the obvious intendment of this language, *Yellow Cab* has been construed by many notable authorities as not being an internal conspiracy case. In *Yellow Cab* a single stockholder succeeded in gaining control of a large cab manufacturing company and a series of metropolitan cab operating companies.[266] The manufacturing company and the operating companies agreed among themselves that the operating companies would purchase cabs only from the manufacturing company, thereby excluding competing cab makers and perhaps raising the price of cabs and taxi service. Addressing itself to the Government's charge that "the restraint of interstate trade was not only effected by the combination of the appellees but was the primary object of the combination,"[267] the Court remarked that "[t]he theory of the complaint . . . is that 'dominating power' over the cab operating companies 'was not obtained by normal expansion to meet the demands of a business growing as a result of superior and enterprising management, but by deliberate, calculated purchase for control.' "[268] This characterization of the Government's case has led some to believe that the Court viewed predatory acquisition as the gravamen of the charge; the mutually supporting policies after acquisition merely bore out its original purpose.[269] This interpretation is supported by the decisions after trial on remand. The district court found that the operating companies had not been acquired with any deliberate or calculated purpose to control their cab purchases and that no compulsion had been exercised to control such purchases, and judgment for the defendants was affirmed by the Supreme Court.[270] Thus, it has been argued that

264 Id. at 227.

265 Id.

266 The cab operating company did 86% of the business in the Chicago market, 100% in Pittsburgh, 58% in Minneapolis, and 15% in New York.

267 332 U.S. at 227.

268 Id. at 227-28.

269 Brewster, supra note 22, at 184.

270 United States v. Yellow Cab Co., 80 F. Supp. 936 (N.D. Ill. 1948), aff'd, 338 U.S. 338 (1949).

the case is not an internal conspiracy case and that the Government failed because of its inability to establish the predatory intent of the original acquisitions.[271]

Both the *Crescent Amusement* and *Yellow Cab* cases were cited and relied upon by the Supreme Court in *Schine Chain Theatres, Inc. v. United States*,[272] which held that a motion-picture-theater company and five of its wholly owned subsidiaries had violated Sections 1 and 2 of the Sherman Act, notwithstanding the fact that they were affiliated.[273] Later, financial bite was added by *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*,[274] in which a wholesale liquor dealer in Indiana was permitted to recover treble damages from the nation's largest distilling enterprise on a claim that its wholly owned subsidiaries, House of Seagram, Inc. and Calvert Distillers Company, had conspired to fix maximum resale prices for wholesalers in Indiana and to sell only to concerns which agreed to these prices. Seagram and Calvert were independently managed and were considered by the court of appeals to be competitors, particularly because they pursued independent policies except in this instance. In allowing recovery the Supreme Court said:

> Respondents next suggest that their status as "mere instrumentalities of a single manufacturing-merchandizing unit" makes it impossible for them to have conspired in a manner forbidden by the Sherman Act. But this suggestion runs counter to our past decisions that common ownership and control does not liberate corporations from the impact of the antitrust laws. [Citing *Yellow Cab*.] The rule is especially applicable where, as here, respondents hold themselves out as competitors.[275]

Kiefer-Stewart, like *Yellow Cab* on which it relied, involved conduct far beyond the normal centralized management of separate subsidiaries.[276] In the first place, it has been suggested that the restraint

271 Brewster, supra note 22, at 184.

272 334 U.S. 110 (1948).

273 The nature of the violation was that the theater chain, because of its unitary bargaining power, had been enabled, in negotiating with distributors of motion pictures, to obtain advantages over competing theaters in first-runs, clearance and minimum admission charges.

274 340 U.S. 221 (1951), rev'g 182 F.2d 228 (7th Cir. 1950).

275 340 U.S. at 215. It is not entirely clear what the Court meant by its statement that Seagram and Calvert held themselves out as competitors. Presumably, their distributors knew they were purchasing from a single corporate family. P. Areeda, supra note 250, at 238 (1967). Nevertheless, "the notion of expanded antitrust liability where affiliated companies adopt a competitive posture is consistent with an old line of cases under Section 5 of the Federal Trade Commission Act . . . ." H. Blake & R. Pitofsky, supra note 252, at 438.

276 Brewster, supra note 22, at 183. The argument presented in the text at this point is based on Professor Brewster's analysis.

was in essence a partial "tying" of the two brands since one could not be bought without acquiescing in the demands for the other. Second, the record indicates that this "tie" was arrived at, not in the normal course of management by the head of the corporate family, but by the two subsidiaries acting on their own without direction from their corporate parent. To this extent, the restraint was the result of an exceptional special agreement entered into by independently managed and apparently competing entities to act together in this particular instance. These factors have led some to the conclusion that *Kiefer-Stewart* does not declare objectionable the normal centralized planning of a multicorporate enterprise, but simply outlaws practices which join the products of separate entities by tying, requirements or full-line forcing arrangements.

It does not appear that this interpretation is sound. In the first place, there was no tying agreement and the Court did not find one.[277] Indeed, it does not appear that the Court was at all aware of any "partial tying" problem. In the second place, the case was treated as a price-fixing case in which the Court declared unlawful "an agreement among competitors to fix maximum resale prices of *their* products" on the ground that "such agreements, no less than those to fix minimum prices, cripple the freedom of traders and thereby restrain their ability to sell in accordance with *their* own judgment."[278] (Emphasis added.) Grammatically, it is clear from the use of the plural pronoun that the arrangement was condemned not because it was the unlawful act of a single trader, but because of the internal restraints it placed upon the pricing initiative of the contracting parties. It might be argued that the Court was here expressing, perhaps inarticulately, its concern over the plight of the plaintiff wholesaler who was "collectively" boycotted because it persisted in charging high prices unsatisfactory to Seagram and Calvert. But this does not provide the basis for the Court's opinion which expressly states: "Seagram and Calvert acting individually perhaps might have refused to deal with petitioner or with any or all of the Indiana wholesalers. But the Sherman Act makes it an offense for respondents to agree among themselves to stop selling to particular customers."[279] Quite clearly, it was the internal restraint agreed to by Seagram and Calvert, rather than the external restraint imposed upon the plaintiff, which condemned

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[277] Technically, it is not a tying arrangement since purchasers were not required to buy one product in order to purchase another. A tying arrangement has been defined by the Supreme Court as "an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier." Northern Pac. Ry. v. United States, 356 U.S. 1, 5-6 (1958).

[278] 340 U.S. at 213.

[279] Id. at 214.

the conduct. Finally, there is another aspect of the case, one which helps to explain the result and the Court's conclusion that Seagram and Calvert should not be allowed to have it both ways: The Court did intimate the view that if two or more commonly owned subsidiaries hold themselves out as independent competitors they should not be allowed to agree among themselves to control that competition.

Despite the limited factual application of the *Yellow Cab* and *Kiefer-Stewart* cases, they have given rise to a judicial slogan whose implication has long since exceeded the bounds of the facts and the theory of the initial cases. The *Timken* decision furnishes us with an excellent example of this; it came shortly after *Kiefer-Stewart* and relied upon it for the proposition that common control of the conspirators does not free them from the antitrust laws. Yet, as shown above, *Timken* did not present a real intraenterprise conspiracy problem, and the Court's statements to that effect may be merely dicta.[280]

The several intraenterprise conspiracy cases are a source of great confusion. Some observers find in the decisions one significant fact, namely that the Court has always put the proposition in the negative:[281] The defendants cannot escape the consequences of a combination in restraint of trade by insisting that they are one person;[282] the fact that restraints occur in a vertically integrated enterprise does not necessarily remove the bar of the Sherman Act;[283] any integration flowing from an illegal conspiracy cannot insulate the conspirators from the Act;[284] corporate interrelationships are not determinative of the applicability of the Act;[285] concerted action was not immunized by reason of the fact that members were closely affiliated rather than independent;[286] common ownership and control do not liberate corporations from the impact of the Act.[287]

From this negative approach it is concluded that the converse principle is not true. It does not follow, the argument runs, that agreement among members of the same corporate family governing their own prices and territories or otherwise limiting competition *inter sese* necessarily violates the Act. The decisions, it is claimed, are all ex-

[280] See notes 254-58 supra and accompanying text. Since *Timken*, the notion that a parent can conspire with a subsidiary has been applied to defeat motions to dismiss in Sanib Corp. v. United Fruit Co., 135 F. Supp. 764 (S.D.N.Y. 1955); Hershel Cal. Fruit Prods. Co. v. Hunt Foods, Inc., 1955 Trade Cas. ¶ 68,046 (N.D. Cal. 1955).

[281] See Whipple, Problems of Combination—Integration, Intracorporate Conspiracy and Joint Ventures, 1958 N.Y. State Bar Ass'n Antitrust Law Symposium 34, 45.

[282] United States v. General Motors Corp., 121 F.2d 376, 404 (7th Cir.), cert. denied, 314 U.S. 618 (1941).

[283] United States v. Yellow Cab Co., 332 U.S. 218, 277 (1947).

[284] Id.

[285] Id.

[286] Schine Chain Theatres, Inc. v. United States, 334 U.S. 110, 116 (1948).

[287] Timken Roller Bearing Co. v. United States, 341 U.S. 593, 598 (1951).

plainable on other grounds, since each involves conduct far beyond normal central management of subsidiaries or affiliates. Most can be seen as instances of proved monopolistic intent under section 2, though this did not form the basis of the Court's decisions. Further, all involve combinations between members of the same corporate family aimed at, or resulting in, unreasonable restraints on the trade of outsiders.[288] The clearest examples of such external restraints are said to be found in the *Yellow Cab*, *Kiefer-Stewart*, *General Motors* and *Crescent Amusement* cases. *Kiefer-Stewart*, like *Timken*, also contains elements of internal restraints. But this is construed to mean that agreements regulating the conflicting interests of members of an enterprise entity may be condemned only where competition existed between them prior to the agreement. The explanation for this conclusion is found in language, used in both opinions, suggesting that the courts are more disposed to upholding the notion of intraenterprise conspiracy where the affiliates are largely independent or held out to be competitors. Finally, it is argued, the courts insist upon finding an undue restraint on someone's competition—usually an external restraint on the trade of outsiders and possibly an internal restraint on existing competition of the affiliates themselves. And this supposedly indicates that while corporate affiliation is no shield against a Sherman Act charge, it is also no sword for thrusting charges of antitrust violation on an enterprise entity.

There are several difficulties with this analysis. First of all, the Supreme Court did not base any of the decisions on a finding of attempt to monopolize under section 2—a violation which can be perpetrated by a single trader—but expressly found illegal conspiracies forbidden by section 1. Also of doubtful validity is the suggestion that liability can be avoided, regardless of the seriousness of the restraints effectuated, simply by complete identification of the parent with its subsidiaries. It is more the product of wishful thinking than judicial decision, for no language used by the Supreme Court indicates that it has ever, consciously or unconsciously, viewed the intraenterprise con-

[288] The view adopted by the majority of the Attorney General's Committee is that the intraenterprise conspiracy doctrine should be limited to concerted action between members of a corporate family, the purpose and effect of which is a coercive restraint on the trade of strangers to the corporate family:

> It seems indeed inconceivable to hold *per se* illegal the mere fixing by a parent of a subsidiary's price or production, or the selection by the parent of those persons with whom its subsidiary may or may not deal. Most members of this Committee disapprove any application of this doctrine to joint action between members of a corporate family not intended to or resulting in coercive undue restraint on their customers or competitors. However, they believe, for example, that when a parent and its subsidiary, though short of an attempt to monopolize, nonetheless plan to drive out a competitor, Section 1 may be transgressed.

Att'y Gen. Rep. 35.

spiracy doctrine as applicable only to the loosely knit, mutiple-entity enterprise. Finally, the attempted distinction between internal and external restraints on competition does not distinguish the lawful from the unlawful. Consider for example the horizontal situation of two commonly owned corporations agreeing on price or marketing policies, or even the vertical situation of a parent establishing its subsidiary's policy in these respects. In each case there are external restraints on the trade of buyers who must purchase at the dictated price and be subject to the jointly agreed-upon marketing plans. But, in the horizontal case, there exists an added restraint on the internal commerce of the parties, since they are no longer free to compete against each other in price. Does this mean that one agreement is lawful and the other not? There is no reason why it should.

Determination of the scope of the intraenterprise conspiracy doctrine is, however, not greatly aided by finding fallacy in the previous arguments. Judicial opinions have neither recognized limitations on the doctrine, nor have they attempted to define its scope. Attempts to inferentially limit the doctrine to particular types of conduct have no judicial support or recognition and clash with the broad, sweeping statements used by the courts in promulgating and applying the rule. Perhaps the best counseling approach is to be guided by the Government's enforcement policy and avoid practices which can be considered as predatory or directly aimed at achieving dominance or eliminating competitors. In the years since the doctrine was first announced, it has rarely been used by enforcement agencies and even when it has, lower courts have generally adopted positions contrary to a broad interpretation of the doctrine.[289] The reason for this judicial hesitancy to apply the rule unyieldingly is obvious. "Thousands of companies in the United States conduct their business through incorporated subsidiaries and, under a broad interpretation of the intraenterprise conspiracy doctrine, they would be in constant violation of the antitrust laws."[290]

In assessing the impact of the intraenterprise conspiracy doctrine upon normal centralized planning activities of multicorporate entities within a single business enterprise it is necessary to draw distinctions based upon the percentage of stock ownership held. Quite obviously, there is complete identity of interest between a parent and its wholly owned subsidiaries just as there is between a corporation and its branches, divisions or departments. From a business viewpoint, the parent-subsidiary and corporate-division relationships are the same. They are simply separate types of organizational structures used within a single business enterprise, and, although they differ in form, they are identical in substance. Since corporate subsidiaries usually are

[289] H. Blake & R. Pitofsky, supra note 252, at 436.
[290] Id.

established for reasons completely divorced from market considerations, no persuasive reason exists for treating them differently. The Attorney General's National Committee to Study the Antitrust Laws has concluded that it is not unlawful for a parent corporation to centrally determine and promulgate policies for its subsidiaries which include price fixing and market division.[291] It emphasized the bases for its position in rather strong language:

> The use of subsidiaries is generally induced by normal, prudent business considerations. No social objective would be attained were subsidiaries enjoined from agreeing not to compete with each other or with their parent. To demand internal competition within and between the members of a single business unit is to invite chaos without promotion of the public welfare.[292]

Similar conclusions have been derived by others. The American Bar Association's Subcommittee on Subsidiaries in Foreign Trade has even gone so far as to say: "With regard to foreign subsidiaries wholly owned by a U. S. company, it is usually taken for granted that no antitrust violation arises merely from the creation of a new subsidiary or from the normal operation of the parent and the subsidiary as a single concern."[293] And this, it indicates, is also true where several corporations are present within the same enterprise entity. The position forcefully adopted in these reports seems undeniably sound, for "antitrust policy should not convert normal business operations within a multi-corporate enterprise, such as coordinating of pricing and other sales policies, into a series of antitrust violations."[294]

The rationale which permits centralized planning where one corporation owns all of the stock of another may also permit it where there is less than complete ownership, for a parent-subsidiary relationship may still exist. But "[s]eparate incorporation is more than a formality when the membership differs."[295] As the percentage of ownership decreases, the control of the parent is diluted and the identity of interest between the two corporations gradually disappears. If a majority of the voting capital stock is owned by one party with one interest and the remainder is held merely for investment purposes by noncompetitors, the situation is clearly equivalent to a parent-subsidiary relation and the two will be viewed as a single unit.[296] But when the minority

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291 Att'y Gen. Rep. 30-36.

292 Id. at 34.

293 Comm. on Antitrust Problems in Int'l Trade, Report of the Subcomm. on Subsidiaries in Foreign Trade, 7 A.B.A. Sec. of Antitrust Law 242, 243 (1955).

294 H. Blake & R. Pitofsky, supra note 252, at 437.

295 P. Areeda, supra note 250, at 239.

296 Att'y Gen. Rep. 35. Cf. P. Areeda, supra note 250, at 239.

interest is held by persons who are or could be competitors of the majority, it becomes even less possible to find the necessary community of interest between the majority shareholder and its "subsidiary" which permits a court to treat the two as an enterprise entity. Nevertheless, the majority shareholder's commanding position will enable it to direct the subsidiary's affairs through normal voting channels without the necessity for formal agreement. This latter technique will also permit centralized planning without "combination" in the case where one corporation owns a minority but controlling stock interest in another and the remaining stock is widely diffused among the public. In these latter two instances, there is no enterprise entity since a community of interest between the "parent" and its "subsidiary" is lacking. Consequently, the two corporations will be considered as distinct entities for purposes of evaluating the legality of any joint action they take. Any agreements which restrain their competitive posture towards one another will be illegal. Obviously, the two firms are well advised to treat each other as strangers.

In light of *Kiefer-Stewart* and *Timken,* one caveat appears necessary. A problem may be presented where we have joint action by two or more commonly owned subsidiaries acting on their own without direction from their corporate parent. Here there is no normal centralized planning for a multicorporate enterprise exercised through ownership channels. Nevertheless, when there is an enterprise entity, the same result should obtain even though the person charged with planning enterprise policy is not acting. From a practical viewpoint, however, it is wise to avoid contracts of this type and the problem is one easily avoided by proper parental supervision.

d. *Ancillary Restraints and Postestablishment Conspiracy Problems of the Joint Venture.* Often in the formation of joint ventures the collaborators will take steps to protect themselves against competition from their jointly owned enterprise. They may impose restraints upon it at the time of its formation or at some later time. Present authority indicates that the antitrust implications of such restrictive agreements may vary, depending upon how and when they are made and used.

Restrictions placed upon a lawful joint venture by agreements made at the time of its inception will probably be upheld under the ancillary doctrine adopted from the common law by Judge Taft in *United States v. Addyston Pipe & Steel Co.*[297] Under that doctrine,

[297] 85 F. 271 (6th Cir. 1898), aff'd, 175 U.S. 211 (1899). The ancillary doctrine was later adopted and applied by the Supreme Court in Cincinnati Packet Co. v. Bay, 200 U.S. 179 (1906). With regard to this doctrine, Professor Brewster has said:

> The doctrine is a loose one, but there are some persistent limitations which should be noted. First the restraint must be reasonably related to the interest sought to be protected. Thus, the purchaser of a business may be restrained

reasonable restraints which are deemed necessary in order to induce the sale or purchase of a business or a trade secret, are upheld on the ground that there is no net restriction on commerce because without it the grantee would not have been put in business.[298]

In *Addyston Pipe*, Judge Taft laid down the rule that no restraint of trade could be permitted unless "ancillary to the main purpose of a lawful contract, and necessary to protect the covenantee in the enjoyment of the legitimate fruits of the contract, or to protect him from the dangers of an unjust use of those fruits by the other party."[299] "This very statement of the rule," Judge Taft went on, "implies that the contract must be one in which there is a main purpose, to which the covenant in restraint of trade is merely ancillary."[300] Continuing, he said:

> The covenant is inserted only to protect one of the parties from the injury which, in the execution of the contract or enjoyment of its fruits, he may suffer from the unrestrained competition of the other. The main purpose of the contract suggests the measure of protection needed, and furnishes a sufficiently uniform standard by which the validity of such restraints may be judicially determined. In such a case, if the restraint exceeds the necessity presented by the main purpose of the contract, it is void for two reasons: First, because it oppresses the covenantor, without any corresponding benefit to the covenantee; and, second, because it tends to a monopoly. But where the sole object of both parties in making the contract as expressed therein is merely to restrain competition, and enhance or maintain prices, it would seem that there was nothing to justify or excuse the restraint, that it would necessarily have a tendency to monopoly, and therefore would be void.[301]

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only in the use of the business he buys. The sale does not justify restricting the purchaser in the use of properties he already owned or may acquire elsewhere. So too, the seller of a business cannot be made to restrict himself outside the area which has been served by the business he is parting with. Second, the restraint, it used to be said, must be partial. Therefore, covenants even reasonably related to the interest transferred may be stricken down if they result in the elimination of all competition in a significant market. Moreover, the ancillary restraint will be illegal if its duration is considered excessive. Finally, if it can be proved that the primary purpose of the whole arrangement was the elimination of competition, it will be stricken down even if it is attached to some underlying transaction. (Footnotes omitted.)

Brewster, supra note 22, at 86.

[298] Brewster, supra note 22, at 219.

[299] 85 F. at 282.

[300] Id.

[301] Id. at 282-83.

With reference to the last point, Judge Taft later said:

> In them the actual intent to monopolize must appear. It is not deemed enough that the mere tendency of the provisions of the contract should be to restrain competition. In such cases the restraint of competition ceases to be ancillary, and becomes the main purpose of the contract, and the transfer of property and good will, or the partnership agreement, is merely ancillary and subordinate to that purpose.[302]

Though the potential importance of the ancillary doctrine to international trade is enormous, it has received little use by the judiciary in handling foreign commerce antitrust cases. This is not because the doctrine has been held inapplicable as a matter of law, but because "the restraints were found to go far beyond the reasonable protection of the interest transferred or retained, and because it was found, to use Taft's words, that 'the restraint . . . ceases to be ancillary, and becomes the main purpose of the contract . . . .' "[303] *Timken* furnishes an excellent example. There, it will be recalled, the Supreme Court rejected the defendant's ancillary-restraint argument because of the district court's finding that the dominant purpose of the agreement was to avoid all competition.[304] Later the Court said,

> Nor do we find any support in reason or authority for the proposition that agreements between legally separate persons and companies to suppress competition among themselves and others can be justified by labeling the project a "joint venture." Perhaps every agreement and combination to restrain trade could be so labeled.[305]

Since the joint venture was ancillary to the underlying unlawful conspiracy, rather than the restraints being ancillary to the joint venture, the doctrine was irrelevant. A careful reading of *Timken* also reveals that the agreements unreasonably extended beyond the venture and were intended to restrain the trade of outsiders. As a result, even the requirement that the restraints must be "reasonably related to the interest sought to be protected"[306] was not satisfied.

The doctrine has been used, however, by two lower courts as the explicit basis for upholding restraints ancillary to international licensing contracts.[307] More recently, the doctrine was used in *Pan*

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302 Id. at 291.

303 Brewster, supra note 22, at 87.

304 Timken Roller Bearing Co. v. United States, 341 U.S. 593, 597-99 (1951).

305 Id. at 598.

306 Brewster, supra note 22, at 86.

307 Thoms v. Sutherland, 52 F.2d 592 (3d Cir. 1931); Foundry Servs., Inc. v. Beneflux Corp., 110 F. Supp. 857 (S.D.N.Y.), rev'd on other grounds, 206 F.2d 214

American to uphold territorial restrictions placed upon a joint venture.[308] The district court sustained a contract entered into by Pan American and Grace in connection with the formation of Panagra. Under this contract, it was apparently agreed that Panagra would not operate on the east coast of South America and Pan American would not operate on the west coast. The Government attacked this agreement as an illegal division of markets. Judge Murphy held that the agreement was neither per se unreasonable nor unreasonable under the circumstances because it was "perfectly consistent with the air transportation policy of this country in those formative years."[309] He went on to say:

> Pan American's restraints against Panagra and its continued determination to suppress the extension of that airline to the United States, in itself, and in combination with other conduct on the part of Pan American constitutes a monopolization of commerce that contravenes the provisions of the Sherman Act, and would seem to require divestiture by that defendant . . . .[310]

Apparently, Judge Murphy was suggesting that restrictions placed upon a joint venture may be lawful at the time of formation but become unlawful when changed circumstances make it competitively desirable to release the joint venture from those restrictions and permit it to engage in competition with one or more of its parents. At first blush, this seems unfair. However, it is to be remembered that, under the common law ancillary doctrine, a lawful restraint had to be "partial," and ancillary restraints were forbidden if their duration was excessive.[311] While Judge Murphy's decision might seem unreasonably harsh, unfair or even contradictory, it is not wholly unfounded. Unless a court is willing to break away from its common law shackles, such a result is to be expected. As the court noted, the case was a "continuation of a bitter family quarrel rampant since 1941 arising out of the unhappy and quondam unholy union of Pan American and Grace, each of whom owns 50% of the stock of Panagra, that the Civil Aeronautics Board (C.A.B.) could not resolve."[312] Moreover, "[t]he C.A.B. in 1945 and again in 1953 requested the Attorney General to initiate this suit."[313] While these factors did not appear to

(2d Cir. 1953). One commentator thinks it doubtful that the *Thoms* case would be precedent today in light of the *National Lead* and *Timken* cases. See Fugate, supra note 22, at 139. But cf. Brewster, supra note 22, at 87.

[308] United States v. Pan American World Airways, Inc., 193 F. Supp. 18 (S.D.N.Y. 1961), rev'd on grounds not here relevant, 371 U.S. 296 (1963).

[309] 193 F. Supp. at 34.

[310] Id. at 22-23.

[311] Brewster, supra note 22, at 86.

[312] 193 F. Supp. at 20.

[313] Id. at 20 n.2.

influence the decision, they certainly were not the type of considerations which would entice a court to break with precedent.

Further support for Judge Murphy's position can be found in the approach of the Supreme Court in *Columbia Steel*, where, after finding the merger lawful under Section 1 of the Sherman Act, the Court stated that "even though the restraint effected may be reasonable under § 1, it may constitute an attempt to monopolize forbidden by § 2 if a specific intent to monopolize may be shown."[314] There was some evidence in *Pan American* which might indicate the presence of an unlawful intent to monopolize. In the first place, the record revealed several instances in which Pan American blocked expansion of Panagra's South American lines which would have brought it into competition with Pan American's subsidiaries.[315] Second, it may be that Pan American was not simply enforcing the lawful territorial agreement by which Panagra agreed not to operate on the east coast of South America, but was attempting to extend its territorial protection and prevent extension of Panagra's lines to the United States.[316] In this respect, it is important to note the precise language used by Judge Murphy:

> In our opinion, Pan American's successful blocking of Panagra's extension to its own terminal in the United States constitutes an unlawful exercise of the power it had to exclude Panagra as a competitor in the United States-South American market, and to thereby maintain its virtual monopoly position over that market at least until the entry thereinto by Braniff

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[314] United States v. Columbia Steel Co., 334 U.S. 495, 531-32 (1948).

[315] 193 F. Supp. at 34-36. Pan American's actions in this regard may have been perfectly consistent with its territorial agreement but some of the markets protected did lie close to the west coast of South America.

[316] There is some confusion as to the precise scope of the agreement. At one point, the court said:

> It is the government's claim that Pan American and Grace entered into an agreement prior to the formation of Panagra whereunder the proposed jointly owned company was to have the exclusive right to traffic along the west coast of South America from the Canal Zone south free from Pan American competition, and Pan American was to be free from competition from the proposed jointly owned company elsewhere throughout South America and between the Canal Zone and the United States.

193 F. Supp. at 22. Later, however, the court stated: "We find that the agreement between the defendants as to spheres of operations and its evolution was substantially in the manner described by Grace." Id. at 35. According to the court, Grace had contended that the agreement

> was, in general terms, to the effect that Panagra was to operate on the west coast and in all the countries of the west coast through which its international mail line ran, as well as over the Andes to Buenos Aires and Montevideo, and that there was no intention one way or the other contemplated *mutually* by them with respect to possible extension of Panagra's line to the United States.

Id. at 34-35.

> in 1948. Thereafter and to date, it remains the dominant carrier in that market and maintains its power to participate in substantially all United States origin or destination traffic carried by Panagra through its continued suppression of a Panagra-United States extension.[317]

Assuming that Pan American had originally acquired its monopoly position legally, Judge Murphy nevertheless concluded that, since Panagra could not be legally identified with Pan American, its subsequent maintainance of that monopoly through its voice in Panagra was illegal under section 2.

> Pan American's justification for its blocking actions is bottomed upon a fallacious predicate; Panagra is *not* part of the Pan American system to the extent that it is reduced to that status through the subjugating exercise of Pan American's negative control over its destiny. Panagra is not a subsidiary of Pan American; its co-equal stockholder, Grace, never so intended it to be (and never intended to be a mere investor in Panagra), nor has Panagra's abstention from independent entry into the United States-South American market been the result of *concerted* action between it and Pan American. If Pan American were the majority shareholder in Panagra or if Panagra were a wholly owned subsidiary of Pan American it might make a decisive difference in this case.[318]

The recent decision of the Supreme Court in *United States v. Sealy, Inc.*[319] is another instance in which postestablishment use of a lawfully formed joint enterprise has been declared illegal under the Sherman Act. The opinion suggests that joint venturers will encounter strong objection where the jointly owned company seeks to regulate the activities of its parents. In the early 1920's, a large group of manufacturers jointly formed Sealy, Inc. to engage in the business of licensing manufacturers to make and sell bedding products under the Sealy name and trademarks. Its original formation was admittedly for "genuine and lawful purposes" and the Government did not contend that Sealy was a "facade" for a conspiracy to suppress competition.[320] Conceding this, the Government nevertheless charged Sealy with allocating exclusive territories and imposing territorial restrictions upon its dealers as well as fixing resale prices in violation of Section 1 of the Sherman Act. At the time of trial, there were almost thirty Sealy "licensees," and they owned substantially all of its stock. Pur-

317 Id. at 39.
318 Id. at 39-40.
319 388 U.S. 350 (1967).
320 Id. at 361 (Harlan, J. dissenting).

suant to by-law requirements, Sealy's board of directors and executive committee were composed exclusively of licensee-stockholders or their nominees. Through these groups, the licensee-stockholders exercised control over the day-to-day business of Sealy, including the grant, assignment, reassignment, and termination of exclusive territorial licenses.

In assessing the validity of the licensing program, the Court indicated, "it is first necessary to determine whether the territorial arrangements here are to be treated as the creature of the licensor, Sealy, or as the product of a horizontal arrangement among the licensees."[321] Seeking "the central substance of the situation, not its periphery . . . ," the Court felt "moved by the identity of the persons who act, rather than the label of their hats."[322] The Court then concluded:

> The arrangements for exclusive territories are necessarily chargeable to the licensees of appellee whose interests such arrangements were supposed to promote and who, through select members, guaranteed or withheld, and had the power to terminate, licenses for inadequate performance. . . . It would violate reality to treat them as equivalent to territorial limitations imposed by a manufacturer upon independent dealers as incident to the sale of a trademarked product. Sealy, Inc., is an instrumentality of the licensees for purposes of the horizontal territorial allocation. It is not the principal.[323]

The Court also stressed the fact that it was faced with an aggregation of trade restraints since Sealy's trademark licenses specified minimum retail prices as an integral part of the licensing program. This, the Court said, "underlines the horizontal nature of the enterprise and the use of Sealy, not as a corporate entity but as an instrumentality of the individual manufacturers."[324] Beyond this, it also negated the claim that the territorial restraints were mere incidents of a lawful program of trademark licensing.[325] Since the arrangements for terri-

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321 Id. at 352.

322 Id. at 353.

323 Id. at 353-54.

324 Id. at 355-56. Quaere how price fixing can carry any implications as to whether a particular relationship is horizontal.

325 Id. at 356. The Court cited *Timken* as another case where the argument that territorial restrictions were reasonable steps incident to a valid trademark licensing system was "summarily rejected." The Court approached the Sealy licensing program the same way, despite obvious differences between the two cases. In *Timken*, the restraints covered nonbranded merchandise as well as the Timken line. In *Sealy*, however, the restraints covered only Sealy products; as to their private-label products, the licensees were free to sell outside of the given territory at prices determined by them alone. Relying on the *Timken* statement that "[a] trademark cannot be legally

torial limitation were part of an aggregation of trade restraints, including unlawful price fixing and policing, they were held per se unlawful under Section 1 of the Sherman Act.

Comparison of the decisions in *Pan American* and *Sealy* raises some interesting implications. *Pan American* suggests that once a joint enterprise is incorporated and comes into existence, it acquires an independent legal personality separate and distinct from that of its parents. And, since the separate and individual partners are each actively engaged in the direction and management of the joint venture, it does not possess a community of interest with any one of them even where one parent owns a majority of its stock.[326] Because of the absence of this identity of interest between the joint enterprise and its parents, the enterprise-entity rationale which would justify agreements between parent and subsidiary corporations designed to maintain noncompetitive peace within the multicorporate family is inapplicable. Nor does it appear that the ancillary doctrine can be utilized to justify postestablishment restrictive agreements of this type between the joint venture and its parents since their chronological position shows they are not truly "ancillary" to the formation of the collaborative enterprise.[327]

Unless such restrictive provisions were part of the accomplishment of some lawful purpose, such as the licensing of a valid patent, trademark or secret process, or a contract providing for the transfer of capital or technology, the ancillary doctrine cannot be used to justify them.[328] Even here, however, the doctrine may prove futile. It must be remembered that in its broadest application, it protects only *reasonable* restraints ancillary to a primary lawful purpose. While the concept of reasonableness is broad and in some instances even unmanageable, it has been said that "covenants even reasonably related to the interest transferred may be stricken down if they result in the elimination of all competition in a significant market."[329] Consequently, the defense may be unavailing to collaborators who are dominant factors in either the domestic or foreign market even though their combination might survive the initial test requiring justification for their combination.[330]

In the last analysis, enterprise planning of the activities of joint companies can be achieved only through the assertion of control

used as a device for Sherman Act violation," the Court found the trademark to be no defense to what would otherwise be a violation of the Sherman Act.

[326] See notes 146-47 & 294-95 supra and accompanying text.

[327] Devine, Foreign Establishment and the Antitrust Law: A Study of the Antitrust Consequences of the Principle [sic] Forms of Investment by American Corporations in Foreign Markets, 57 Nw. U.L. Rev. 400, 447 (1962).

[328] Id.

[329] Brewster, supra note 22, at 86.

[330] See id. at 222.

through normal channels. Incomplete and insecure as they may be, these control channels offer the only possible avenue for achieving postestablishment noncompetitive peace between a joint venture and its parents. Sometimes even this avenue may be frustrated. *Sealy* warns that the separate existence of an incorporated joint venture will be disregarded where the court is convinced that it was formed or is being used as a horizontal combination to restrain the competition of its parents in violation of the Sherman Act. If the *Sealy* facts are demonstrative of the type of situation which will produce this judicial reaction, the problem will probably be confined to those relatively few instances where the creature expressly seeks to regulate the competitive activities of its parents.

2. *Antitrust Responsibility for the Acts of Affiliates.*—In the preceeding section the discussion was directed at antitrust questions arising from the internal relationship between the American corporation and its foreign establishment. There, concern was focused on the extent to which the American entrepreneur can direct the affairs of its overseas operation without engaging in a "contract, combination, . . . or conspiracy" within the meaning of the Sherman Act. Here, the concern is with the other side of the question, and the purpose is to determine the extent to which the American investor will be liable for antitrust violations of its overseas establishment. Since the United States parent is often the only concern personally amenable to the process of United States courts, this problem greatly affects the question of what form of business organization is most feasible for overseas expansion.

Conducting business abroad through the unincorporated form of organizational structure—branch, division or department—makes the United States firm responsible for all of its foreign operations. Since the foreign establishment is merely an extension of the firm, acts of its overseas personnel are readily attributed to the firm. Thus any course of conduct engaged in by the branch, division or department aimed at, or resulting in, unreasonable restraint of trade or monopoly or amounting to an unfair method of competition or deceptive trade practice renders the corporation an antitrust violator.

When, however, the United States businessman establishes a separate corporate entity abroad—be it a wholly or partially owned subsidiary or even a joint venture—the vicarious responsibility of the American parent for the acts of the foreigner is less obvious. Because there are now two legally separate persons involved the question becomes one of "piercing the corporate veil" and it is to this question we turn.

It is a basic premise of corporate law that companies separately

incorporated are separate entities distinct not only from their incorporators and stockholders but also from other corporations as well. And this rule obtains even though the corporation is owned by a single investor or interest, for control is inherent in the nature of a corporation. To hold those controlling responsible for the acts of the corporation would frustrate the legislative purpose of creating an instrument of limited liability. Thus the courts have repeatedly held that the fact that one corporation owns all of the stock of another and that the two have the same directors and officers is alone insufficient to warrant piercing the veil of corporate existence.[331] Yet, it is also true that the courts have looked through the corporate form to the actualities of the situation and sometimes disregarded the corporate fiction.[332]

As a general rule, the independence of a parent from its subsidiaries is presumed. For no matter how great a fiction the corporate entity concept may be, or how transparent it may appear, it is a fiction created by sovereign act of the state and as such will be recognized in the absence of compelling reasons to the contrary. The courts, as interpreters of legislative policy, thus find themselves faced with a most difficult problem of maintaining the sanctity and usefulness of the corporation, while at the same time guarding against its becoming a convenient device for cloaking violations of the law. The result has been the formulation of many meaningless principles which fail to aid analysis because they are nothing more than the statement of results. Thus, it is often stated that where the corporation has been used as a device "to defeat public convenience, justify wrong, protect fraud, or defend crime,"[333] the theoretical distinctions between the corporation and its shareholders will be disregarded. Another frequently repeated judicial statement is that "[t]he legal fiction of distinct corporate existence will be disregarded, when necessary to circumvent fraud,"[334] and "may also be disregarded in a case where a corporation is so organized and controlled, and its affairs are so conducted, as to make it merely an instrumentality or adjunct of another corporation."[335]

Under the traditional rules for piercing the corporate veil, the test is the form rather than the substance of control.[336] These rules have

331 H. Ballantine, Corporations §§ 118-21, 135 (rev. ed. 1946); 1 W. Fletcher, Cyclopedia of the Law of Private Corporations §§ 41-47 (rev. ed. 1963); H. Henn, Corporations §§ 77-78, 136, 143-45 (1961); N. Lattin, Corporations 60-61, 90-96 (1959).

332 See H. Ballantine, supra note 331, §§ 122, 130, 132, 136-39, 142; 1 W. Fletcher, supra note 331, §§ 41-47; H. Henn, supra note 331, §§ 143, 151-52; N. Lattin, supra note 331, at 66-78.

333 United States v. Milwaukee Refrigerator Transit Co., 142 F. 247, 255 (E.D. Wis. 1905).

334 In re Watertown Paper Co., 169 F. 252, 256 (2d Cir. 1909).

335 Id.

336 In Kingston Dry Dock Co. v. Lake Champlain Transp. Co., 31 F.2d 265 (2d Cir. 1929), Judge Hand explained:

made it necessary for the courts to conduct a detailed examination of the parent-subsidiary relationship to determine whether the parent has in fact disregarded the separate and distinct existence of the subsidiary. In doing so, they have looked to see whether the subsidiary is held out to the public as a distinct enterprise with its own business, has functioned as a separate corporation making commercial decisions through the formal office of its own directors and officers, is adequately financed as a separate unit, and maintains its own accounts, records and the other paraphernalia of an independent company. When the court has determined that these formalities have not been followed, it has disregarded the fictitious personality of the subsidiary saying it was nothing but the "alter ego," "instrumentality," "corporate dummy" or "agent" of the parent. These theoretical rationalizations developed by the courts are conducive neither to clarity of thought nor to predictability of results.[337] In this respect, the criticism and warning uttered forty years ago by Mr. Justice Cardozo remains true today: "The whole problem of the relation between parent and subsidiary corporations is one that is still enveloped in the mists of metaphor. Metaphors in law are to be narrowly watched, for starting as devices to liberate thought, they end often by enslaving it."[338] There is little doubt that this has in fact occurred.[339]

> Control through the ownership of shares does not fuse the corporations, even when the directors are common to each. One corporation may, however, become an actor in a given transaction, or in part of a business, or in a whole business, and, when it has, will be legally responsible. To become so it must take immediate direction of the transaction through its officers, by whom alone it can act at all. At times this is put as though the subsidiary then became an agent of the parent. That may no doubt be true, but only in quite other situations; that is, when both intend that relation to arise, for agency is consensual. This seldom is true, and liability normally must depend on the parent's direct intervention in the transactions, ignoring the subsidiary's paraphernalia of incorporation, directors and officers. The test is therefore rather in the form than in the substance of the control; in whether it is exercised immediately, or by means of a board of directors and officers, left to their own initiative and responsibility in respect of each transaction as it arises. Some such line must obviously be drawn, if shareholding alone does not fuse the corporations in every case. (Citations omitted.)

Id. at 267.

337 "Unfortunately, it has not been found possible to lay down any definite test or formula as to when the usual immunity of the controlling shareholder will be lost, but the courts have employed various illusory terms and theories to express the results at which they arrive." H. Ballantine, supra note 331, § 136 at 311. See also Douglas & Shanks, Insulation from Liability Through Subsidiary Corporations, 39 Yale L.J. 193 (1929).

338 Berkey v. Third Ave. Ry., 244 N.Y. 84, 94, 155 N.E.2d 58, 61 (1926).

339 E.g., Mull v. Colt Co., 31 F.R.D. 154 (S.D.N.Y. 1962); Walkovszky v. Carlton, 24 App. Div. 2d 582, 262 N.Y.S.2d 334 (1965); Majestic Factors Corp. v. Latino, 15 Misc. 2d 329, 184 N.Y.S.2d 658 (Sup. Ct. 1959); Mangan v. Terminal Transp. Sys., Inc., 157 Misc. 627, 284 N.Y.S. 183 (Sup. Ct. 1935), aff'd, 247 App. Div. 853, 286 N.Y.S. 666 (1936).

Since our major concern here is primarily with the operation of foreign business enterprises, the ensuing discussion is limited to an analysis of the recent foreign trade precedents bearing upon the subject. The cases are few in number and their *rationes decidendi* have not always been clearly articulated. It is, accordingly, difficult to extract clear, meaningful principles from them. Nevertheless, one thought is clear. The traditional approach has not enslaved the courts in enforcing the antitrust laws.

Among the fifty-one defendants in *United States v. Aluminum Co. of America*,[340] were the Aluminum Co. of America [Alcoa] and Aluminium Limited, a Canadian corporation. Limited, it is recalled, was formed by Alcoa to take over its foreign operations, and its stock was distributed to Alcoa's shareholders. As a result, a parent-subsidiary relation was not established, but the two companies were owned and controlled by the same group. At the time of the suit, a majority of the stock in the two companies was still commonly owned, but the district court found that they had operated independently for some time. Nevertheless, the Government sought to charge Alcoa with an illegal restraint of trade because of Limited's membership in an international cartel designed, *inter alia*, to restrict United States imports and thereby protect Alcoa's domestic monopoly. Judge Hand noted the increasing disposition of the courts to disregard the fictitious nature of a corporation when it was possible to "substitute the concept of a group of persons acting in concert." In view of the district court's finding, which was not clearly erroneous, the alleged identity of the two corporations had to be based solely on common majority stock ownership. This was too extreme a position for Judge Hand to accept for it endangered the rights of minority shareholders:

> Nevertheless, the group must not be committed legally except in so far as they have assented as a body, and that assent should be imputed to them only in harmony with the ordinary notions of delegated power. The plaintiff did not prove that . . . there was not a substantial minority in each company made up of those who held no shares in the other; and the existence of the same majority in the two corporations was not enough by itself to identify the two. "Alcoa" would not be bound, unless those who held the majority of its shares had been authorized by the group as a whole to enter into the "Alliance"; and considering the fact that, as we shall show, it was an illegal agreement, such an authority ought convincingly to appear. It does not appear at all.[341]

[340] 148 F.2d 416 (2d Cir. 1945).
[341] Id. at 441-42.

It is important to note the precise facts of the *Alcoa* decision. Limited had joined the cartel; Alcoa had not. And although the cartel's quota restrictions on imports were helpful to Alcoa, there was nothing to connect the two companies except common ownership. Because of the district court's finding that Limited had acted altogether free from any connection with Alcoa, their separate corporate existence had to be accepted. *Alcoa* decided only that two operationally unrelated companies will not be treated as a single unit merely because of common majority stock ownership. As such, the decision falls well within traditional principles and neither aids nor hinders antitrust enforcement against multicorporate business enterprises.

If *Alcoa* states that something more than common ownership is required to associate one corporation with the conspiratorial action of another, *United States v. National Lead Co.*,[342] shows that the courts are sometimes willing to find the necessary connection in the parent-subsidiary context. There the court held that three American corporations, National Lead Company, its wholly owned subsidiary, Titan Company, Inc., and E.I. du Pont de Nemours and Company, Inc., had conspired among themselves and with several foreign companies to divide the world into exclusive territories with respect to trade in titanium compounds. The commercial development of titanium compounds began around the time of World War I as a result of the independent work of three separate groups of chemists in the United States, Norway and France. The American group acquired patents and assigned them to the Titanium Pigment Company, Inc. (TP), a domestic company formed for this purpose. The Norwegian patents were assigned to Titan Co. A/S (TAS). In 1920 TP and TAS entered into a cartel agreement described by the court as "the basic charter for the worldwide regulation of production and commerce in titanium compounds."[343] This agreement set the stage for more than 60 other agreements in the following 24 years which fundamentally altered the free world market. It was made at a time when National Lead owned no TAS stock and only 10 percent of TP's stock but had option rights to increase its TP holdings to 50 percent. These two companies subsequently became subsidiaries of National Lead.[344]

National Lead and du Pont were connected to the cartel largely

[342] 63 F. Supp. 513 (S.D.N.Y. 1945), aff'd, 332 U.S. 319 (1947).

[343] Id. at 517.

[344] In 1927 National Lead acquired 87% of TAS's stock with the original Norwegian interests retaining the remaining 13%. Later, in 1929, National Lead organized Titan Company, Inc. which the court characterized as its "corporate pocket for the deposit of its holdings in foreign titanium enterprises." 63 F. Supp. at 519. Titan at the time of its formation acquired the rights and assumed the liabilities of TAS under the 1929 cartel agreement. By 1932 National Lead had acquired all of the stock of TP and in 1936 it acquired all of its assets and assumed all of its liabilities. Id.

through the participation of their subsidiaries. Yet the opinion is devoid of the detailed examination of the parent-subsidiary relationship which typically precedes an application of the "instrumentality," "agency," "corporate dummy" or "alter ego" rules. The reason for this is clear with respect to National Lead. Upon acquiring its 10 percent stock interest in TP, the court found it "thereupon negotiated [the cartel] . . . agreement with TAS"[345] and by another agreement simultaneously executed by the three corporations bound itself to respect their basic agreement.[346] The opinion thus suggests that National Lead was the motivating force behind TP and that TP did not play an independent role, yet there is no recitation of facts to show that TP did not function as a separate corporate entity.[347]

The manner of tying du Pont to the conspirators is less clear. The court identified it with Krebs Pigment & Color Corporation, which was organized by du Pont and another United States company in 1931 with 70 percent of its stock held by du Pont. Krebs manufactured and sold titanium compounds until 1935, when du Pont acquired all of its assets. Thereafter du Pont engaged directly in the manufacture and sale of titanium compounds. In 1933, before its absorption into du Pont, Krebs and TP entered into contractual arrangements "cast" in "the form of a settlement of patent disputes" by which they exchanged irrevocable, nonexclusive licenses of all patents then or thereafter owned by them or otherwise at their disposal.[348]

Judge Rifkind had considerable difficulty in connecting du Pont with the cartel because the factual evidence of its participation was by no means as clear as that establishing National Lead's complicity. Du Pont had not subscribed to the 1920 cartel and the 1933 agreement between Krebs and TP "deviated sharply from the form and from the principles" of the earlier arrangements.[349] Moreover, du Pont had withdrawn from any exchange of information with National Lead and competed with it for the United States market. Finally, the du Pont organization was never regarded by the cartel group as a "full fledged

[345] Id.

[346] Id. at 518.

[347] On appeal, National Lead did not challenge the district court's finding that it participated in the cartel, but simply contended that the decree "went too far in forbidding normal and usual contractual arrangements." The Supreme Court disagreed. National Lead Co. v. United States, 332 U.S. at 325-26.

[348] 63 F. Supp. at 520, 528.

[349] The precise language of the opinion is that du Pont "did not subscribe to the 1920 agreement; the agreement it did sign, in 1933, deviated sharply from the form and from the principles of the 1920 agreement." Id. at 527. Despite the implication of this language that du Pont signed the 1933 agreement, it is clear that the agreement was between Krebs and TP and that du Pont itself did not sign it. Clearly, the court was here referring to the du Pont family not to du Pont individually. The use by the court of the phrase "the agreement it did sign" is explained by the fact that Krebs later became and was an integral part of du Pont at the time suit was instituted.

member of their family" and "its anomalous position" under the 1933 patent exchange agreement was the subject of frequent discussion and apprehension which led to constant efforts to convert it into a fully conforming member.[350] Indeed, Judge Rifkind was forced to admit that "much of the evidence supports its denial" of complicity.[351] But he had an explanation for this:

> In sharp contrast with NL [National Lead], DP [du Pont] exhibited from the very beginning of its interest in titanium, an alert consciousness of the antitrust laws and moved cautiously and under the guidance of trained antitrust lawyers. The question is whether it succeeded in avoiding not only the form but also the substance of the transgression. I have concluded that it has not . . . .[352]

This conclusion was founded entirely upon the circumstances surrounding the 1933 agreement. A most important fact was the manifest eagerness of du Pont to obtain access to National Lead's patents and skill in the titanium field and the latter's equally strong desire to grant access. Difficulties arose because the cartel agreement forbade National Lead to grant du Pont a patent license unless it agreed to adhere to the cartel arrangement. This du Pont repeatedly refused to do for a number of reasons, the most conspicuous of which was antitrust prohibition. In this "troubled atmosphere," highly professional lawyers well-skilled in antitrust drew the 1933 agreement between Krebs and TP in terms so vague that counsel disputed its meaning during the trial. Contemporaneous documents indicated its uncertainty was intentional. In a letter from a National Lead official to an English associate, it was explained that the "obscurity" was "deliberate and the product of fear of the antitrust laws."[353] While this letter served to show National Lead's frame of mind in its negotiations with du Pont, it did not establish the illegality of the 1933 agreement, nor did it support any inference adverse to du Pont. Having thus determined that the contract was itself insufficient to establish conspiracy, the court found du Pont had indirectly joined the cartel by making promises to abide by its terms. Its finding was predicated upon communications between officials of Krebs and National Lead which culminated in a telltale letter from the executive vice president of National to one of the principal cartel members. The letter was exhibited to Krebs' president before mailing and since it encountered no objection, was deemed an admission of du Pont's participation in the cartel.

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350 Id. at 527.
351 Id.
352 Id.
353 Id. at 528.

While Krebs' role in the conspiracy is thus established, du Pont's involvement is not. There is nothing in the opinion to indicate that du Pont ever disregarded the separate corporate status of Krebs. Yet the court considered the two as one. Nowhere is it expained why du Pont was responsible for the action and knowledge of its subsidiary. At one point, where the court "sketched" the "outlines" of the "story," it said the 1933 agreement was preceded by a "protracted period of negotiation" between National Lead and du Pont.[354] However, no du Pont official was named as a negotiator and the only person identified as being connected with the neogtiations was the president of Krebs. According to the court, he acted on behalf of du Pont, but no factual basis substantiating this conclusion was mentioned. The court did, however, explain that the absence of any evidence showing that du Pont's executive committee knew of his commitments was immaterial for there was "abundant evidence" to establish that his authority "was broad enough to justify charging the corporation with his acts in its behalf."[355] It is thus implied that Krebs' president was authorized by du Pont to act on its behalf. But how was he authorized? Was he acting as a special agent of du Pont while still a general agent, indeed an officer, of Krebs, or was Krebs itself considered nothing more than du Pont's agent? The general tenor of the opinion quite clearly indicates the latter, for the court continually identified the two companies, treating them as a single unit, and often said "du Pont" when it meant "Krebs."[356]

In any event, it is clear that liability was not imposed upon du Pont for Krebs' action simply because it later absorbed Krebs into its own corporate structure, for then there would have been no need to discuss the authority of Krebs' president to act on du Pont's behalf. It is also clear that du Pont was found to have joined the conspiracy between National Lead and its foreign associates through the acts of Krebs and that the opinion does not proceed along the avenue normally taken by the judiciary in piercing the corporate veil. Indeed, the questions which would be made relevant by this approach are those which the court either ignored or left unanswered. The court came very close to treating the multicorporate du Pont family as an enterprise entity.[357]

The court's handling of the parent-subsidiary problem in *United States v. Imperial Chem. Indus., Ltd.*[358] differs from that in *National Lead* and sheds considerable light on the treatment of this doctrine

354 Id. at 520.

355 Id. at 530-31.

356 See, e.g., note 349 supra.

357 For an explanation of the enterprise-entity theory, see Berle, The Theory of Enterprise Entity, 47 Colum. L. Rev. 343 (1947).

358 100 F. Supp. 504 (S.D.N.Y. 1951).

under the antitrust laws. The case presents the interesting and contrasting picture of a subsidiary being held responsible for the acts of its parents. It is thus important on the question of enterprise planning for it shows that too much centralized planning and control of a multicorporate business enterprise can cause the coalescence of parent and subsidiary and lead the courts to regard the entire combination as a single business unit.

In *ICI,* it was held that the four corporate defendants—du Pont, its subsidiary, Remington Arms Company, Inc., Imperial Chemical Industries, Ltd. (ICI) and its subsidiary Imperial Chemical Industries (New York), Inc.—together with a number of foreign coconspirators, entered into various patent and process agreements as part of a conspiracy to divide world markets for the manufacture and sale of chemical products, sporting arms, and ammunition.

Du Pont owned more than 50 percent of Remington's stock. The Government alleged that Remington joined in the conspiracy between du Pont and ICI in 1933 when du Pont acquired its majority stock interest in Remington. Specifically it was claimed that, following this acquisition, du Pont and ICI agreed to extend the conspiracy so as to include Remington.[359] It was also charged that Remington cooperated with du Pont and ICI to eliminate competition beween them in furtherance of their agreement. Remington denied participation in the conspiracy and defended on the ground that "at no time ha[d] duPont controlled its management, policies or activities, other than as a right incidental to stock ownership, but that Remington ha[d] continued to act independently . . . ."[360] Thus, the issue was drawn as to whether du Pont exercised such control over Remington as to associate Remington with the conspiracy between it and ICI.

Here again, the court did not address itself to the arguments traditionally advanced to support a disregard of the corporate entity, but simply stated: "The record is clear that duPont and Remington were managed as one and the same enterprise; Remington was used to serve and accomplish duPont's objectives."[361] The court pointed to the fact that, from the time du Pont secured its majority interest in Remington, it consistently nominated a majority of the Remington board of directors with the concomitant result of continuous joint management and interlocking directorates between the two.[362] When du Pont acquired its interest in Remington, however, the Remington certificate of incorporation was amended to provide for cumulative

[359] Id. at 579.
[360] Id. at 510.
[361] Id. at 581.
[362] Id.

voting for directors which enabled the minority shareholders to elect members to the board. The court pointed out:

> These minority stockholders continued to be active in the affairs of the corporation. No protest is recorded from them, however, as to the division of world markets with ICI, only that "they felt that in equity ICI ought to accept as a general proposition for discussion, that the Remington Company were [sic] entitled to expect a continuation of the status quo ante in foreign markets" . . . .[363]

In reaching its decision that "duPont and Remington were managed as one and the same enterprise . . . . ," the court relied heavily on the fact that "[d]uPont invariably represented Remington in negotiations with third parties . . . ."[364] The Remington-ICI agreement was taken as proof of du Pont's domination of Remington. It was negotiated for Remington by a Remington director who was also a du Pont employee and it was approved by du Pont's Legal Development and Foreign Relations departments. Finally, it was acted upon by the Remington board "subject to approval of the Executive and Finance Committees of the duPont Company" which was subsequently received.[365] There was also du Pont correspondence referring to Remington as a du Pont-controlled subsidiary. And although the du Pont majority did in one instance yield to the interest of the minority shareholders and directors, the court refused to find that du Pont did not control the acts of Remington. There was, in addition, the similarity between the Remington-ICI patents and process agreements and the du Pont-ICI agreements to associate Remington with the comprehensive conspiracy alleged. Moreover, the court found that the purpose of Compania Brasileira de Cartuchos (CBC), a Brazilian company jointly owned by Remington and ICI, was "to carry out and continue the division of world markets which had long existed between duPont and ICI. Remington had made itself a part of the conspiracy, and the creation of CBC was but one step in carrying it into effect in Brazil."[366]

In probing the parent-subsidiary problem, the courts have sometimes placed great weight upon the identity of economic interests between the two corporations where the subsidiary handles all of the enterprise's foreign business and has acted in a manner which primarily benefits the parent. In this instance the parent has much difficulty in insisting that it is the passive beneficiary of the subsidiary's antitrust violations designed to protect the parent's domestic market position.

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[363] Id. at 582.
[364] Id. at 581.
[365] Id. at 584.
[366] Id. at 587.

Such a case is *United States v. General Elec. Co.*[367] The Government charged twelve domestic and foreign corporations with a conspiracy to restrain, and attempt to monopolize, domestic and foreign commerce in incandescent electric lamps. The principal defendants included General Electric and its wholly owned subsidiary, International General Electric (IGE). IGE had been organized by General Electric in 1919 for the purpose of exploiting foreign markets. It was an "autonomous organization"[368] and took over and conducted all of General Electric's foreign assets and business in all areas of the world except the United States and Canada. The complaint alleged that General Electric through its subsidiary, IGE, violated the Sherman Act by entering into and maintaining patent licenses and other agreements with potential and actual foreign competitors.[369]

The magnitude of the task undertaken by the Government to associate General Electric with the international cartel, termed the Phoebus agreements, was clearly stated by the court:

> On the face of the Phoebus agreements General Electric and IGE are not parties, United States trade is expressly excluded and the Sherman Act has no extra-territorial operation. There appears to be present merely an agreement between foreign companies doing business abroad . . . . No restraint or conspiracy is present on the face of the agreements but the Government has undertaken to demonstrate this by exploration in the nether surface.[370] (Citations omitted.)

The Government's "explorations in the nether surface" consisted of stressing: (1) IGE's role as the manipulator in bringing about the Phoebus agreements; (2) the fact that a wholly owned subsidiary of IGE was a signatory to the agreements and that both corporations were regarded by General Electric as the same company; and (3) a series of comprehensive reports from a top IGE official, the chief architect of the cartel, to General Electric concerning the status of cartel negotiations. These reports emphasized its benefits to General Electric and recommended policies to be adopted with reference to it. Other factors emphasized by the court were the identity of economic interests between IGE and General Electric, and the submission of a dispute involving IGE and one of the foreign conspirators to the Phoebus tribunal for arbitration. But it was the manifest intent and effect of the international agreements upon which the court principally relied to associate General Electric with the cartel. According to the court:

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[367] 82 F. Supp. 753 (D.N.J. 1949).
[368] Id. at 772.
[369] Id. at 766.
[370] Id. at 842.

> The evidence overwhelmingly supports the Government's contentions for it is a fact that IGE was the manipulator which brought into being the Phoebus Cartel and General Electric activities in the United States were geared to the Phoebus agreement and were controlled by virtue of it. The Phoebus agreement and the 1941 agreement are complements of the domestic monopoly and a part of the general conspiracy charged.[371]

Noting that General Electric had thus used its foreign subsidiaries to develop a cartel system in Europe in order to protect its domestic market, the court stated: "The gloss of separate corporate entities employed to insulate General Electric from the consequences of these maneuvers avails nothing in face of the plain intent to monopolize the incandescent electric lamp industry in the United States and protect this dominant position from foreign competition."[372]

Almost invariably the foreign subsidiary which seeks to protect its parent's domestic position from foreign rivalry will document the intent to do so in internal reports between its personnel and those executives of the parent charged with the responsibility for central policy planning for the enterprise as a whole. This occurred in *General Electric* and greatly influenced the decision. The court noted that "[t]he authors of the documents were no minor figures but men of the stature of 'elder statesmen' who governed, controlled and established the policies of General Electric in their time,"[373] and then stated:

> The conduct of General Electric has been too well geared to the teachings of these documents for their meaning to be discounted. . . . These documents have revealed the intent that governed the policy of General Electric and have lifted the corporate veil of IGE to expose it as a facile tool and active conspirator in a scheme whose primary purpose was the maintenance of General Electric domination over the lamp industry in the United States by preventing foreign competition.[374]

General Electric thus presents a contrast to *ICI* on the dangers inherent in centralized planning in multicorporate business structures. If *ICI* shows that too much supervision by the parent over the subsidiary's decision-making processes can lead the court to conclude that the two corporations are in fact a single enterprise entity, *General Electric* demonstrates that action undertaken by the subsidiary for the

371 Id. at 843.
372 Id.
373 Id. at 845.
374 Id.

benefit of the parent can lead to the same conclusions. This interesting and novel parent-subsidiary problem was involved in another international cartel case. In *United States v. Watchmakers of Switz. Information Center, Inc.*,[375] several American and Swiss manufacturers and sellers of Swiss watches and watch parts and a Swiss trade association were found guilty of conspiring to restrain interstate and foreign trade and commerce in watches and watch parts.[376] Included among the 24 defendants were various United States watch companies and their wholly owned Swiss subsidiaries. The principal agreement found to be the basis of the unlawful conspiracy was the "Collective Convention" executed in Switzerland. According to the court, the purpose of this agreement "was to protect, develop and stabilize the Swiss watch industry and to impede the growth of competitive watch industries outside of Switzerland."[377] The court found that this agreement and the acts done pursuant thereto were intended to and did affect United States commerce.

The Government sought to associate American corporations, not signatories to the Collective Convention, with the conspiracy through the acts of their Swiss affiliates who had executed the agreement. It was the Government's theory that the wholly owned Swiss subsidiaries actually controlled their American parents.[378] This contention was expressly rejected by the court in an earlier opinion, denying the motion of the Swiss affiliates to dismiss for lack of jurisdiction over them:

> Although in each case the American parent has financial control of the Swiss subsidiary, the complaint alleges that it has voluntarily subjected itself as an affiliate to the restrictive dominance of the Swiss industry. Granted the Swiss affiliate did not and could not compel the submission of the American parent, the American parent has submitted itself to important policy controls by its subsidiary by permitting the subsidiary to bind it to the Collective Convention and by permitting the subsidiary to participate as a member of FH [the Swiss trade association found to have violated United States law]. The

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375 1963 Trade Cas. ¶ 70,600 (S.D.N.Y. 1962).

376 Specifically, the court found that the defendants had conspired to restrain the manufacture and sale of watches and watch parts in the United States, imports and exports of watches and watch parts for manufacturing or repair purposes, and the furnishing of machinery, materials or technical assistance in violation of both Section 1 of the Sherman Act, 15 U.S.C. § 1 (1964), and Section 73 of the Wilson Act (Tariff), 15 U.S.C. § 8 (1964).

377 1963 Trade Cas. at 77,426.

378 The two American companies referred to were Gruen Watch Company and its wholly owned Swiss subsidiary Gruen Watch Manufacturing Company, S.A., and Longines-Wittnauer Watch Company and its wholly owned Swiss subsidiary, Wittnauer et Cie., S.A.

> American parent may have bought the Swiss company but the Swiss Company through its know-how and its collective Swiss relationship determines what watches the American parent shall sell and at what price and terms and the American company has committed itself to acquiesce. Also, it has in a sense pledged its subsidiary to the controlling Swiss forces as an earnest for its own conduct in the United States. The Swiss affiliate may be fined or penalized for action by the American parent here. It is unrealistic to speak in terms of corporate separation when both have agreed that acts by one corporation visit penalties upon the other and that one as a member and in its dealings through FH sets the conditions for the actions of the other. To that extent the two affiliates do not deal with each other as independents and it is a sufficient dissolution of the corporate barrier to make the acts of one the acts of the other in determining "presence." . . . [T]aking an overall look at the . . . relationships, they are a corporate partnership with a single program.[379]

The court also found another Swiss corporation within its jurisdiction as a result of its control over a domestic corporation, which had formerly been its wholly owned subsidiary. While the stock-ownership relationship between the two corporations no longer existed, the Swiss defendant retained option rights to compel a reconveyance of the American corporation to it for a nominal sum.[380]

In rendering its decision on the merits, the court did not elaborate on the parent-subsidiary relationships. It simply concluded that the American parents knew and approved of the execution of the Collective Conventions by their respective Swiss subsidiaries.[381] The substantive decision thus suggests the court found no reason to disagree with or modify its earlier statements.[382]

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[379] United States v. Watchmakers of Switz. Information Center, Inc., 133 F. Supp. 40, 47 (S.D.N.Y. 1955).

[380] Eterna, A.G. Uhrenfabrik was a Swiss corporation having as its sole United States distributor Eterna Watch Company of America (Eterna, N.Y.). Eterna, N.Y. was once a wholly owned subsidiary of Eterna, A.G. but had been transferred to two other Swiss corporations for a consideration of one dollar. As part of the transaction it was agreed that Eterna, A.G. would appoint Eterna, N.Y. its sole distributor subject to termination by either party on six months' notice, and that upon termination Eterna, A.G. had an option to compel a reconveyance of the capital stock of Eterna, N.Y. for a nominal consideration. 1963 Trade Cas. at 77,418-19; 133 F. Supp. at 49.

[381] 1963 Trade Cas. at 77,453.

[382] One caveat should perhaps be placed at this point: The issue of whether a court has power to bring a foreign corporation before it because of the acts of its affiliate is not the same as the issue of whether to impose liability on one corporation for the acts of its affiliate. Cf., e.g., Cannon Mfg. Co. v. Cudahy Packing Co., 267 U.S. 333, 336-37 (1925).

The *Swiss Watchmakers* case will probably stand as an anomaly in antitrust law. It is difficult to conceive of a comparable factual and evidentiary situation. Nevertheless, the case is important to the present discussion for two reasons: first, because American corporations were held responsible under our antitrust laws at least in part for the acts of their affiliated foreign corporations abroad; and second, because foreign corporations were brought within the jurisdiction of United States courts and found to have violated our antitrust laws on the basis of their relationships to "affiliated" American companies conducting business within the United States. Like *ICI*, the decision also suggests there is no express distinction between holding the parent liable for the acts of a subsidiary or a subsidiary for the acts of a parent. In antitrust cases, the corporate veil apparently can be pierced from either side whenever two affiliated companies are shown to be "managed as one and the same enterprise"[383] or "a corporate partnership with a single program" is proved.

While there is nothing in the cases to support the formulation of any specific rules on the vicarious liability of an American corporation for the antitrust violations of its overseas establishment, it is possible to make some meaningful observations.

First, the decisions support the conclusion that a corporation may be associated with a conspiracy through the acts of an affiliated—parent or wholly or partially owned subsidiary—corporation without application of the "instrumentality," "agency" or related rules. In each case except *Alcoa,* the courts relied primarily upon the actions of one corporation to associate another with the conspiracy. While something more than the normal relationship between the parent and subsidiary probably must still be shown before the corporate fiction will be disregarded, the degree of domination required under the traditional rules need not be shown. A judicial willingness to probe the relationship to determine whose interests are fundamentally involved in particular actions is rapidly developing. The identity of economic interests of parent and subsidiary has enabled the judiciary to view conduct in its total economic perspective and ferret out the actual consequences of actions taken by parent and subsidiary alike. A finding that one of the affiliated corporations was the sole or primary beneficiary of cartel agreements or other unlawful practices involving the other, has frequently led to the conclusion that the former was intended to and did act for the purpose of accomplishing the latter's end. And a finding that both corporations were benefited as an enterprise entity has similarly led to the conclusion that this was the intended result. Under these circumstances, the form of separate corporate existence has been found impotent to insulate one of the

[383] See text accompanying note 364 supra.

corporate entities from the consequences of the other's actions. It may be that the courts are, in effect if not in theory, beginning to accept for antitrust purposes the enterprise entity theory advanced by some authorities as a substitute for the instrumentality rule.[384]

Second, proof of violation by more than one defendant has been greatly simplified. The evidentiary basis of the cases gives birth to some interesting and potent consequences. In each case, affiliates were charged with being coconspirators; sometimes they were named as defendants. As such they became subject to the rule permitting the use of documents and statements of one conspirator as evidence against another when the latter's relationship to the conspiracy has been independently established. This raises the possibility that the corporate relationship may serve as a substitute for the burden of independent proof. Thus if it is assumed that *A* and *B* have conspired and it is sought to associate *C* with their conspiracy, independent proof connecting *C* with *A* and *B* may not be necessary. Instead, it may be sufficient to associate *C*'s subsidiary *D* with *A* and *B* as a party to the conspiracy and then rely upon *C*'s relationship with *D* to show that *C* as well as *A*, *B* and *D* were all conspirators. The potential advantages of this approach to the Government are indeed obvious where the parent and subsidiary are horizontally related and the subsidiary has entered into cartel agreements protecting its parent's markets as well as its own. But the ramifications of the theory do not stop here. The multicorporate, vertically integrated enterprise can encounter similar problems. Consider, for example, a marketing firm, *D*, having as its sole or principal purpose the distribution of products manufactured by *C*, an affiliated firm, where *D* has agreed with outsiders, *A* and *B*, to restrain trade. If the agreement substantially benefits *C*, the relationship between *C* and *D* may result in a finding that *C* is also a conspirator. Since one member of a multicorporate family seldom acts solely on its own behalf without attempting to benefit the family as a unit, this theory has potent ramifications. It could become the normal rather than the unusual situation for the Government to allege that the affiliates of the active conspirators are coconspirators.

Finally, in the case of partially owned subsidiaries and joint ventures, there is the problem of the nonconspiratorial shareholder. The case of the other investors in the partially owned subsidiary can be easily dismissed because they are simply investors. There is no basis for imposing liability upon them. But the joint venture raises distinct problems where the nonparticipant owns insufficient stock either to control or to block control and does not join in any attempt to control. There is no reason why he should be responsible for the acts of the joint corporation.

[384] See Berle, supra note 357.

The problem becomes more difficult where the shareholder has sufficient shares to block intervention by any other shareholder and to prevent the joint enterprise from engaging in illegal conduct, but does not do so. There are, of course, no cases dealing specifically with this problem and, consequently, no judicially recognized answer to the question exists. For this reason, any attempt to formulate rules is fraught with peril, particularly in light of the limitless intricacies of corporate relationships and the ingenuity of counsel.

In a slightly different context, whenever one of the parents has advance knowledge of the proposed plan of another to have their joint subsidiary engage in conduct violative of the antitrust laws, he may have an obligation to exercise whatever control he has to stop the commission of the offensive act. If he does not, he is effectively participating in the illegal conduct, for the very essence of a joint venture is that it is a partnership enterprise of the parents. However, to impose responsibility here because of partial ownership and control and derivative benefits, would constitute a marked departure from the general rule that corporate parents are not chargeable for the conduct of their wholly or partially owned subsidiaries. As a general rule, it would seem that joint venturers, just as any other corporate parents, should not be held responsible for the unlawful acts of their joint enterprise except to the extent that they participate in them. Nevertheless, the very nature of the joint venture—a collaboration of partners taking an active part in the direction and management of the joint enterprise—may lead to the judicial imposition of responsibility. Of course, if one of the partners dissents from the unlawful acts he liberates himself from liability. In any event, the case where one partner claims the status of a nonparticipating shareholder should be viewed with extreme caution. No matter how small his interest, the joint venturer is an active participant in the activities of the joint enterprise and he may not be permitted to claim the complete freedom of one who has not encouraged or otherwise participated in the decision to commit the illegal act.

V. Recapitulation

When the American businessman decides to expand his operations and engage in business abroad, there are essentially four forms of organizational structure available for choice: (1) the unincorporated branch, division or department; (2) the wholly owned subsidiary; (3) the partially owned subsidiary; and (4) the joint venture. While the businessman's ultimate choice may depend on tax or other factors, a meaningful decision must take account of the distinct antitrust consequences attendant on each form of organization. These consequences may arise in the act of establishment itself, during internal manage-

ment operations, or as the result of independent acts of the foreign establishment. The businessman will need to consider specifically the likelihood of being liable under the antitrust laws for conduct which violates Sections 1 and 2 of the Sherman Act or Section 7 of the Clayton Act. He will have to consider the possibility of being held vicariously liable for the acts of his foreign establishment. Because one organizational structure may be preferable for some purposes but not for others he will have to compare the probable consequences of each form in the context of these areas of antitrust concern.

A. *The Legality of the Establishment*

At the outset it can quickly and safely be stated that the act of establishing an overseas branch or subsidiary cannot in itself be considered violative of the antitrust laws. It becomes illegal only when the establishment is used to accomplish an illegal end or is the fruit of otherwise unlawful conduct. The major antitrust problems which might arise are connected with the market dominance or size of the expanding firm rather than with the fact of establishment. These situations could well lead to monopoly problems under Section 2 of the Sherman Act.

The occurrence of either contingency is unlikely, because, even for large firms, internal expansion is generally considered normal, permissible business behavior. Violations occur only in those unusual instances where there is a specific intent to restrain or monopolize United States trade or where the establishment has such significant market impact that it unreasonably restricts the opportunities of competitors to obtain or market their products in the relevant geographic market. In the latter event, the major issue centers on the determination of the appropriate market. It may be large enough to encompass all or part of the domestic or foreign market alternatives available for American business opportunity and thus reduce still further the possibility of antitrust illegality.

While internal expansion is thus relatively secure from antitrust attack, external expansion is not. Whenever the foreign extension is achieved through the acquisition of an existing foreign business concern, it must be tested under additional prohibitions. If large companies merge to form the foreign establishment, a restraint of trade in violation of the Sherman Act may develop. This arises when the merging companies constitute such major competitive factors in the relevant market that their combination eliminates significant competition between them and also occurs when the merger forecloses competitors from substantial supplies or outlets and hence unduly restricts their opportunity to buy or sell. In contrast, Section 7 of the Clayton Act can be violated by small acquisitions, permissible under the Sherman

Act, since there may nevertheless be a reasonable probability that they may substantially lessen competition or tend to create a monopoly. The significant issue in this area lies in the jurisdictional requirements of section 7 which may prevent its application to acquisitions threatening injury only to the export commerce of the United States. For the most part no distinction can be drawn between complete and partial stock or asset acquisitions since both are covered by the Clayton Act. However, section 7 does exempt from its prohibitions stock purchases which are made "solely for investment" and not used to bring about the substantial lessening of competition and, therefore, the true "investor" encounters no antitrust difficulties.

Although the status of branch and subsidiary operations is clear, the legality of collaborative ventures in foreign commerce is less certain and raises distinct problems. Their permissibility depends not only upon the lawfulness of their conception but also upon the reasonableness of the combination of the parents. Joint ventures have often been established to cloak a division of markets by their parents and sometimes they can be found to possess pernicious effects and to lack redeeming social virtue. In either case, the establishment of a joint venture which is the result of acquisition or the creation of a new enterprise is unlawful under the Sherman Act.

Since joint ventures are also deemed to constitute "acquisitions" even when newly created, at least when their parents are engaged in commerce, they must also satisfy the stringent tests of section 7. Under both the Sherman and Clayton Acts, the key issue is justification for the collaboration. This generally requires at the minimum a showing of absence of prior competition between the venturers in the joint market and of the inability of one of them to go it alone. Under the Clayton Act it is additionally necessary to determine that the venturer who would not have entered the market alone but might have remained at its edge did not constitute a substantial incentive to competition in the market.

It is important to remember that there are restraints inherent in every joint venture. While the danger to the competitive system is perhaps more pronounced in the horizontal situation where competitors combine in joint activity, this does not necessarily prohibit collaboration. It is only when, in light of all the circumstances, an undue limitation on competition exists, that any joint enterprise may be proscribed. To generalize, much depends upon who joins, what is joined and especially what market is served by the joint enterprise. Joint ventures between or among businesses, even competitors, which are too small to have an appreciable competitive impact upon the market will not incur antitrust displeasure. On the other hand, the joint operations of dominant or major firms, particularly actual or potential

competitors, are almost certain to encounter antitrust difficulties. Between these extremes, all that can be said is that, before a joint enterprise is undertaken, its competitive merits and its potential antitrust consequences should be assessed.

B. *Internal Conspiracies*

While no distinction is drawn between incorporated and unincorporated foreign business operations for purposes of determining the validity of their establishment, their separate legal status and structures are important in assessing the import of antitrust problems arising in their operation.

1. *Unincorporated Establishments.*—The chief antitrust advantage of the branch, division or department form of business organization, not offered by any other organizational structure, is the reduction of the problem of internal conspiracy to a minimum. With the unincorporated foreign structure there is, except in rare circumstances, only one legal entity, and it takes at least two to make a conspiracy. The unity of corporate personality allows the greatest freedom in the area of normal business operations. The home office can set policy for its foreign branches, divisions or departments. It can adopt policies which will divide territories, fix prices, regulate output and otherwise tend to avoid competition *inter sese* without fear of antitrust violation. Conspiratorial conduct can occur only when corporate personnel combine with outside agents or in the extraordinary situation where branches, divisions or departments of a single corporation have the status of autonomous and independently functioning subsidiaries and combine among themselves on a horizontal plane without direction from above. In any event, there is nothing in the *rationes decendendi* of the cases which poses any threat to foreign expansion or erects any barrier to centralized management control within the structure of a single corporate enterprise.

2. *Wholly Owned Subsidiaries.*—The major problem here concerns the internal relationship of the two corporations and, specifically, the question whether the parent's centralized management will mesh the two in an intraenterprise conspiracy. The doctrine has seldom been invoked by government enforcement agencies, despite the fact that the Supreme Court promulgated it in broad and sweeping terms. Moreover, in those few instances where it has been used, the courts have ordinarily interpreted it narrowly. The explanation most often given for this governmental and judicial hesitancy to apply intraenterprise principles broadly is that it would place thousands of companies in constant violation of the antitrust laws. An overwhelming majority of

the commentators who have considered the question have concluded that there is no substantive distinction between the single business enterprise which conducts operations on a multicorporate basis and one which operates within the framework of a single corporate shell. The same community of interest which exists between a corporation and its unincorporated components exists also between parent and subsidiary and should permit the latter two to be regarded as a single unit. The use of subsidiaries instead of branches, divisions or departments is generally selected for reasons divorced from market considerations and, therefore, no social objective is attained by enjoining them from agreeing not to compete with each other. Accordingly, it is generally conceded that it is not unlawful for a parent corporation to determine its subsidiaries' policies—including price fixing and market division as well as other arrangements designed to avoid competition within the family. Though an abundance of caution might suggest the avoidance of horizontal agreements in order to negate the impression of competition between subsidiaries, it is clear that the parent's control will enable it to direct the affairs of its subsidiaries through normal voting channels without the necessity for formal agreement.

3. *Partially Owned Subsidiaries.*—The rationale which permits centralized planning when one corporation owns all the stock of another may also permit it when there is less than complete ownership, for a parent-subsidiary relationship may still exist. As the percentage of ownership decreases, however, the control of the parent is diluted and the community of interest beween the two corporations gradually disappears. If the minority interest is held by persons who are or could be competitors of the majority stockholder, it may be impossible to find an enterprise entity. Accordingly, the enterprise theory which permits treating the parent and its subsidiaries as a single trader offers no justification for formal agreements here due to the existence of a competing interest in the partially owned corporation. The doctrine is equally inapplicable where the parent's controlling position stems from a minority stock interest even though the remainder of the stock is widely held. In these latter two instances, however, the parent's controlling stock interest will enable it to exercise management control without antitrust "combination" through normal voting channels.

4. *Joint Ventures.*—The joint venture, if incorporated, has an independent legal personality separate and distinct from its parents, which are separate and distinct from each other. Because each parent is actively engaged in the direction and management of the joint enterprise, it does not possess a community of interest with any of them. The absence of an identity of interest between the joint venture and its

parents, either severally or individually, makes the enterprise entity concept inapplicable to them. Consequently, agreements between the joint venture and its parents limiting competition *inter sese* are unlawful unless reasonably ancillary to a primary lawful purpose such as the creation of the joint enterprise itself, or the licensing of valid patent, trademark or secret process rights.

The same result follows when the joint venture is not incorporated or established with a separate and distinct legal personality, independent from that of its parents. Absent the creation of a separate corporate personality, there is simply an agreement between the colloborators by which they jointly agree upon the bases on which they will engage in foreign commerce. The agreement is permitted only to the extent that the joint venture itself is justified.

C. *Vicarious Liability*

Issues as to the vicarious liablility of the American corporation for the antitrust violations of its overseas establishment center exclusively on the subsidiary and joint venture forms of business structures. Since the unincorporated foreign branch, division or department is but an extension of the American corporation, its acts are the acts of the corporation which bears full responsibility for them. While this is clear, there is no easy answer to the question of when the American parent will be held liable for the acts of its wholly or partially owned foreign subsidiaries. It is often said that the parent will not be visited with responsibilty unless it participated in them. But this statement is deceptively simple, for the parent has frequently been charged with the violation. The actual basis of liability is admittedly unclear, and though the test appears to be the exercise of control over, or intervention in, specific acts, the degree of parental participation required remains clouded. About the only conclusion that can be safely drawn is that the courts are placing antitrust responsibility upon the parent for its subsidiary's actions without laboring expressly to fit the particular intracorporate relationship into the traditional straitjackets of the "instrumentality," "agency" and related rules. The enterprise-entity concept is beginning to receive judicial recognition. Nevertheless, the apparent requirement of some kind of "participation" shows, at least for the present, that a parent corporation is not generally responsible for the antitrust violations of its overseas subsidiaries.

Since the joint venture is simply a partially owned joint subsidiary, the same general rule of nonliability of the parent for its subsidiary's actions obtains here also. Problems arise only where one of the parents has advance knowledge that another intends to intervene in the affairs of the joint enterprise in a manner that will involve it in conduct prohibited by the antitrust laws. If the nonconspiratorial venturer does not

exercise whatever control he has to block the intervention, he effectively becomes a passive participant in the illegal conduct. There is an outside chance that the peculiar status of a joint venture, encompassing as it does the collaboration of partners taking an active part in the direction and management of their joint enterprise, may permit piercing the corporate veil and justify the imposition of responsibility upon the passive beneficiary of its partner's illegal action. However, to impose liability here because of partial ownership, control and derivative benefits, would constitute a marked departure from the general rule that corporate parents are not chargeable for the conduct of their subsidiaries.

Two final thoughts would appear appropriate. First, it has been suggested by at least one writer that a distinction be made between participation in foreign cartels which are limited by their terms and effect to local foreign markets and participation in international cartels which keep foreign companies out of the United States.[385] Under this theory, the participation of the overseas establishment in a cartel limited to foreign markets would not be within the ambit of concern of the United States antitrust laws unless it operates to exclude American exports or exporters. Second, it has also been suggested that neither the American company nor its foreign establishment should be deemed an antitrust violator when the overseas enterprise becomes the unwilling participant in a so-called unlimited foreign cartel.[386] The basis for this suggestion is that in foreign commerce, as opposed to domestic commerce, "there may well be situations where the thinness of the market or private bargaining power make acquiescence in a restrictive agreement a *sine qua non* of doing any business at all."[387] Under these circumstances, it is argued, the "thrust upon" doctrine should excuse participation. While there is little if any judicial support for these theories, they do merit consideration.

D. *Conclusion*

There is no such thing as *the* form of business organization which is the "safest" to adopt from an overall antitrust viewpoint. On specific issues, a particular type of organizational structure may give rise to fewer antitrust problems than others, but on other issues the reverse is true. For example, the unincorporated foreign branch reduces the problem of possible unlawful conspiracy between the home office and the overseas establishment to a minimum, but at the same time increases the antitrust exposure of the American corporation to possible liability for the acts of its overseas personnel. On the other hand,

[385] Brewster, supra note 22, at 186.
[386] Id. at 88.
[387] Id.

utilization of a foreign subsidiary reduces the risk that the American corporation will be held responsible for the unlawful acts of its foreign subsidiaries, but increases the risk that conspiracy charges will spring from the internal relationship among members of the multicorporate family. Thus while one cannot say that any one form of business organization is the "safest," one can certainly conclude that the joint venture is fraught with the most peril.

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