The OIDCs' stake in energy and security issues will increase faster than their power to influence international events. Therefore, they need help in defining their individual energy security problems and domestic policy responses. Urgent attention must be paid to stockpiles and allocation plans for oil supply and price emergencies. Special bilateral arrangements must be negotiated between oil producers and the world's poorest oil consumers. International agencies must start making up for the time they have lost. And, only by becoming directly involved in these preparations can U.S. foreign policy makers help contain the imminent threats to international security.

Joint Ventures Abroad and United States Antitrust: A Reply

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The application of United States antitrust law to joint ventures in foreign countries was the subject of a recent article in THE FLETCHER FORUM by Jim Manzi.[1] In seeking "to determine what is certain and what gray areas still await clarification,"[2] Manzi accurately placed in the gray area the relation of antitrust law to joint ventures in which a foreign government participates or promotes.[3] Also noteworthy was his concern that present antitrust standards might inhibit economically beneficial joint ventures in developing countries.[4] With regard to the principles of antitrust law applicable to foreign joint ventures, however, the author of this reply is unable to endorse the views expressed by Manzi. Manzi's interpretation of case law from the 1950s represents an oversimplification which, instead of producing clarity, causes greater confusion than is warranted by those decisions. His conclusion that U.S. courts "were reluctant to extend per se illegality to international business transactions"[5] cannot be justified by an accurate reading of the cases upon which he relies. Indeed, it will be shown that Manzi commited what Wilbur Fugate calls "a frequent basic error"[6] by failing to distinguish extraterritorial jurisdiction from the substantive principles of antitrust law.

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1. Manzi, "*Joint Ventures Abroad and United States Antitrust*," 4 FLETCHER FORUM 49 (1980).
2. *Id.* at 50.
3. *Id.* at 62-66. *See also* Panel Discussion, "*Sovereign Compulsion Defense in Antitrust Litigation: New Life for the Act of State Doctrine?*" 72 AM. SOC'Y INT'L L. PROC. 97 (1978).
4. Manzi, *supra* note 1, at 67.
5. *Id.* at 57.
6. FUGATE, FOREIGN COMMERCE AND THE ANTITRUST LAWS 174 (2d ed. 1973).

I

Before turning to the cases examined by Manzi, it will be useful to outline the issues of antitrust law pertinent to international joint ventures. The provision of law under which the legality of such joint ventures is tested is Section One of the Sherman Act of 1890,[7] of which the relevant portion states:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade among the several States, or with foreign nations, is hereby declared to be illegal.[8]

When a case involving international business is brought under this section, the court must resolve two basic issues.[9] First, there must be jurisdiction over the subject matter of the litigation. This issue involves the extraterritorial application of the Sherman Act, that is, whether the U.S. statute can reach beyond the territory of the United States to affect the conduct in question. Second, principles of substantive antitrust law must be applied to the facts of the case. This issue involves whether the conduct complained of violated the law. The issues are related insofar as "[b]oth inquiries rest on judgments about the apparent will of Congress with respect to foreign transactions."[10] Thus, jurisdiction and substance both limit the application of the Sherman Act to international transactions. For instance, conduct which would plainly violate the law in a domestic case might not be illegal in an international setting because subject matter jurisdiction is not satisfied. Conversely, where subject matter jurisdiction does exist, applying substantive principles in light of special factors that obtain in international transactions might dictate a different result from that reached with respect to a similar domestic transaction. Yet despite this interaction, it is important to keep in mind that these are different issues and should be analyzed separately. A potential source of confusion is presented because, as Smit and Pugh note, "ordinarily both questions arise at the same time, [and] the cases usually deal with them in their natural conjunction."[11]

The scope of subject matter jurisdiction is defined by the stratutory language "trade or commerce among the several States, or with foreign nations." In a domestic suit, the court must determine whether the activities constituted "trade or commerce among the several States," that is, interstate commerce.

7. 26 Stat. 209 (1890), *codified, as amended, in* 15 U.S.C. §§ 1-7 (1976).
8. 15 U.S.C. § 1 (1976).
9. Not considered are issues germane primarily to the conduct of litigation, such as jurisdiction over the defendant or his property, and pretrial discovery. *See generally* 1 P. AREEDA & D. TURNER, ANTITRUST LAW: AN ANALYSIS PRINCIPLES AND THEIR APPLICATION 256-60 (1978) (in personam and in rem jurisdiction); United States v. First Nat'l City Bank, 396 F.2d 897 (2d Cir. 1968) (pretrial discovery).
10. 1 P. AREEDA & D. TURNER, *supra* note 9, at 267.
11. H. SMIT & R. PUGH, "International Business Transactions in the Common Market," pt. 3, at 7 (unpublished course materials, Columbia University, 1980).

Similarly, the crucial inquiry in an international case is whether the suit pertains to "trade or commerce . . . with foreign nations," that is, the internatioal trade of the United States. Where a court finds, as in *American Banana Company v. United Fruit Company,*[12] that "the acts causing the damage were done . . . outside the [legislative] jurisdiction of the United States,"[13] the acts are not within the subject matter of the Sherman Act. More recent cases have focused not on the place where the acts were committed but where they have an effect.[14] Subject matter jurisdiction is found if there is a legally sufficient effect on U.S. international trade. The requirements of the "effects doctrine" have been stated in different ways. One case indicates that conduct which "directly and materially affects foreign commerce"[15] is required, while the Department of Justice Antitrust Division has termed the required effcect "substantial and foreseeable."[16] What emerges from these formulations is that below some minimum level, acts performed overseas will not have a significant enough effect to fall within the ambit of the Sherman Act.

Once subject matter jurisdiction has been established, imposing liability under Section One requires two findings: first, that a "contract, combination . . ., or conspiracy" is involved; second, that it is "in restraint of" trade. The first finding is achieved automatically in cases dealing with joint ventures, for they involve by definition a "combination" of two or more venturers. The meaning of the term "in restraint of," as it is used in the Sherman Act, is less clear. After uncertainty in early cases, the Supreme Court in 1911 enunciated the so-called "rule of reason" by interpreting the Act to prohibit only those arrangements which represent undue or unreasonable restraints of trade.[17] Under this approach, a court must evaluate the particular circumstances of a transaction to determine whether it has illegal consequences. Among the factors taken into account are the existence of any peculiar conditions in the industry, the nature and effect of the restraint of trade, and the reasons or business justification for adopting the restraint.[18] A special component of the rule of reason is the "ancillary restraints doctrine," which upholds restraints of trade that form a necessary part of a legitimate transaction and are consistent with its purpose.[19]

12. 213 U.S. 347 (1909).
13. *Id.* at 355.
14. *E.g.*, United States v. Sisal Sales Corp., 274 U.S. 268 (1927); United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945).
15. United States v. Hamburg-Amerikanische Packetfahrt A.G., 200 F. 806, 807 (S.D.N.Y. 1911), *vacated as moot,* 239 U.S. 466 (1916).
16. U.S. Department of Justice Antitrust Division, "Antitrust Guide for International Operations" (1977), *reprinted in* [1977] ANTITRUST AND TRADE REG. REP. (BNA), E-2.
17. Standard Oil Co. v. United States, 221 U.S. 1 (1911).
18. *See* United States v. Topco Assoc., Inc., 405 U.S. 596, 607 (1972).
19. The ancillary restraints doctrine originated in United States v. Addyston Pipe & Steel Co., 85 F. 271 (6th Cir. 1898), *aff'd,* 175 U.S. 211 (1899).

The Supreme Court has recognized, nevertheless, that some restraints of trade have such a consistently undesirable effect that they are almost incapable of satisfying the rule of reason, regardless of the surrounding circumstances. Such restraints have been "conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use."[20] This doctrine of "per se illegality" makes enforcement of the antitrust laws more predictable and avoids unnecessary litigation concerning the individual transaction in which the restraint appears. Per se illegality is not a rejection of the rule of reason, but permits a court to reach a conclusion more rapidly and with less evidence than would otherwise be the case.[21] Practices in interstate commerce that have triggered the per se rule include horizontal[22] and vertical price fixing,[23] and horizontal territorial limitations.[24]

II

The article by Manzi discusses the three leading cases of the early 1950s involving international joint ventures. They are *Timken Roller Bearing Company v. United States,*[25] *United States v. Minnesota Mining & Manufacturing Company,*[26] and *United States v. Imperial Chemical Industries, Ltd.*[27]

Timken Roller Bearing Company v. United States[28] pertained to a conspiracy in restraint of trade on the part of Timken, an Ohio corporation, and its subsidiaries in Britain and France. At trial it was shown that Timken and an English businessman, Dewar, jointly owned controlling interests in the subsidiaries, making them joint ventures. Beginning in 1928, Timken and its subsidiaries maintained agreements concerning the manufacture and sale of antifriction bearings and the licensing to the subsidiaries of the Timken trademark. As the trial court's findings of fact were summarized by the Supreme Court,

> [u]nder these agreements the contracting parties have (1) allocated trade territories among themselves; (2) fixed prices on products of one sold in the territory of the others; (3) cooperated to protect each other's markets and to eliminate outside competition; and (4) participated in cartels to restrict imports to, and exports from, the United States.[29]

20. Northern Pac. Ry. v. United States, 356 U.S. 1, 5 (1958).
21. *See* FUGATE, *supra* note 6, at 178.
22. *E.g.*, United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940).
23. *E.g.*, Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911).
24. United States v. Topco Assoc., Inc., *supra*, p. 18.
25. 341 U.S. 593 (1951), *modifying* 83 F. Supp. 284 (D. Ohio 1949).
26. 92 F. Supp. 947 (D. Mass. 1950).
27. 100 F. Supp. 504 (S.D.N.Y. 1951).
28. 341 U.S. 593 (1951), *modifying* 83 F. Supp. 284 (D. Ohio 1949).
29. Timken Roller Bearing Co. v. United States, 341 U.S. at 598.

After finding the requisite effect on U.S. international trade, the trial court ruled that the agreements were a per se violation of the Sherman Act.[30] The court enjoined the defendants from continuing or repeating the illegal conduct and ordered Timken to divest itself of the subsidiaries. The Supreme Court affirmed the holding that the conduct was illegal but modified the remedy by refusing to order divestiture.[31]

Timken had raised several lines of argument on appeal in its effort to avoid liability,[32] of which the only one relevant to the present discussion was that the restraints were reasonable because they were ancillary to a legitimate joint venture. Justice Black, for the majority of the Court, rejected this contention, saying "Our prior decisions plainly establish that agreements providing for an aggregation of trade restraints such as those existing in this case are illegal under the Act."[33] The Court ruled that neither the fact that the agreements were between a parent corporation and its subsidiaries nor that the subsidiaries were joint ventures could shield Timken from liability.

Jim Manzi contends that the statement by Justice Black quoted above illustrates that the Court "was extremely reluctant to call the Timken agreements per se violations of Section One."[34] While conceding that Justice Black "didn't use any Latin,"[35] it is submitted nevertheless that he considered the restraints in question to be a per se violation. In particular, there should be no question that price fixing agreements and horizontal market allocations in international trade are illegal per se, as they are in interstate commerce. By disposing of the joint venture argument in one paragraph, Justice Black plainly did not evaluate the business justification of the agreement, as would ordinarily be required if the rule of reason were applied. Moreover, the first two cases that he cited to support the quoted sentence were *Kiefer-Stewart Company v. Joseph E. Seagram & Sons,*[36] and *United States v. Socony-Vacuum Oil Company, Inc.*,[37] both of which stated, "Under the Sherman Act a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal *per se*."[38]

Subsequent interpretations of *Timken* have, with the exception of Manzi's

30. United States v. Timken Roller Bearing Co., 83 F. Supp. at 310.
31. Timken Roller Bearing Co. v. United States, *supra*, n. 29 at 600-01.
32. Other defenses were that the restraints were ancillary to a trademark licensing scheme and that they were reasonable because of conditions in international trade. Both defenses were rejected. *Id.* at 599-600.
33. *Id.* at 598.
34. Manzi, *supra* note 1, at 52.
35. M. HANDLER, H. BLAKE, R. PITOFSKY, & H. GOLDSCHMID, CASES AND MATERIALS ON TRADE REGULATIONS 332 (1975) [hereinafter cited as M. HANDLER et al.].
36. 340 U.S. 211 (1951), *cited in* Timken Roller Bearing Co. v. United States, 341 U.S. at 598.
37. 310 U.S. 150 (1940), *cited in* Timken Roller Bearing Co. v. United States, 341 U.S. at 598.
38. Kiefer-Steward Co. v. Joseph E. Seagram & Sons, 340 U.S. at 213, *citing* United States v. Socony-Vacuum Oil Co., 310 U.S. at 223.

article, consistently viewed the case as applying the per se doctrine. The Supreme Court discussed the holding of *Timken* and *United States v. Topco Associates, Inc.*[39] Justice Marshall, writing for a majority of the Court, cited *Timken* for the proposition that horizontal territorial allocations are illegal per se.[40] Chief Justice Burger, in dissent, agreed that *Timken* applied a per se rule but contended that it covered territorial allocations only if they were combined with price restraints.[41] Leading writers on antitrust law also consider that *Timken* applied a per se rule.[42]

Once it is recognized that a per se rule was enunciated, the scope of the rule must be considered. It plainly covers price fixing agreements and, at least after *Topco,* territorial allocations, irrespective of whether these agreements are collateral to a joint venture.[43] When *Timken* is read in isolation, however, it is not entirely clear whether per se illegality extends to the creation of a joint venture in the absence of restrictive agreements. One commentator though that it did so.[44] But Joelson and Griffin assert that since the Supreme Court overturned the divestiture order, the creation of the joint venture did not entail per se liability.[45]

The second case examined by Manzi is *United States v. Minnesota Mining & Manufacturing Company.*[46] The part of the case relevant to overseas joint ventures involved direct foreign investment by the four largest American producers of coated abrasives, a chemical product.[47] In 1929, when the four companies ac-

39. 405 U.S. 596 (1972).
40. *Id.* at 608 (Marshall, J.).
41. *Id.* at 616 (Burger, C.J., dissenting).
42. *See* FUGATE, *supra* note 6, at 150 ("These cases indicate that the participation of an American company in price-fixing in a foreign market may be treated the same as price-fixing in the American market, that is, it is considered unreasonable per se if there is a substantial effect on U.S. commerce."); M. HANDLER, et al., *supra* note 35, at 359 ("As in domestic cases, both price-fixing and the division of markets have been held to be *per se* illegal."); Bork, *"The Rule of Reason and the Per Se Concept: Price Fixing and Market Division,"* pt. 1, 74 YALE L.J. 775, 777 (1965).
43. Discussion of the aspect of *Timken* related to intracorporate conspiracies would lead too far afield. In general, the concept that a parent may be found guilty of conspiring with its subsidiaries to restrain trade is very much alive. *See* Perma Life Mufflers, Inc. v. Int'l Parts Corp., 392 U.S. 134 (1968).
44. Graham, *"Antitrust Problems of Corporate Parents, Subsidiaries, Affiliates and Joint Ventures in Foreign Commerce,"* 9 ABA ANTITRUST SECTION REP. 32, 38 (1956).
45. Joelson & Griffin, *"Multinational Joint Ventures and the U.S. Antitrust Laws,"* 15 VA. J. INT'L L. 487, 505 (1975).
46. 92 F. Supp. 947 (D. Mass. 1950).
47. Another part of the case dealt with a second joint subsidiary, Durex Abrasives Corporation, a Webb-Pomerene Associated which handled the joint venturers' worldwide export sales. The Webb-Pomerene Export Trade Act of 1918, 15 U.S.C. §§ 61-65 (1976), granted limited immunity from the antitrust laws for the formation of a joint exporting association. Judge Wyzanski ruled that the immunity did not apply in this case because the defendants had exceeded the scope of the exemption available under the Act. United States v. Minnesota Mining & Mfg. Co., 92 F. Supp. at 964-66.

counted for eighty percent of the export trade in coated abrasives, they jointly organized a subsidiary, The Durex Corporation (Durex), as a holding company to control manufacturing subsidiaries in Great Britain, Canada, and Germany. The joint venturers agreed to license their foreign patents to Durex, which would sublicense them to its subsidiaries. The effect of these agreements was that the markets in the three host countries were supplied from the jointly-owned local subsidiaries instead of from export sales by the individual producers, as had previously been the case.

The principal argument raised at trial by the defendants was that the court lacked subject matter jurisdiction because the overseas manufacturing did not affect U.S. exports.[48] While conceding that U.S. exports had fallen drastically after Durex had been set up, the defendants contended that the decrease was due solely to an increase in tariffs and other trade barriers in the foreign countries. In a passage quoted by Manzi,[49] Judge Wyzanski accepted the hypothesis that if foreign trade barriers prevented exports, then direct investment in the foreign country could not affect U.S. trade. Nevertheless, he wrote, "the Court has by its ultimate finding of fact rejected defendants' argument"[50] concerning foreign trade barriers. He therefore ruled that Durex's activities did affect U.S. international trade and that subject matter jurisdiction was established.

Manzi contends that Judge Wyzanski's discussion of foreign trade barriers is "an unusually strong argument for . . . the 'rule of reason' methodology in multinational cases."[51] It is manifest, however, that Judge Wyzanski was not yet examining substantive liability and that his analysis related instead to the issue of jurisdiction. Manzi's interpretation is simply erroneous.

In a later part of the opinion, also quoted by Manzi,[52] Judge Wyzanski discussed the possibility that Durex might have had an effect on interstate, as opposed to international, commerce. He suggested that the joint overseas operations might have spillover effects and reduce competition among the four procedures in the U.S. domestic market. Being unnecessary to the disposition of the case, this part of the opinion has been criticized for causing too much uncertainty for American businesses. Joelson and Griffin report, however, that no subsequent case has followed Judge Wyzanski's suggestion.[53]

Manzi interprets this section of the opinion to be a discussion of "the issue of per se illegality."[54] Once again, however, an accurate reading of the opinion

48. *Id.* at 958.
49. Manzi, *supra* note 1, at 54, *citing* United States v. Minnesota Mining & Mfg. Co., *supra*, at 598.
50. United States v. Minnesota Mining & Mfg. Co., *supra*, at 961.
51. Manzi, *supra* note 1, at 53.
52. *Id.* at 54, *citing* United States v. Minnesota Mining & Mfg. Co., 92 F. Supp. at 963.
53. Joelson & Griffin, *supra* note 45, at 512.
54. Manzi, *supra* note 1, at 54.

demonstrates that Judge Wyzanski was discussing subject matter jurisdiction, not substantive rules, although in this instance the subject matter was interstate instead of international commerce.

When Judge Wyzanski did reach the substantive issue, he ruled that "[p]rima facie there could hardly be a more obvious violation of § 1 of the Sherman Act."[55] He found that Durex's operations illegally restrained exports to Germany and the British Commonwealth by its parents as well as by other U.S. domestic producers of coated abrasives. Because he considered the violation to be obvious, Judge Wyzanski did not make it clear whether he endorsed per se liability for joint ventures in all cases. While it is arguable that the decision applied per se illegality to the creation of Durex,[56] an alternative would interpret *Minnesota Mining* as a decision that the creation or operation of Durex did not satisfy the rule of reason. Under the latter approach, the holding of illegality would be limited to joint ventures that combine dominant firms in an industry, while joint ventures among smaller firms might be upheld. Clarification of these conflicting interpretations would require further developments in the law.

The third case considered by Manzi is *United States v. Imperial Chemical Industries, Ltd.*[57] In this case, the defendants, four corporations and five of their officers, allegedly allocated world markets and restricted trade in chemical products, ammunition, and sporting arms by a series of agreements relating to patent and process licensing, joint ventures, and miscellaneous selling arrangements. This discussion deals with the part of the court's opinion relating to joint ventures.

Judge Ryan considered the issue that had not been directly addressed in *Timken* or *Minnesota Mining*: what legal standard applies to the creation of a foreign joint venture? Based on decisions in domestic settings, he considered it established that in the absence of a purpose to restrain trade, the legality of a joint venture is determined by the rule of reason, particularly where the joint venture is formed by a single U.S. company and a single foreign company in order to penetrate an overseas market.[58] With respect to the joint ventures in the case at bar, however, Judge Ryan noted that the joint venturers were already established or were potential entrants in the foreign markets, and that in addition to the joint venture, the participants formed a pool of their patents and secret processes. In this situation, the court questioned whether the arrangement would escape per se illegality, but found it unnecessary to decide that question because the joint ventures did not satisfy the rule of reason:

55. United States v. Minnesota Mining & Mfg. Co., *supra*, at 961.
56. *See* Graham, *supra* note 44, at 38.
57. 100 F. Supp. 504 (S.D.N.Y. 1951).
58. *Id.* at 557.

> The history of each of these companies demonstrates the unlawful purpose with which they were organized, and demonstrates that they were used as instruments by which territories and countries were divided and assigned for trade and commerce.[59]

In short, *Imperial Industries* seems to leave open the possibility that per se illegality might be applied where dominant firms form a joint venture.

III

In determining the standards of antitrust liability that emerge from these three cases, it is necessary to distinguish the creation of a joint venture from collateral agreements involved in it. *Imperial Industries* endorses the rule of reason for the creation of some joint ventures, but possibly not where dominant firms participate. Neither *Timken* nor *Minnesota Mining* contradicts this view. Application of the rule of reason to the creation of joint ventures in the absence of restrictive collateral agreements has been adopted by the Supreme Court in *United States v. Penn-Olin Chemical Company,*[60] a domestic case in which the Court set out a list of criteria by which the effect of a joint venture should be judged.[61] Today it can be assumed that similar criteria would be used with respect to an overseas joint venture, with the proviso that conditions in international business could be expected to produce results different from those in a domestic case. The theme of *Minnesota Mining* and *Imperial Industries* casting doubt on joint ventures among dominant firms can probably best be viewed as the proposition that such joint ventures are unlikely to satisfy the rule of reason, although per se illegality need not apply.

As for restrictive agreements collateral to a joint venture, it is evident from *Timken* that the presence of a joint venture does not necessarily trigger application of the rule of reason. On the contrary, unless a separate legitimate ancillary purpose can be shown,[62] agreements to fix prices or divide markets in international trade give rise to per se liability under Section One of the Sherman Act.

The conclusion reached in the present discussion that the rule of reason applies to the creation of international joint ventures while per se illegality applies to collateral price or territorial agreements is consistent with the interpretation of other commentators[63] and has been endorsed by the Department of Justice

59. *Id.* at 559.
60. 378 U.S. 158 (1964).
61. *Id.* at 177.
62. For instance, a legitimate ancillary purpose could be the transfer of property, as in a patent licensing agreement. *See, e.g.,* Handler & Blechman, "*An American View of the Common Market's Proposed Group Exemption for Patent Licenses*," 14 INT'L LAW. 403, 404-07 (1980).
63. *See* Fugate, *supra* note 6, at 360; Joelson & Griffin, *supra* note 45, at 534; Comment, "*Joint Ventures Abroad and Per Se Antitrust Violations*," 1 CALIF. W. INT'L L.J. 95, 110 (1970).