Joint Ventures Abroad and United States Antitrust

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The dramatic expansion of the activities of multinational corporations over the past three decades, in both the volume of business and the types of corporate activity, has not been accompanied by a corresponding increase in sophistication of U.S. antitrust law as it affects the overseas operations of U.S. and foreign firms. This is particularly true for antitrust regulation of joint ventures abroad, despite efforts by the Justice Department to clarify the law as it endeavors to enforce it. Jim Manzi explores the evolution of antitrust law as it applies to overseas joint ventures, critiques the Justice Department's position and highlights those areas of the law which require further clarification.

> It is urgently necessary to reassess and clarify the application of antitrust legislation to foreign investment, and in particular to joint ventures, in the light of contemporary international realities.[1]

Nineteen years after Wolfgang Friedmann first analyzed the antitrust questions posed by joint ventures in international business, the same urgent necessity for clarification remains. What has changed are the "contemporary international realities" which today intensify the need for reassessment. Friedmann was concerned with the growing complexities of international business as well as the rising current of economic nationalism, both of which had confused American antitrust authorities and, by extension, American businessmen operating abroad. The passage of time has not dispelled this confusion.

It would be unfair to argue that there has been no judicial direction of international business since the landmark cases of the 1940s and 1950s, but the

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1. Wolfgang Friedmann and George Kalmanoff, *Joint International Business Ventures* (New York: Columbia University Press, 1961), p. 253.

record on cases involving joint venture activity is exceptionally sparse. As is often true with the extraterritorial application of U.S. laws, a great deal of uncertainty surrounds those businessmen who must guide their actions overseas on the basis of court decisions in purely domestic cases. The attempt to bridge the gap between domestic and multinational applications is always difficult, and the parallels which are drawn between the two may often be only tenuous at best. As a result, multinationals, and particularly those planning joint venture operations, have been left in something of a legal fog, despite protests from the U.S. Department of Justice that clear guidelines do exist for multinational businesses.

The purpose of this analysis is to enter that legal fog — in the specific area of equity joint ventures — and attempt to determine what is certain and what gray areas still await clarification. Little attention will be paid to the purely business reasons for joint venture formation; although whenever these affect significant legal issues, particularly in joint ventures with state-owned or -controlled corporations, they too will be examined.

The "Unholy Three"

Timken Roller Bearing v. United States[2] is one of only a half-dozen cases from which overseas ventures can exact some relevant and direct guidance. The Supreme Court placed some clear limitations on joint venture activity by denying the legality of the restrictive agreements entered into by the defendants. In a carefully worded and oft-quoted phrase, the use of joint ventures as a shield from antitrust liabilities was rejected.

> The fact that there is common ownership or control of the contracting corporations does not liberate them from the impact of the antitrust laws.[3]

But the decision in *Timken,* while establishing some groundwork on which to base the permissible limits for joint venture operations, is itself somewhat confined by the facts of the case. In effect, the court was ruling upon the actions of American Timken and its overseas operations with British and French Timken via a complicated series of agreements which date back to 1909, forty years before the case was brought to court under Section One of the Sherman Act.

Timken had tried to "legitimize" its anticompetitive practices by making partners of its former competitors. By 1948, American Timken owned 30 percent of the stock of British Timken and 50 percent of the stock of French Timken. It was in response to these developments that the Supreme Court

2. Timken Roller Bearing v. United States, 341 U.S. 593 (1951).
3. *Ibid.* at 597.

knocked down the antitrust shield which Timken thought it had constructed.

> 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.[4]

Thus, the court clearly stated that it is not concerned with the form of a business entity, here a joint venture, but rather with corporate activity and practice. As Kingman Brewster stated the issue, the arrangements were nullified because of "the explicit agreement governing the partners, not the partnership, which formed the basis of liability."[5]

The question of U.S. jurisdiction in cases of *Timken*'s vintage need not be examined in depth here. It is sufficient to say that the courts were generally guided by the "effects test" established only a few years earlier in *U.S. v. Aluminum Company of America.*[6] The existence of jurisdiction in *Timken* was clearly established by the following passage:

> [T]he fact that the cartel arrangements were made on foreign soil does not relieve defendant from responsibility . . . They had a direct influencing effect on trade in tapered bearings between the United States and foreign countries.[7]

But, at the same time, the justices left unanswered several questions: What constitutes corporate independence? Should such independence or, conversely, control, be defined in terms of the percentage of equity ownership? Can an intracorporate conspiracy ever exist if control is established, as would be the case between a parent and its wholly owned subsidiary?

In his analysis of the case, Mark Joelson argued that *Timken* is not an example of intracorporate conspiracy to restrain trade, largely because other corporate interests, particularly those of a British entrepreneur named Dewar, were parties to the anticompetitive agreements.

> Dewar managed the affairs of both companies [British Timken and French Timken] in such a way that they "retained their corporate independence and jealously guarded their interests in dealings with [American Timken]." Consequently, the court viewed

4. *Ibid.*
5. Kingman Brewster, *Antitrust and American Business Abroad* (New York: McGraw-Hill, 1958), p. 211.
6. U.S. v. Aluminum Co. of America, 148 F.2d 416 (1945).
7. Timken, 83 F. Supp. 284 (1949) at 309.

> the agreements as a conspiracy between American Timken and Dewar . . . for the purpose of eliminating competition.[8]

The Ohio trial court in the *Timken* case had also affirmed the right of persons or corporations to enter joint ventures or partnerships for the purpose of a "lawful business enterprise," and even went so far as to say that if "restraints result from the right to protect established business interests, no violation of law occurs."[9] But, the court concluded, violations of law do exist if the "purpose" of the joint venture is to continue "a combination to allocate exclusive territories in the world, to fix prices and to eliminate competition both within and without the combination."[10] In the process, the court rejected Timken's defense that such agreements were ancillary to what otherwise would have been a legitimate trademark agreement.

In perhaps the most interesting and far-reaching section of the opinion, the trial court declared the Timken agreements "unreasonable per se"[11] and, in a particularly punitive action that went one step too far, ordered the divestiture of American Timken's foreign equity holdings.

The Supreme Court, however, proved far less willing than the federal judge in *Timken* to extend per se rulings beyond the U.S. shoreline. While it generally agreed with the trial court decision, it was extremely reluctant to call the Timken agreements per se violations of Section One. It was sufficient, the court believed, to say that the "aggregation of trade restraints" was illegal under the Sherman Act. It is important to note that the restraints of trade which *Timken* furthered — price-fixing and territorial divisions[12] — had long been considered "per se illegal" in the purely domestic setting. The court also overturned the divestiture order.

Even though the Supreme Court softened the trial court's ruling in *Timken*, Justice Frankfurter issued a strong dissent that outlined some of the problems that are still germane today:

> When as a matter of cold fact the legal, financial and government policies [of a foreign country] deny opportunities for exportation from this country and importation into it, arrangements that afford such opportunities to American enterprise may not fall

8. Timken, 83 F. Supp. 284 (1949) at 311, cited by Mark Joelson and Joseph Griffin, "Multinational Joint Ventures and the U.S. Antitrust Laws," 15 *Virginia Journal of International Law*, (Spring 1975), p. 505.
9. Timken, 83 F. Supp. 284 (1949) at 312.
10. *Ibid.*
11. *Ibid.* at 309.
12. *See* U.S. v. Addyston Pipe & Steel Co., 85 F. 271, 6th Cir. (1898), aff'd. 175 U.S. 211 (1899). Also, U.S. v. Socony-Vacuum, 310 U.S. 150 (1940).

> under the ban of a fair construction of the Sherman Law because comparable arrangements regarding domestic commerce come within its condemnation.[13]

Justice Jackson, also dissenting, reemphasized the differences between domestic and foreign markets, and ultimately concluded that the decision in *Timken* would restrain more trade than it would free.[14]

As the *Timken* case was en route from the trial court to the Supreme Court in 1950, Justice Wyzanski of the U.S. District Court in Massachusetts rendered an equally important but controversial decision in *U.S. v. Minnesota Mining and Manufacturing Co.*[15]

The facts of the case are reasonably straightforward: four manufacturers of coated abrasives, all American, joined to form the Durex Corporation to export them under the Webb-Pomerene Act. The venture represented 86 percent of U.S. production. All the participants agreed, in 1929, not to export abrasives except through Durex. In separate agreements, the firms also established joint manufacturing facilities overseas and mandated the licensing of the individual corporate patents to the Durex operation abroad. As is common in joint venture formation abroad, the companies were seeking to overcome local restraints such as tariffs, import controls and foreign exchange restrictions.[16] Once the manufacturing subsidiaries in Canada, the United Kingdom and Germany had been established, the parent corporations ceased exporting in competition with Durex subsidiaries.

The district court found that the agreement above unlawfully restrained U.S. exports, and rejected the defendant's claim that such an arrangement was mandated by import and tariff considerations. Higher profits to be realized, the court said, were the real motivation. Another Section One violation existed, the judge ruled, because American competitors of the parents were, to some extent, denied the ability to export to markets they might otherwise have served.

In his opinion, Wyzanski correctly noted that issues other than the purely legal ones color the consideration of cases involving international transactions. He made an unusually strong argument for what has come to be called the "rule of reason" methodology in multinational cases. The rule of reason standard is applied to cases in which the court chooses to weigh the likely anticompetitive consequences of a particular business activity against its procompetitive results. This contrasts with the per se standard under which

13. Timken at 605-06.
14. *Ibid.*
15. U.S. v. Minnesota Mining & Manufacturing Co., 92 F. Supp. 947 (D. Mass., 1950).
16. Henry Steiner and Detlev Vagts, *Transnational Legal Problems*, 2d ed. (Mineola, New York: The Foundation Press, 1976), pp. 1229-30.

restraints of trade are conclusively presumed to be undue or unreasonable.[17] In Wyzanski's opinion:

> It is axiomatic that if 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 there is not and could not be any American foreign commerce in that area which could be restrained or monopolized.[18]

Unfortunately, Wyzanski went on to examine the issue of per se illegality. Kingman Brewster criticized this as clearly wandering from the issue at hand, adding, "The pinprick of its language remains to nettle the would-be joint venturer."[19] The section from Wyzanski's opinion is important enough to quote at length:

> It may very well be that even though there is an economic or political barrier which entirely precludes American exports to a foreign country, a combination of dominant American manufacturers to establish joint factories for the sole purpose of serving the internal commerce of that country is a per se violation of this other clause [i.e., the interstate commerce clause] of the Sherman Act. The intimate association 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 . . . It may therefore be subject to condemnation regardless of the reasonableness of the manufacturers' conduct in foreign commerce.[20]

The citation above seems to offer an example of the unlikely combination of clairvoyance and imprudence. It would have been more logical, especially in light of Wyzanski's earlier comments implying a rule-of-reason attitude, simply to have waited to see whether "zeal" was in fact reduced and what effects manifested themselves. The implication that joint ventures may be rejected out

17. Standard Oil Co. (New Jersey) v. United States, 221 U.S. 1 (1911). *See also* Bork, "The Rule of Reason and the Per Se Concept: Price Fixing and Market Division," Part I, 71 *Yale Law Journal* (1965), pp. 775, 783-808.
18. Minnesota Mining at 958.
19. Brewster, *Antitrust and American Business Abroad,* p. 210.
20. Minnesota Mining at 963.

of hand as per se illegal seems to reject the standard by which per se illegality as a concept was established: "pernicious effect" and "lack of any redeeming virtue."[21]

While Joelson and Griffin are both highly critical of the Wyzanski dicta in *Minnesota Mining,* they have argued that other courts have "never expressly" adopted or rejected the dictum.[22]

However, in *United States v. Imperial Chemical Industries, Ltd.*[23] (*ICI*), the last case of the so-called "unholy three," it appears quite clear that the district court in New York settled much of the issue in a single sentence:

> It is settled that joint ventures, even in domestic markets, are not made unlawful per se by the Sherman Act, but become unlawful only if their purpose or their effect is to restrain or monopolize trade.[24]

At issue in *ICI* was a series of patent and processes agreements between Imperial Chemical Industries, Ltd., a British company, and duPont, an American concern. The two firms, which also established a joint venture in Canada, were alleged to have used the agreements to divide world territories and allocate customers for chemical products.

The district court established that a Sherman Act violation was present and further determined that an adverse impact on U.S. imports and exports had occurred.

> These agreements, irrespective of their per se *legality,* were instruments designed and intended to accomplish the world-wide allocation of markets; their object was to achieve an unlawful purpose — an illegal restraint of trade prohibited by Section 1 of the Sherman Act. The agreements are unlawful because they provide a means for the accomplishment of this purpose and objective.[25] (emphasis added)

Thus, the district court in *ICI* turned its attention away from structure to purpose, using the criteria of "wrongful purpose and harmful effect."[26]

These three cases stand out as the most important road markers for joint venturers but their limitations as guideposts are obvious. What is made clear is that each decision, with the exception of some sections of *Minnesota Mining,* il-

21. Northern Pacific Railway v. U.S., 356 U.S. 1 (1911) at 5.
22. Joelson and Griffin, "Multinational Joint Ventures," p. 512.
23. United States v. Imperial Chemical Industries, Ltd., 100 F. Supp. 504 (S.D.N.Y., 1951).
24. *Ibid.* at 557.
25. *Ibid.* at 592.
26. *Ibid.* at 557.

lustrates the court's concern with broad antitrust questions that extend well beyond joint ventures themselves.

But in each case, the violations were glaring, and the agreements or combinations had been well established for a long period of time and had been arranged before World War II in most cases. The war, however, marked a break, not in the way U.S. courts viewed their cases, but in the world at large. New forces such as economic nationalism were growing in intensity in the post-colonial age. Both changing attitudes toward foreign investment and shifting political and economic conditions today subject the authority of these cases to question.[27]

Were this 1951, after each case had reached its conclusion, it might be difficult to discern just what degree of comfort, if any, a joint venture overseas would afford its participants. Potential joint venturers were forced to look to other, general antitrust decisions treating international operations and to domestic decisions regarding joint venture activity.

In essence, American businessmen of the 1950s who were contemplating joint venture formations were left with a lack of precision. They faced the single problem that is anathema to any business undertaking, foreign or domestic — uncertainty. To be sure, the Justice Department recognized this and attempted to clear up some of the major questions in its 1955 *Report of the Attorney General's National Committee to Study the Antitrust Laws.* For instance, a parent operating through a subsidiary which it fully controls may allocate territories or set prices. Control had generally been established via majority stock ownership, but was later to include "effective control" in the absence of such majority ownership. The ruling cleared up one of the thornier questions left over from *Timken.*

But still Judge Wyzanski's dictum in *Minnesota Mining* would, as Brewster noted, continue to haunt joint venturers. As Wolfgang Friedmann observed several years later:

> To expect an American investor to compete actively with its own subsidiary by exporting to the country the very product that the joint venture is manufacturing would be an absurdity, even though this contingency seems to be included in the Wyzanski dicta.[28]

Friedmann recognized, however, that an agreement to limit or exclude sales to the United States from the overseas operation would be "more objectionable and, therefore, application of the Sherman Law would be more acceptable."[29]

27. Steiner and Vagts, *Transnational Legal Problems,* pp. 1228-9.
28. Friedmann and Kalmanoff, *Joint International Business Ventures,* p. 254.
29. *Ibid.*

THE IMPACT OF THE OIL INDUSTRY

It is worthwhile examining possible explanations, other than purely legal ones, as to why U.S. courts — especially the Supreme Court in *Timken* — were reluctant to extend per se illegality into international business. One logical explanation is to be found in the structure of the international oil industry.

Ever since the early 1920s U.S. firms had been combining with each other and with foreign petroleum firms in the exploitation of Middle Eastern crude. Many of the combinations can only be labeled joint ventures while others, such as the so-called Red Line Agreement of 1928, were clearly anticompetitive.

Under the terms of that agreement, the constituent members of the Iraq Petroleum Company — including Standard Oil of New Jersey and Socony-Vacuum (Mobil) as well as British participants — agreed not to seek concessions in other parts of the Middle East except in association with fellow members. It is essential to note that American corporate participation in the Agreement was strongly backed by diplomatic pressure from the U.S. Government. Five years later, in 1933, four American firms formed the Arab-American Company (ARAMCO), a classic joint venture, to exploit Saudi Arabian oil reserves. The history of Middle Eastern oil development is dotted with such unions that continue to exist today.

In 1954, three years after the books were closed in *Timken,* a consortium agreement among the oil companies was negotiated. Included were British Petroleum, Standard Oil of New Jersey, Socony-Vacuum, Standard Oil of California, Gulf, Texaco, Royal Dutch–Shell and Compagnie Française des Pétroles. Nine other American companies were admitted a year later. The U.S. Government gave its approval to the negotiations leading up to the final consortium agreement which, as a State Department adviser later admitted, "might otherwise have been called into question under the antitrust law."[30]

The example of petroleum offers a clear case of U.S. strategic needs — as they were then perceived — modifying legal enforcement, even in the face of Wyzanski's statement that such common corporate experience abroad "may inevitably reduce their zeal for competition *inter sese* in the American market."[31]

Perhaps the Justice Department accepted the restraints in the oil combinations as "ancillary"[32] to an otherwise lawful act. If this was the case, both the Justice Department and the federal judiciary would indeed be hard-pressed to argue for per se applicability abroad. Would not such discrimination on an

30. L. E. Becker, "The Antitrust Law and Relations with Foreign Nations," 40 *Dept. State Bulletin,* 272 (1959), p. 278. Cited *in ibid.,* p. 255.
31. Minnesota Mining at 963. *See* note 19, also p. 9 above.
32. *See* U.S. v. Addyston.

industry-by-industry basis surely offend the concept of "fair play and substantial justice"?[33] Rule of reason treatment seems mandated by past practice.

Penn–Olin and Potential Entry

Before advancing to the major developments of the 1960s in the field of joint venture regulation, it is important to note current Justice Department sentiments on the matters already discussed, particularly per se application overseas.

In perhaps the first official document of the Carter Administration's Justice Department — *Antitrust Guide for International Operations* (26 January 1977) — the Department outlines the factors it considers in examining joint venture legality. It names, for instance, the duration of the agreement and the dominance of the participating firms in their respective markets, as well as a dozen other considerations. But, tucked away at the bottom of a paragraph, there is a most important sentence:

> We emphasize, however, that the normal per se rules will be applied fully to basic horizontal restraints designed to affect U.S. market conditions or to divide the U.S. market from other markets.[34]

The Justice Department's self-contradiction is almost spellbinding in this phrase from a later section of the *Antitrust Guide:*

> The Supreme Court held such general territorial allocations among competitors to be per se Sherman Act Section 1 violations in *Timken* . . .[35]

Whereas the first statement indicates that it is the effect in the U.S. which is important, the second states that territorial allocations are illegal regardless of effects on U.S. markets or firms. Thus, there is either confusion about the case or a more serious confusion about legislative, judicial and enforcement functions. A single federal department, fortunately, is not permitted the luxury of all three.

In the late 1950s, when legal scholars were seeking a resolution of the major conflicts in the extraterritorial reach of U.S. antitrust law, Brewster argued that the "essential measure" for joint ventures appeared to be whether the volume

33. International Shoe Co. v. Washington, 326 U.S. 310 (1945). The quoted phrase was used in a different context in the case but fits well here.
34. *Department of Justice Antitrust Guide for International Operations,* 26 January 1977, p. 1. Reprinted in full in *Bureau of National Affairs Antitrust and Trade Regulations Reporter* of 1 February 1977. (Hereinafter BNA ATTR).
35. *Ibid.,* p. 14.

of U.S. exports would have been substantially altered had no joint venture been formed.[36] In 1958 William Fugate suggested an alternative test:

> In considering the legality of the operations of a joint company, the question should be asked whether the parents, through the company are doing something which they may not legally do in its absence.[37]

The single most important development of the 1960s on the issue of joint ventures came through a purely domestic case, *United States v. Penn-Olin Corp.*[38] The Supreme Court, in 1964, ruled that Section 7 of the Clayton Act, which bars corporate acquisition foreclosing or eliminating substantial competition in any relevant market, applied to the joint venture before the Court. Since then, the consequences of *Penn-Olin* have remained high on the list of antitrust considerations. The case, according to Joelson and Griffin, marked the first non-Sherman application to joint ventures.[39]

In applying the antimerger provision of Clayton to the proposed joint venture between Olin Mathieson Corporation and Pennsalt Chemicals Corporation, the Supreme Court stated that it considered a joint venture to be an "acquired" corporation[40] — thus bringing it within the scope of Clayton, which addresses corporate acquisition.

Reversing the district court's decision in favor of the defendants, who had joined to produce sodium chlorate in the southeastern U.S., the Supreme Court warned of the potentially anticompetitive effects of a joint venture and reaffirmed the necessity of defining the relevant market. It stressed that one of the two joining firms might have entered the market separately while the other might have become a "potential entrant" at some point, thus exerting a beneficial effect upon competition.[41] Judicial concern about future competition was thus established.

> Just as a merger eliminates actual competition, this joint venture may well foreclose any prospect of competition between Olin and Pennsalt in the relevant sodium chlorate market.[42]

But the court refused to make a blanket comparison of joint ventures and mergers.

36. Brewster, *Antitrust and American Business Abroad,* p. 216.
37. W. L. Fugate, *Foreign Commerce and the Antitrust Laws* (Boston: Little, Brown & Co., 1958), p. 264.
38. United States v. Penn-Olin Corp., 378 U.S. 158 (1964).
39. Joelson and Griffin, "Multinational Joint Ventures," p. 499.
40. Penn-Olin at 158.
41. *Ibid.*
42. *Ibid.*, at 173-74.

> This is not to say that the joint venture is controlled by the same criteria as the merger or conglomeration. The merger eliminates one of the participating corporations from the market while a joint venture creates a new competitive force therein . . . Overall, the same considerations apply to joint ventures as to mergers, for in each instance we are but expounding a national policy enunciated by the Congress to preserve and promote a free competitive economy.[43]

In order to provide a degree of certainty that had been absent in many earlier decisions, the court outlined fifteen factors which it said should be considered in determining whether Section 7 of Clayton had been violated by a joint venture. These include "the number and power of competitors in the relevant market . . . [and] the power of the joint venturers."[44]

How does *Penn-Olin* extend to international business transactions and joint venture formation? In its 1977 report, cited above, the Justice Department indicates that it will base much of its analysis on the fifteen factors the Supreme Court established. Thus, if a dominant U.S. firm were to establish a joint venture overseas to produce a good that each firm was already producing or could potentially produce separately, the *Penn-Olin* doctrine would govern. The Justice Department has stated that it is equally concerned with foreign firms which are "potential entrants" into the U.S. market.[45] Several cases establishing this principle have run their course.[46]

As James Atwood summarized the issue in the application of the *Penn-Olin* finding to joint ventures with foreign partners: "Is the foreign partner a likely potential entrant into the United States and has the joint venture reduced its

43. *Ibid.*, at 170-71.
44. *Ibid.*, at 177. The complete list of factors which the court outlined is as follows:
 1) the number and power of the competitors in the relevant market; 2) the background of their growth; 3) the power of the joint ventures; 4) the relationship of their lines of commerce; 5) the competition existing between them; 6) the power of each in dealing with the competitors of the other; 7) the setting in which the joint venture was created; 8) the reasons and necessities for its existence; 9) the joint venture's line of commerce; 10) the joint venture's relationship to its parents; 11) the adaptability of its line of commerce to noncompetitive practices; 12) the potential power of the joint venture in the relevant market; 13) 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; 14) the effect, in the event of this occurence, of other joint venturers' potential competition; and 15) any other factors which might indicate potential risk to competition in the relevant market.
45. *Antrust Guide*, p. E-9.
46. *See* United States v. Monsanto Company, Farbenfabriken Bayer, A.G. *et al.*, C.A. No. 64-324 (S.D.N.Y., 1964). This case was settled by a 1967 consent decree requiring one party to divest its interest. The court had found that both firms were selling the relevant chemical prior to the joint venture.

chances of entry?"[47] Atwood indicated that much of the enforcement in this area is handled exclusively by the Federal Trade Commission (FTC). He cited a 1975 FTC challenge to a joint venture between Brunswick, a U.S. firm, and Yamaha, a Japanese company, to produce outboard motors.[48]

In summary, overseas joint ventures are at the same time ruled both by antitrust formulations that apply across-the-board to all types of business combinations and by a separate branch of antitrust policy which grew out of the confusion of the 1950s. In the first instance, courts have generally chosen to examine the "reasonableness" of the restraints involved in any given international arrangement.

> The important point to be stressed is that the circumstances surrounding a foreign restraint may dictate a legal conclusion different from that which would be appropriate to the same restraint at home. The relevant differences might be found in both the quality and magnitude of the restraint's threats to protected interests, offsetting virtues, and less restrictive alternatives.[49]

Generally, the extension of American antitrust provisions abroad has grown more predictable with the passage of time, not only because of U.S. efforts but also because of multilateral agreements governing competition and restrictive practices.

But, in a special way, joint venturers still labor under uncertainty. Much of the writing in this area is unclear and offers little practical advice. For instance, Atwood's remark that U.S. corporations operating overseas need to ensure that their joint efforts will not "adversely affect the competitive position of other American firms"[50] seems somewhat inappropriate. After all, what is the nature of business if not to improve one's competitive position relative to other firms?

Clearly, however, the ventures most difficult to defend are those by which competition is eliminated from the market through the entry of a new entity which attains a dominant position in that market.[51] Joelson and Griffin conclude that restraints which "are not essential to the success of a legitimate joint venture have little chance of surviving an antitrust attack."[52]

47. James Atwood, "International Joint Ventures and the U.S. Antitrust Laws," 10 *Akron Law Review*, p. 260.
48. *Trade Regulation Reporter* 30, 877/Dkt. 9028. 197376 Binder.
49. Philip Areeda and Donald Turner, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* (Boston: Little, Brown & Co., 1978), p. 267.
50. Atwood, "International Joint Ventures," p. 613.
51. Joelson and Griffin, "Multinational Joint Ventures," p. 535.
52. *Ibid.* A clear example of this is the 1961 Panagra case. *See* United States v. Pan American World Airways, Inc., 193 F. Supp. 18 (S.D.N.Y., 1961).

As complex as the issues seem for joint ventures abroad with private parties, that complexity appears insignificant when attention is paid to joint ventures in less-developed countries, particularly joint ventures with state agencies or corporations therein.

JOINT VENTURES WITH STATE ENTERPRISES

When examining antitrust implications of joint ventures with state-owned or -controlled agencies, it is necessary once again to attempt to derive an understanding from non-joint venture cases. The problems in this undefined area are similar to those which were tackled in the general application of antitrust law to overseas corporate activity in such matters as act of state doctrine and foreign sovereign compulsion. But any attempt to apply the principles reached in more general cases to specific joint ventures is a difficult task.

Particularly helpful lessons can be drawn by looking at such cases as *Continental Ore Co. v. Union Carbide and Carbon Corp.*,[53] as well as the newer cases in the field such as *Interamerican Refining Corp. v. Texaco Maracaibo*[54] and *Occidental Petroleum Corp. v. Buttes Gas & Oil Co.*[55]

In response to a variety of forces after World War II, American firms opted for joint ventures as means of gaining entry into foreign markets or access to various essential commodities or materials. As mentioned earlier, this had been the practice in the oil industry for decades. With growing economic nationalism, many American firms were compelled to grant equity ownership in their ventures to either local industrialists or government agencies such as development corporations.

In Third World countries, such equity ownership was often mandated by law as a means of promoting general development. If it was not required by local law, it was often a matter of stated policy or government regulation that could be enforced through such measures as exchange controls, import and export controls and tariff regulation, all of which were in the hands of the sovereign government. In an era of such intense nationalism and rising resentment of foreign domination, whether economic or political, the demands of both the local situation and the government required foreign investors to adapt in ways not contemplated by the Sherman Act.[56]

Coupled with these developments overseas was the reasonable concern at home of the Justice Department, which was wary of restraints, foreign or

53. Continental Ore Co. v. Union Carbide and Carbon Corp., 370 U.S. 690 (1962).
54. Interamerican Refining Corp. v. Texaco Maracaibo, 307 F. Supp. 1291 (D. Del., 1970).
55. Occidental Petroleum Corp. v. Buttes Gas & Oil Co., 331 F. Supp. 92 (C.D. Cal., 1971). cert. denied, 409 U.S. 950 (1972).
56. Wolfgang Friedmann, "Antitrust Law and Joint International Business Ventures in Economically Under-developed Countries," 60 *Columbia Law Review*, (1960), p. 788.

domestic, that might have a significant impact on U.S. commerce. At the same time, *ICI* had demonstrated the problems in securing compliance with its antitrust enforcement overseas.

The teaching of *Timken* regarding the existence of corporate control by a parent of its subsidiary of joint venture has already been discussed. Such control was necessary to avoid antitrust liability, assuming of course that the control was not established solely to avoid antitrust application.[57] But what is the implication of this doctrine when a U.S. parent is relegated by a foreign investment law or regulation to a minority position in an overseas joint venture — as is the case in almost all such arrangements in extractive industries today?

Joelson and Griffin argue that, if such control is absent, the parent will generally not be held responsible for the actions of its subsidiaries.[58] However, in a case in which a non-controlled foreign subsidiary or joint venture enters a cartel, the resulting problems are considerable. It is altogether possible that the U.S., in such a situation, may seek action against the foreign subsidiary if it can establish that "minimum contacts" exist with the U.S. and that these contacts have caused substantial adverse effects. However, if the majority interest in a joint venture is a foreign government or its direct agent, the U.S. might be extremely reluctant to flex its antitrust muscles. One of the most difficult questions of the 1970s has been how to determine what constitutes a "sovereign or public" act of a foreign government and what distinguishes it from a "commercial" act. It is this distinction that is established by the "restrictive theory of sovereign immunity" which is incorporated in the 1976 Foreign Sovereign Immunities Act.[59]

While the distinction in principle is carefully drawn, its definition in practice is far more difficult to establish. According to the 1976 act:

> Commercial activity means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct of the particular transaction or act, rather than by reference to its purposes.[60]

It seems fairly obvious that international disputes of definition are certainly likely and the U.S. firms operating abroad may stand to lose their position in world commerce if the U.S. attempts an aggressive application of this principle.

In a recently decided case — *Alfred Dunhill of London, Inc. v. The Republic of Cuba*[61] — this exact problem was treated. The Supreme Court declined to

57. *See* notes, *supra,* on Timken.
58. Joelson and Griffin, "Multinational Joint Ventures," p. 506.
59. 90 Stat. 2891 (1976).
60. *Ibid.,* Sect. 1603(d).
61. Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682 (1976).

allow act of state doctrine as a defense to "acts committed by foreign sovereigns in the course of their purely commercial operations."[62] In that the actions involved were generally defined as profit-making, the court held that the "act was not an act of state."[63]

But in *Interamerican Refining,* the court's finding was considerably different:

> When a nation compels a trade practice, firms there have no choice but to obey. Acts of business become effectively acts of the sovereign.[64]

While the Justice Department recognizes the fine line that exists between political and sovereign acts on the one hand, and commercial acts on the other, many foreign governments, particularly those governing non-market economies, might not. To them, political acts and commercial acts can be the same, and both are sovereign. Thus, sovereign immunity and act of state doctrine are closely intertwined. Their use as a defense from antitrust liability has been subject to the constraints imposed by consideration of international comity.

As early as 1895, U.S. courts expressed their reluctance to examine acts of a sovereign within its own territory because it

> would imperil the amicable relations between governments and vex the peace of nations to permit the sovereign acts or political transactions of states to be subjected to the examination of the legal tribunals of other states.[65]

Never has there been more truth to this statement than in the 1960s and 1970s.

Often, overseas subsidiaries and joint ventures of U.S. corporations are requested or compelled to act as agents of foreign governments. Those in the extractive industries, for example, usually serve as the marketing and distribution agents for commodities or resources. Such a situation poses numerous antitrust questions which were first addressed in *Continental Ore.* Acting as an agent for the Canadian government, Electro Met of Canada, a subsidiary of Union Carbide, served during World War II as the exclusive firm empowered to purchase and allocate vanadium. Continental Ore alleged that the firm used its power anticompetitively, monopolizing the vanadium industry. While not establishing the merits of the claim, the court rejected Union Carbide's act of state defense.

62. *Ibid.*, at 706.
63. *Ibid.*
64. Interamerican Refining at 1298.
65. Underhill v. Hernandez, 168 U.S. 250 (1897). *See also* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964) at 416.

In addition to establishing that Union Carbide was not compelled by the Canadian government to exclude Continental but was acting on the basis of its own discretionary judgment, the case raises another question of interest in the present context:[66] Was the Canadian appointment of Union Carbide as its agent a political or commercial act? Does the strategic consideration involved — allocation of a mineral under wartime conditions — have any bearing on the determination?

Of course, this question was not being considered in *Continental Ore,* but it does raise an additional dimension in attempting to establish any meaningful guidelines for differentiating political from commercial acts.

It appears safe to say that general teachings from the doctrine of foreign sovereign compulsion, derived solely from cases involving U.S. subsidiaries, apply equally to joint ventures. With no joint venture case yet litigated, one gray area would exist in a scenario in which the minority share of a joint venture is owned by the state; and the state, in another capacity, compels a certain action or commits the entire joint venture to anticompetitive activity.

In another context, Wolfgang Friedmann offered the following advice to policymakers that seems to apply equally well here:

> If a joint venture is the only alternative to the elimination of American enterprise from business, manufacture or trade in a country concerned, it should not, even by the most strained construction, be interpreted as a restrictive practice.[67]

Likewise, Kingman Brewster, in an oft-cited phrase, argued:

> Anticompetitive practices compelled by foreign nations are not restraints of commerce, as commerce is understood in the Sherman Act, because refusal to comply would put an end to commerce.[68]

In the case of joint ventures with state-owned agencies, such refusal to comply would be an irrelevant problem; it would probably result in nationalization or expropriation. The problem of establishing whether a firm was indeed compelled to take a violative action, or instead *sought* to be "compelled" by the government in question, has been widely examined and requires only brief consideration here.

In *Occidental Petroleum,* the oil firm was alleged to have extracted an anticompetitive decision from the government of the Trucial State of Umm Al Qaywayn to deny the richest oil fields to the plaintiff, Buttes Gas & Oil Co. Similar issues, involving the so-called Noerr doctrine, were raised in *Continen-*

66. Areeda and Turner, *Antitrust Law,* p. 275.
67. Friedmann, "Antitrust Law and Joint International Business Ventures," p. 785.
68. Quoted in Interamerican at 1296.

tal Ore. The Noerr doctrine, an exemption to antitrust prohibitions, holds that

> the Sherman Act does not prohibit two or more persons from associating together in an attempt to persuade the legislature or the executive to take particular action with respect to a law that would produce restraint or monopoly.[69]

The court ruled in *Occidental* that the Noerr doctrine did not apply in the present case, but dismissed the case on act of state grounds.

In its 1977 *Antitrust Guide*, however, the Justice Department stated:

> While the Noerr case turns in part on U.S. domestic constitutional considerations, the Department does not consider it to be limited to the domestic area. The Supreme Court's discussion in *Continental Ore* implies as much.[70]

In *Continental Ore,* the Supreme Court really said:

> In this case, respondents' conduct is wholly dissimilar to that of the defendants in Noerr. Respondents were engaged in private, commercial activity, no element of which involved seeking to procure the passage or enforcement of laws.[71]

This provides a convenient example of Justice Department policy formulation seemingly at odds with judicial decisions, the net effect of which is to confuse American businessmen operating abroad. Yet the Justice Department does retain a great deal of discretionary authority in the application of U.S. antitrust abroad, constrained, of course, by the need to substantiate an effect on U.S. commerce.

CONCLUSION

It is this wide latitude presently afforded the Justice Department that sends chills up the spines of American businessmen contemplating the formation or expansion of their overseas activity. When this discretion conflicts with court opinions, as it does in many instances, the consistency that should exist evaporates.

Certainly the Justice Department may try, in a sense, to engineer U.S. law by placing certain issues before the courts and ignoring others. This process works only up to a point, since the courts are, fortunately, able to reject Justice Department contentions.

Thus, under different federal administrations, each with its different goals,

69. Eastern R.R. Presidents Conf. v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961), at 136.
70. *Antitrust Guide,* p. E-18.
71. Continental Ore at 707.

new policies develop just as quickly as old ones die. Nonetheless, it seems to be dangerous and almost self-destructive for any Justice Department administration to operate on the basis of what often appears to be an eccentric interpretation of previous judicial directions.

As has been mentioned throughout this article, overseas enforcement of U.S. antitrust legislation is still undergoing an evolutionary development, even as it enters its seventieth year. The evolutionary process is a natural one, however slow it may be in reacting to new forces overseas. Joint ventures, relatively new creatures in foreign countries, are among the activities most recently affected by this evolution.

It seems quite unrealistic to attempt to provide an orderly framework for international business transactions without paying careful attention not only to U.S. actors abroad, but also to the changing customs and sentiments of the environment in which corporations operate.

Still to be clarified in the antitrust area are the differentiation between political and commercial activities of states and the effect of new types of institutions such as government-affiliated LDC development corporations on extraterritorial enforcement. Is the process of national development and its monitoring by corporations or agencies political or commercial? And are such distinctions necessary only as they relate to U.S. corporations and their dealings with such agencies?

Should a different "effects test" be devised for corporate activity emanating solely from LDCs? What sorts of standards should be developed to guide international development projects that involve truly "multinational" participation, such as the LAMCO project in Liberia?[72]

What will be the long-term effects of the January 1978 Supreme Court ruling that foreign governments are to be considered "persons" under Section 4 of the Clayton Act?[73] Will such a right to sue in U.S. courts affect overseas operations of U.S. companies or change the U.S. courts' perceptions of foreign government activity in commercial areas? Is the U.S. now to be concerned with the effect of U.S. corporate activity on foreign consumers and foreign commerce?

These questions are, unfortunately, impossible to answer at present and many are likely to remain so for years. But their resolution is not likely to be served by such simplistic Justice Department remarks as: "No essential distinction is made between domestic and foreign firms"[74] when protection of the American market is at stake. If these questions are to be answered satisfactorily,

72. The Liberian LAMCO project included Bethlehem Steel, the Government of Liberia, and a Swedish-led consortium.
73. *BNA, ATTR,* 12 January 1978, p. A-9.
74. *Antitrust Guide,* p. E-3.

the Justice Department must become more sensitive to international issues and broader policy considerations.

To paraphrase one noted American jurist, the power to regulate involves the power to destroy. In an era when international development depends, to a significant degree, upon U.S. public and private activity overseas, U.S. antitrust regulation has become the power to destroy on an international scale, and thus must be based on a reasonable and clear legal doctrine.