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INTERNATIONAL JOINT VENTURES AND THE U.S. ANTITRUST LAWS*

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JOINT VENTURES are a perplexing area of antitrust. They raise questions under an array of traditional antitrust headings—price fixing, territorial restraints, licensing, mergers, etc.—and yet a traditional analysis rarely proves to be appropriate. In some joint-venture contexts, for example, the rules of per se illegality may be subject to mitigation. Yet in other situations, the most logical business arrangements between joint-venture partners will raise deep antitrust concern. To make matters worse, commentators and judicial decisions can often be impressively marshalled on both sides of even relatively basic questions of joint-venture legality.

When a joint venture is placed in an international context, the perplexity is often enhanced. The rules of choice of law, conflict of laws, or extraterritorial application of laws will make some antitrust questions easier and others more difficult. Special defenses unavailable in the domestic context may arise, but at the same time other defenses will be lost. The identity of potential challengers to the venture may be less certain, and the forum in which challenges would be heard less predictable. Antitrust lawyers have thus had numerable field days debating the fine points of international joint ventures.

This paper deals with only a limited class of international joint ventures and with only one body of law. It is therefore incomplete but more manageable in scope. I address only questions under United States antitrust laws, excluding those raised by foreign or international antitrust. Also, consistent with the Symposium's topic I limit myself to joint ventures involving foreign business activities by U.S. companies. This excludes joint ventures between solely foreign firms, and those between U.S. companies and foreign entities where the locus of the venture is to be the United States. These other forms of joint ventures present competitive issues that are somewhat distinct from those reviewed here.

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†Member, District of Columbia Bar; B.A., Yale; J.D., Stanford University. The author and his firm have been involved in several of the cases or matters referenced in this paper and, more generally, represent a number of companies with international operations, which therefore have an interest in the topics discussed. The views stated, however, are solely those of the author.

A. *The Varieties of Jointness*

An important opening disclaimer must be made—joint ventures can take many different forms and have many different purposes, and the antitrust concerns will vary accordingly. A joint venture can take the form of an on-going business enterprise, or be an *ad hoc* arrangement with a life of only one transaction. It can be a large entity with millions in assets, or be paper-thin. It can be designed to perform the whole spectrum of business functions—from exploration for raw materials through to local merchandising of a finished product—or it can be limited to a single function. All these variables affect the antitrust analysis. To take one example, Ford and General Motors might form a joint venture to operate a common spare-parts warehouse in Java. The competitive issues raised by that venture would be very different from those created by a joint-venture between the same two companies which constituted a pooling of all their international operations.

Further, joint ventures similar in form and function may have been established for different business reasons, and again the antitrust analysis will be affected. The purpose of the venture may have been to spread the business risks of a risky proposition among two or more firms, none of whom would have gone forward alone. Or perhaps a company of one nationality concluded that a particular business endeavor was more likely to succeed if a foreign partner were involved; indeed, the laws or customs of the targeted foreign market might dictate some form of local participation. Or, as stated frankly by Kingman Brewster, "a venture may, in some instances, be made joint to avoid the competition which might result from independent endeavor."[1] Given the importance of intent and justification in many areas of antitrust, the reason or reasons behind a joint venture may have significance that is independent of what the joint venture looks like or does.[2]

With this introductory note on the varieties of jointness, I turn to two basic categories of joint ventures within this paper's topic. The first is where two or more U.S. corporations join together in order to deal collectively in some aspect of their foreign commerce. This could include

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[1] K. BREWSTER, ANTITRUST AND AMERICAN BUSINESS ABROAD 202 (1958) [hereinafter cited as BREWSTER].

[2] *See, e.g.*, United States v. Imperial Chem. Indus., Ltd., 100 F. Supp. 504, 557 (S.D.N.Y. 1951) (determining that a foreign joint venture violated the Sherman Act in part because of the parents' "wrongful purpose" in its establishment).

Indeed, the purpose for which a joint venture is established may affect whether the venture is within the jurisdictional reach of the U.S. antitrust laws. Judge Learned Hand's famous decision in the *Alcoa* case encompassed the notion that conduct abroad that is intended to affect U.S. commerce is more susceptible to the U.S. antitrust laws than is the identical conduct absent such intent. United States v. Aluminum Co. of America, 148 F.2d 416, 444 (2d Cir. 1945).

a joint export association, the pooling of foreign manufacturing facilities of U.S. companies, or a variety of other joint efforts. The common characteristics of the ventures in this class are that they are between U.S. companies and directed towards foreign markets.[3] The second class to be discussed arises where a U.S. corporation and a foreign entity form a joint venture which is designed—at least from the prospective of the U.S. partner—to assist the U.S. company in its export or foreign operations. While many other forms of joint ventures can exist even within the previously defined scope of this paper, these two types are common and should bring out the basic analysis.

B. *Joint Ventures by U.S. Companies to Sell to Foreigners*

It is frequently charged by American businessmen that the extraterritorial application of the U.S. antitrust laws operates to handicap U.S. firms in their dealings abroad. U.S. antitrust, it is claimed, prevents American companies from entering into a variety of business arrangements that are essential if they are to participate and to compete effectively in foreign markets.[4] In reply, enforcement officials often point to the fact that at least one particular form of international business arrangement has not been the subject of U.S. enforcement action for some twenty-five years — the joint venture by U.S. companies to sell abroad.[5] Indeed, the Antitrust Division now points to recent business-review clearance given to a joint venture of precisely this type.[6] Thus it would seem that one class of joint ventures—that composed of U.S. companies to sell in foreign markets—is relatively free of antitrust risks.

This conclusion is largely accurate, although several important caveats must be kept in mind. While focusing on those caveats, I should not be misunderstood as disagreeing with the thrust of the Government's reply—joint ventures of U.S. companies to sell abroad can usually be structured without serious antitrust risk.

1. *Webb-Pomerene associations.*

One particular avenue open to U.S. companies wishing to engage in

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[3] I exclude from this category joint ventures among U.S. firms designed to operate as buying groups in foreign markets. For a thoughtful treatment of that subject, see Davidow, *Antitrust, Foreign Policy, and International Buying Corporation,* 84 YALE L.J. 268 (1974).

[4] *E.g.,* ANTITRUST TASK FORCE ON INTERNATIONAL TRADE AND INVESTMENT OF THE CHAMBER OF COMMERCE OF THE U.S., FINAL REPORT ON U.S. ANTITRUST LAWS AND AMERICAN EXPORTS 2 (Feb. 26, 1974); J. LAPALOMBARA & S. BLANK, MULTINATIONAL CORPORATIONS AND NATIONAL ELITES 2-3, 90-91 (Conference Board Rep. No. 702, 1976).

[5] *E.g.,* Davidow, *Recent Developments in International Antitrust,* 10 AKRON L. REV. 603 (1977); Letter from Thomas E. Kauper, Assistant Attorney General, Antitrust Division of the U.S. Department of Justice, to Arch N. Booth, President, U.S. Chamber of Commerce (Apr. 26, 1974), in BNA ANTITRUST & TRADE REG. REP. No. 663, at F-1 (May 14, 1974).

[6] Davidow, *supra* note 5, at 607.

joint export trade is to organize an association under the provisions of the Webb-Pomerene Act.[7] Passed in 1918 to encourage U.S. companies to expand their export trade,[8] the Act exempts from the antitrust laws organizations which are created for the sole purpose of engaging in export trade and whose activities are in fact limited to export trade. The only precondition of obtaining an exemption under the Act is the making of filings with the Federal Trade Commission.[9]

However, the statute contains significant limitations and qualifications on the exemption. The association may not act "in restraint of trade within the United States" or restrain the export trade of any domestic competitor of the association. Nor may the association take any action "which artificially or intentionally enhances or depresses prices within the United States of commodities of the class exported by such association or which substantially lessens competition within the United States or otherwise restrains trade therein."[10]

Webb-Pomerene associations have proven to be significant in only a few industries, and their cumulative impact on U.S. exports has been slight.[11] This is due in part to the fact that the statute's antitrust exemption has been narrowly construed; it has been read as not embracing joint manufacturing abroad,[12] services,[13] sales as part of the United States foreign

[7] 15 U.S.C. §§ 61-65 (1970). *See generally* FEDERAL TRADE COMMISSION, WEBB-POMERENE ASSOCIATIONS: A 50-YEAR REVIEW (1967) [hereinafter cited as FEDERAL TRADE COMMISSION]; BREWSTER, *supra* note 1, at 24-25, 108-20, 352-54, 454-55; W. FUGATE, FOREIGN COMMERCE AND THE ANTITRUST LAWS 223-54 (2d ed. 1973) [hereinafter cited as FUGATE]; Note, *An Appraisal of the Webb-Pomerene Act*, 44 N.Y.U. L. REV. 341 (1969).

[8] *See* BREWSTER, *supra* note 1, at 24-25; Note, *supra* note 7, at 341-42.
The terms of the Webb-Pomerene Act do not limit its availability to U.S. companies, and indeed the Federal Trade Commission recently opined that a U.S. corporation controlled by foreign interests could be a member of a Webb-Pomerene association. 83 F.T.C. 1840 (1973) (advisory opinion). Legislation introduced in 1975 would have limited the membership of Webb-Pomerene associations to "persons who are citizens of the United States or which are created under and exist pursuant to the laws of any State or of the United States" [H.R. 9449 & S. 1973, 94th Cong., 1st Sess. (1975)], but the legislation failed to pass. Nevertheless, because a Webb-Pomerene association must be engaged exclusively in the export trade of the United States (15 U.S.C. §§ 61-62), membership, by necessity, is limited to companies with U.S. productive or manufacturing facilities.

[9] 15 U.S.C. § 62 (1970).

[10] *Id.* §65.

[11] The 1967 FTC study of Webb-Pomerene associations found that only about 3 percent of total U.S. exports were attributable to such associations and that many of the associations were composed of large firms in relatively concentrated industries, which might have exported successfully independently of the associations. FEDERAL TRADE COMMISSION, *supra* note 7, at 24, 33-34, 36-37.

[12] United States v. Minnesota Mining & Mfg. Co., 92 F. Supp. 947, 963 (D. Mass. 1950).

[13] Baker, *Antitrust and the World Economy*, 5 CCH TRADE REG. REP. ¶ 50,161, at 55,285 (1973).

aid program,[14] licensing transactions,[15] or certain restrictive agreements with foreign producers.[16] And, as discussed next, much of the antitrust relief which the Act supplies may well be unnecessary. Whether the Webb-Pomerene Act should be retained at all is open to serious question, but in any event its uncertainties and limited scope have disqualified it as a viable option for most U.S. companies.

2. *Non-exempt export ventures.*

In most instances, then, prospective participants in an export venture will conclude that the uncertain benefits of the Webb-Pomerene Act do not outweigh its clear limitations. They will therefore choose to form their venture without recourse to that Act. At least two and possibly three areas of antitrust concern must then be addressed.

First, if U.S. enforcement officials examine the venture they will want assurances that the joint efforts of the participating companies will not adversely affect the competitive position of other American firms.[17] Generally speaking, if the joint venture serves to benefit some American exporters but operates to the competitive detriment of others, an antitrust problem might exist. For example, a venture that tied up the only available distribution facilities in a competitively significant foreign market would be vulnerable.[18] This would be by analogy to the rule in the domestic context that the exclusion of a competitor from a joint venture may be illegal if as a result the competitor is denied access to indispensable facilities.[19]

This problem can usually be overcome without great difficulty. Often the domestic competitors have reasonable access to foreign markets by other means, perhaps through separate joint ventures of their own. If so, competitive goals are in fact advanced by excluding the competitors from the initial venture, for the result may then be several export joint ventures competing with each other.[20] Or if a single venture is the most feasible,

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14 United States v. Concentrated Phosphate Export Ass'n, 393 U.S. 199 (1968). A critical factor in this opinion was the adverse impact of the restraint on the U.S. Treasury.

15 U.S. DEPARTMENT OF JUSTICE, ANTITRUST DIVISION, ANTITRUST GUIDE FOR INTERNATIONAL OPERATIONS 4 (mimeo. Jan. 26, 1977) (hereinafter cited as ANTITRUST GUIDE).

16 United States v. United States Alkali Export Ass'n, 86 F. Supp. 59 (S.D.N.Y. 1949).

17 *See* ANTITRUST GUIDE, *supra* note 15, at 5; Baker, *supra* note 13, at 55,283; Memorandum of the Department of Justice Concerning Antitrust and Foreign Commerce, 5 CCH TRADE REG. REP. ¶ 50,129, at 55,211 (1972).

18 *See* United States v. Learner Co., 215 F. Supp. 603 (D. Hawaii 1963). The question of market definition as it pertains to measuring the competitive damage to U.S. exports is discussed below in the context of U.S.-foreign joint ventures. *See* text accompanying notes 36-42 *infra*.

19 *See, e.g.*, Associated Press v. United States, 326 U.S. 1 (1945); United States v. Terminal R.R. Ass'n, 224 U.S. 383 (1912).

20 *See* Zimmerman, *Adventures in Jointness*, 37 A.B.A. ANTITRUST L.J. 125, 129-30 (1968).

it could be open on reasonable, nondiscriminatory terms to all U.S. entities that have a competitive need to participate. In other instances, such as where the purpose of the venture is to prepare a joint bid on a foreign contract, limiting the number of participants may be desirable; in such cases, the right to participate in the venture might be determined by some impartial, competitive method.[21] By using one or a combination of these devices, it should be possible to structure the venture so that it will not hurt the competitive standing of any American firm.

A second concern which U.S. enforcement officials may have is that the venture, while designed to coordinate export trade, might have some spillover effects on domestic commerce. Depending on the circumstances, there could be concern that cooperation among American competitors in their export trade will lessen the vitality of their competition *inter sese* within the United States. For example, implementation of the venture might require the participants to exchange business data that would ordinarily be regarded as competitively sensitive.[22] The close association of the venturers on a regular basis could, in and of itself, make an antitrust mind suspicious.[23]

This is another problem that is usually solvable. The scope or responsibilities of the joint venture can often be altered to minimize troublesome contacts between the U.S. competitors. Alternatively, competitively sensitive aspects of the venture's operations might be conducted not by personnel of the venture's owners but by an independent management

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[21] *See, e.g.,* U.S. Department of Justice Press Release, May 10, 1976 (re *Burns and Roe, Inc.*). That press release describes a proposed joint venture, which was given business review clearance by the Department of Justice (*see* 28 C.F.R. § 50.6), under which an independent engineering firm was to coordinate a joint U.S. bid for heavy hydroelectric equipment for a South American power plant. Under the terms of the proposed venture, the engineering firm was obligated to consider for participation in the bidding group any U.S. company which had the expertise and capability necessary for fulfilling the project's specifications. *Id.* In its recent guidelines on international operations, the Justice Department has commented that short-term consortia such as the described bidding group may not be obliged to grant access to other U.S. firms, because exclusion from any particular consortium should not injure the competitive health of the excluded entity. ANTITRUST GUIDE, *supra* note 15, at 22.

[22] *Cf.* United States v. Container Corp., 393 U.S. 333 (1969) (agreement to exchange price information held, under the circumstances, to violate Sherman Act § 1).

[23] An oft-quoted observation of Judge Wyzanski deals with this point:

> The intimate association of the principal American producers in day-to-day manufacturing operations [of a foreign joint venture], 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 the foreign countries.

United States v. Minnesota Mining & Mfg. Co., 92 F. Supp. 947, 963 (D. Mass. 1950) (dictum). Judge Wyzanski's particular articulation of this concern has been frequently criticized, for it appears to suggest that all joint ventures between competitors are *per se* unlawful.

group, which would be bound by constraints as to what it could reveal to each of the owners about the business activities of the others.[24] A similar device was used recently in a venture which received Justice Department business review clearance; three major U.S. manufacturers were permitted to submit a joint bid on a large hydroelectric project in South America, but an independent engineering firm acted as a coordinator of the bid and only it had access to all features of the proposal of each manufacturer.[25] By such means, businessmen and antitrust lawyers should be able to develop procedures to minimize the possibility of domestic spillover effects of the foreign venture.

A third area of antitrust risk that may arise from an export joint venture comes from a potential group of treble-damage plaintiffs—the venture's foreign customers. They might attempt to invoke the U.S. antitrust laws in arguing that the venture represents a combination or conspiracy among American companies to fix prices or otherwise restrain U.S. export trade, to the detriment of those foreign customers. The likelihood of such suits is now enhanced by rulings—soon to be reviewed by the Supreme Court—that foreign governments are "persons" entitled to bring treble-damage actions under section 4 of the Clayton Act.[26]

It is an unresolved question whether the United States antitrust laws may be read as protecting foreign customers, even where there is no showing of an adverse impact on either American consumers or on American businessmen. One noted commentator concludes without hesitation that the antitrust laws do apply, and thus that it is *per se* illegal for American firms to fix prices in export trade.[27] Others disagree.[28] The Justice Department has generally been on the conservative side of this issue, concluding that in many instances the antitrust laws do not prohibit concerted action by

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[24] The Antitrust Division's international guidelines state that "[i]n some circumstances, such as an ongoing, long-term venture, it may be desirable that the venture have separate personnel of its own, to reduce day-to-day contact among officials of the competitor-members." ANTITRUST GUIDE, *supra* note 15, at 20.

[25] *See* May 10, 1976 Press Release, *supra* note 21. The Department conditioned its business review decision on the parties' agreement that the Antitrust Division have access to all documents generated by the joint venture that related to any communications between the parties. *Id.*

[26] Pfizer Inc. v. Government of India, 550 F.2d 396 (8th Cir. 1976), *cert. granted,* 45 U.S.L.W. 3690 (Apr. 18, 1977); In re Antibiotic Antitrust Actions, 333 F. Supp. 315 (S.D.N.Y. 1971). *See also* Todhunter-Mitchell & Co. v. Anheuser-Busch, Inc., 383 F. Supp. 586 (E.D. Pa. 1974) (holding that a Bahamian liquor distributor may sue under the U.S. antitrust laws for having been denied the right to import defendant's beer from the United States).

[27] Rahl, *American Antitrust and Foreign Operations: What Is Covered?,* 8 CORNELL INT'L L.J. 1, 6-7 (1974).

[28] BREWSTER, *supra* note 1, at 105; FUGATE, *supra* note 7, at 102-04.

U.S. companies vis-a-vis foreigners.[29] It has, for example, sanctioned if not encouraged joint bargaining by American oil companies with the producing Arab nations in efforts to resist nationalization or demands for increased revenue from oil concessions.[30] But until these questions are authoritatively resolved by the courts, export joint ventures that do not qualify for Webb-Pomerene protection are potentially vulnerable to attacks by foreign customers. Thus it is obviously desirable to minimize, to the extent feasible, the restrictive aspects of such ventures and, in particular, the degree of collective action on pricing.

3. *Ventures to manufacture abroad.*

A joint venture by U.S. companies to engage in joint manufacturing abroad—as opposed to joint exporting—raises somewhat different questions, which I will discuss only briefly.[31] Some such ventures may be beyond

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[29] *See, e.g.*, Baker, *Antitrust and World Trade: Tempest in an International Teapot?* 8 CORNELL INT'L L.J. 16, 27 (1974):

> American firms are normally permitted to collaborate in selling abroad, so long as they avoid anticompetitive spillover into the domestic market. Thus, in general, they can collectively agree on prices and markets, since the Sherman Act does not extend to the protection of foreign buyers against such horizontal restraints (a matter primarily for foreign law).

Mr. Baker was the Deputy Assistant Attorney General in the Antitrust Division at the time his paper was prepared, and subsequently served as the Assistant Attorney General. A similar view was expressed by Douglas E. Rosenthal, Assistant Chief of the Antitrust Division's Foreign Commerce Section, in his April 23, 1977 address to the annual meeting of the American Society of International Law. Rosenthal, *Subject Matter Jurisdiction in United States Export Trade* (mimeo. Apr. 23, 1977).

The Government has not always been entirely consistent on this point. A 1962 indictment alleging a variety of trade restraints included a charge that U.S. exporters fixed the prices at which foreign customers would buy scrap metal. United States v. Learner Co., Civ. No. 11736 (D. Hawaii June 25, 1962). The indictment survived a motion to dismiss (215 F. Supp. 603 (1963)), but then was dismissed by the Government with prejudice. *See* [1961-1970 Transfer Binder] Trade Reg. Rep. ¶ 46,062, at 52,477-78. Also, the United States has supported as amicus curiae the foreign-government plaintiffs in the antibiotics litigation on the issue of their standing to sue under section 4 of the Clayton Act. *See* note 26 *supra.* This is somewhat inconsistent with the position that foreign entities have no rights as customers under the U.S. antitrust laws.

[30] *See Hearings on Multinational Petroleum Companies and Foreign Policy Before the Subcomm. on Multinational Corporations of the Senate Comm. on Foreign Relations,* 93d Cong., 2d Sess., pt. 9, at 46-49 (1974) (statement of Thomas E. Kauper, Ass't Attorney General, Antitrust Division). *See generally* Davidow, *supra* note 3.

[31] *See generally* BREWSTER, *supra* note 1, at 213-16.

Joint manufacturing ventures, as compared to export ventures and others discussed in this paper, are more likely to result in the formation of a new corporate entity and thus to raise the possibility of questions under Section 7 of the Clayton Act. *See* United States v. Penn-Olin Chem. Co., 378 U.S. 158 (1964). This paper does not focus on Section 7 questions, in part because of the questionable applicability of that section's commerce requirement to international joint ventures (*see* ANTITRUST GUIDE, *supra* note 15, at 15-16, 21) and because the foreclosure and other competitive issues pertinent to a Sherman Act analysis would also be pertinent to a Clayton Act analysis. It should be recognized, however, that the Clayton Act may raise distinct questions. Also, it must be remembered that certain ancillary restraints which may be associated with a joint venture may raise serious antitrust difficulties even if the formation of the joint venture is legal under Clayton Act standards.

the reach of the U.S. antitrust laws altogether, because they have no effect on U.S. commerce. Where, for example, it is impractical either to export from the United States to the foreign market or to import from that market to the United States, a joint venture to manufacture in that market would probably not be within the jurisdiction of the U.S. antitrust laws, even though the venture were composed of U.S. competitors. There might be a question of possible spillover effects into domestic commerce,[32] but if that does not occur the venture would not impact on U.S. exports and hence not raise questions under U.S. law.[33]

Two types of ancillary restraints which might accompany a foreign manufacturing venture could well affect the foreign commerce of the United States and thus be vulnerable. One would be an agreement by the U.S. parents to rely exclusively on their foreign joint venture for their foreign sales, *i.e.*, not to export from the United States in competition with the joint venture. Such an agreement may be *per se* illegal, and will almost certainly fall if the venture participants are in any sense dominant factors in the U.S. export market.[34] A second would be a restraint on the venture prohibiting it from importing back into the United States in competition with its parents. It is less clear that this restraint is unlawful, since U.S. law may not be at the point of requiring that joint ventures be free to turn upon their parents.[35] Where both parents are already actively competing in the United States, and thus where an agreement eliminating the joint venture as a competitor cannot be viewed as barring one U.S. parent from directly or indirectly entering into competition with the other, the restraint could well withstand

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[32] *See* United States v. Minnesota Mining & Mfg. Co., 92 F. Supp. 947, 963 (D. Mass. 1950).

[33] Joelson & Griffin, *Multinational Joint Ventures and the U.S. Antitrust Laws,* 15 VA. J. INT'L L. 487, 513-14 (1975).

[34] United States v. Minnesota Mining & Mfg. Co., 92 F. Supp. 947 (D. Mass. 1950). *See* 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. 1952). *Compare* Note, *International Joint Ventures and Section One of the Sherman Act: Per Se as the Meaningful Standard,* 23 AM. U.L. REV. 659 (1974) (such an agreement illegal per se), *with* Joelson & Griffiin, *supra* note 33, 15 VA. J. INT'L L. at 513 (agreement may be lawful if U.S. parents are not dominant U.S. manufacturers).

[35] *See* J. RAHL, COMMON MARKET AND AMERICAN ANTITRUST 189 (1970). A parent corporation is free under the antitrust laws to regulate the affairs of its subsidiary, so long as that regulation does not result in coercion or unreasonable restraints on the trade of third parties. *E.g.*, In re Penn Central Securities Litigation, 367 F. Supp. 1158 (E.D. Pa. 1973), and cases there cited. *See also* ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS, REPORT 34 (1955). It is not altogether clear why the same rule should not apply where the parents are multiple rather than singular and the subsidiary thus a joint venture, at least where the formation of the joint venture was lawful. As Judge Wyzanski said on a related issue (whether the parents of a joint venture may agree on the prices at which each would supply products to the venture), such restraints would seem to be "normal features of any joint enterprise." United States v. Minnesota Mining & Mfg. Co., 92 F. Supp. 947, 965 (D. Mass. 1950). Until the law is clarified on this point, however, contractual constraints on a joint venture's freedom are not without significant risk.

attack. A different result might follow, however, if the joint venture had a peculiar competitive advantage its parents lacked (*e.g.*, access to a cheap foreign raw material). In that event, one might wonder whether the venture and its ancillary restraints constituted, in effect, an agreement by the parents to mutually refrain from upsetting the domestic status quo by competitively seeking access to the foreign competitive advantage.

C. *Joint Ventures between U.S. and Foreign Companies to Sell Abroad*

The second type of joint venture covered by this paper arises where a U.S. company and a foreign company get together to assist the U.S. company in its foreign commerce. For political, legal, and more purely business reasons, frequently a U.S. company will conclude that its participation in a foreign market would be substantially aided by some cooperative arrangement with a company local to that market. Indeed, the arrangement may be with an agency of the host government itself. In the energy field and other industries thought to be particularly important to home governments, government participation through a joint venture may be a prerequisite to any local operations by a U.S. company. The antitrust concerns raised by these U.S./foreign ventures are similar but not identical to those raised by all-U.S. ventures.

One area of inquiry is whether the joint venture between the U.S. company and the foreign entity operates to prejudice the competitive position of other American companies, such that the venture may be regarded as an impermissible restraint on U.S. export commerce. This might be the result if, for example, the joint venture denied competitors of the U.S. partner an important foreign marketing outlet. As mentioned in the context of all-U.S. joint ventures, the American antitrust laws attempt to ensure that all American companies have fair access to foreign markets.[36]

This possible foreclosure effect of the joint venture raises the difficult question of what is the relevant geographic "market" in the foreign-commerce field. Standard antitrust analysis under the Sherman and Clayton Acts requires first the determination of a relevant market so that the significance of a competitive foreclosure can be measured; "the threatened foreclosure of competition must be in relation to the market affected."[37] Several options as to the relevant market are available in the foreign-commerce field,[38] but the existing precedents suggest that the entire export market for the product in question — and not just a single foreign country or other

[36] *See* text accompanying notes 17-21 *supra.*

[37] Tampa Electric Co. v. Nashville Coal Co., 365 U.S. 320, 327 (1961).

[38] *See* Spivack, *International Joint Ventures Under the Antitrust Laws,* 40 A.B.A. ANTITRUST L.J. 871, 879 (1971).

lesser market — may be the pertinent one with which to judge the potential foreclosure effect of an international joint venture.

The Supreme Court opinion in the *Tampa Electric* case[39] appears to compel this result. That decision involved a 20-year requirements contract, whereby a Florida public utility company agreed to purchase all its coal requirements for that length of time from a single company. If measured in terms of the market served by the *purchaser* (a portion of Florida and Georgia), the contract would have foreclosed 18 to 50 percent of coal sales. But the Court ruled that the relevant market was "the area in which respondents and the other 700 producers [of coal] effectively compete," an area covering virtually all the eastern United States.[40] Thus in the domestic context, the courts have focused on the geographic area serviced by the sellers and their competitors, rather than looking at the market from the customer's viewpoint.

This approach would appear particularly applicable when analyzing foreclosure questions in the foreign-commerce field. Requirements contracts, exclusive-dealing arrangements, and other forms of vertical restraints may be questioned in part because they result in injury to consumers. But "there is no apparent antitrust concern with maximizing alternatives for foreign consumers of American goods."[41] The most pertinent U.S. antitrust concern in foreign commerce is with the competitive health of American firms in export commerce, and hence the foreclosure impact of a U.S.-foreign venture should probably be measured not by national markets but in terms of the broader markets open to U.S. export trade.[42] Thus, even if a joint venture operates to co-opt a particular foreign national market for one U.S. company, a

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[39] Tampa Electric Co. v. Nashville Coal Co., 365 U.S. 320 (1961).

[40] 365 U.S. at 331-32. *See also* Twin City Sportservice, Inc. v. Charles O. Finley & Co., 512 F.2d 1264, 1971 (9th Cir. 1975) (the parties did not dispute adoption of a national market even though the exclusive dealing contract under dispute affected only a single city).

[41] BREWSTER, *supra* note 1, at 130.

[42] There are instances in which American courts and antitrust officials appear to have evidenced concern about foreclosure of particular national markets. But on further analysis these precedents are not particularly compelling. In several cases, foreclosure of particular foreign markets was attacked as part of a broader scheme whose potential impact was to destroy American companies or limit imports into the United States. *E.g.*, Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690 (1962); Timken Roller Bearing Co. v. United States, 341 U.S. 593 (1951); United States v. Sisal Sales Corp., 274 U.S. 268 (1927). One government case was directed at foreclosure of the export market to a single country (Japan) but in circumstances where that country represented the only available export market for a number of American firms. United States v. Learner Co., 215 F. Supp. 603 (D. Hawaii 1963).
This analysis could well deserve modification where different national markets have different commercial features or degrees of attractiveness to U.S. exporters. For example, foreclosure of the Canadian locomotive market could not be discounted by the theoretical availability of exporting locomotives to Tibet. One would have to analyze the characteristics of the foreclosed market to determine if that foreclosure may properly be viewed as competitively harmful to U.S. companies. *See also* 1977 ANTITRUST GUIDE *supra* note 15, at 47 n. 80.

valid antitrust challenge might not exist unless that foreign market accounts for a large percentage of the total U.S. export trade for the product.

Another concern about U.S.-foreign ventures of the type here discussed is that they may adversely impact on the domestic commerce of the United States. If the foreign partner is a competitor in the United States with the U.S. partner, there exists the possibility of adverse spillover effects on that competition, just as in the case of joint ventures among U.S. companies.[43] Certainly the enforcement officials will need to be assured that no express or implied agreements existed with respect to the U.S. competition of the venturers. And even if the foreign partner is not presently in the U.S. market, the venture could still prove troublesome if the foreign partner is a likely potential entrant into the United States and the formation of the venture was thought to reduce the chances of that entry. This is especially so if the U.S. market in question is relatively concentrated. A joint venture in the field of outboard motors between Brunswick and Yamaha was recently challenged by the Federal Trade Commission on precisely those grounds.[44]

A U.S.-foreign joint venture may not be inherently illegal under the antitrust laws, but at the same time collateral restrictions in the parents' joint-venture agreement can be troublesome. As in the case of a foreign manufacturing venture among U.S. entities, a commitment by the U.S. partner not to export in competition with the venture could raise serious antitrust risks. This question cannot be resolved in the abstract; for example, if the U.S.-foreign venture is essentially vertical in nature, the domestic exclusive-dealership cases[45] would suggest that in some circumstances the U.S. firm might permissibly grant the foreign entity an exclusive right to distribute in that market, free of competition from the U.S. parent. It is certainly preferable, however, to leave the parents free to make their economic decisions without regard to contractual commitments, or at least to limit such commitments to a limited start-up period during which the new venture can get its feet on the ground. Restraints on the activities of the venture itself might in some situations be more defensible,[46] although here too prudence dictates that they be kept at the minimum necessary for the successful operation of the venture.

Where a foreign governmental agency is itself a participant in the joint venture, special defenses from antitrust exposure may arise. The Act

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[43] *See* text accompanying notes 22-25 *supra.*

[44] In re Brunswick Corp., Dkt. 9028 (FTC 1975), 3 TRADE REG. REP. [1973-1976 Transfer Binder] ¶ 30,877.

[45] *E.g.,* Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke Liquors, Ltd., 416 F.2d 87 (9th Cir. 1969), *cert. denied,* 396 U.S. 1062 (1970).

[46] *See* text accompanying note 35 *supra.*

of State doctrine and the defense of governmental compulsion may place certain restrictive agreements beyond the reach of antitrust courts.[47] Indeed, these defenses may be available even if the government is not a direct participant in the venture, but has acted in its capacity as sovereign to impose certain practices on the venture. There are indications, however, that the Supreme Court may narrow the availability of these defenses.[48]

CONCLUSION

This paper has presented only the briefest survey of the application of the U.S. antitrust laws to joint ventures involving United States companies and foreign commerce. A few generalizations have emerged. First, U.S. law will be primarily concerned with whether a joint venture impacts adversely on American consumers or American competitors; impact on foreign buyers or businesses should be principally a matter of foreign law. Second, combinations of U.S. companies to sell abroad can usually be structured without significant risk under American law, even if major United States competitors are involved. Much will depend on the details and refinements, and the lingering possibility of treble-damage actions by foreign buyers still exists. But typically such ventures can be organized at an acceptable level of antitrust risk. Finally, U.S.-foreign ventures — even though directed toward foreign markets — may involve more complex antitrust questions. Proper care at the designing board, however, and a good input of common sense should avoid many otherwise troublesome problems.

[47] *See* Davidow, *supra* note 5, at 607-08.

[48] *See* Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682 (1976) (Act of State doctrine narrowly applied); Cantor v. Detroit Edison Co., 428 U.S. 579 (1976) (defense of governmental compulsion rejected in domestic context). The Justice Department takes the position that the Act of State doctrine applies only to the political, public actions of a foreign government and not to its "commercial" acts. ANTITRUST GUIDE, *supra* note 15, at 55.