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# U.S. Antitrust and Doing Business Abroad: Recent Trends and Developments

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# U.S. Antitrust and Doing Business Abroad: Recent Trends and Developments

by Joel Davidow*

The recent successful completion and endorsement of the Multilateral Trade Negotiations is a direct reflection of America's long-standing commitment to removing governmental restraints on trade, thus enhancing the freedom and fairness of the world trading system. Equally important to that commitment is our continuing enforcement of U.S. antitrust laws against private restraints on international trade.

Sherman Act sections 1 and 2,[1] enacted in 1890, prohibit both conspiracies to restrain, and attempts to monopolize, the domestic or foreign commerce of the United States. The Clayton Act of 1914[2] prohibits anticompetitive mergers by all firms engaged in domestic or foreign commerce. Generally speaking, these laws apply to domestic and foreign firms without discrimination, and to transactions in the United States and abroad. What then is unique about the application of antitrust rules to international business? The answer is that antitrust issues in foreign commerce often involve special problems concerning jurisdiction, and special exceptions and defenses. This paper will discuss these special issues, and then will review recent enforcement developments.

## I. Jurisdictional Issues

It is helpful in analyzing the many jurisdictional issues in an international antitrust case to divide the general concept into four more precise categories: legislative jurisdiction, personal jurisdiction, jurisdiction over information, and jurisdiction in regard to elements relevant to relief.

### *A. Legislative Jurisdiction*

The first question in examining whether an act in U.S. foreign commerce can provide the basis for a suit under the Sherman Act is to determine whether it is the kind of act the legislature intended the law to encompass. This determination may turn on an analysis of what kind of acts or actors were intended to be covered, as in concluding that the

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[1] 15 U.S.C. §§ 1, 2 (1976).

[2] 15 U.S.C. § 18 (1976).

Sherman Act is not aimed at restrictive "acts of state" but only at business conduct. The issue usually arises when the key acts take place abroad and application of U.S. antitrust laws would have to be based on their effects on U.S. commerce. In modern times our courts have regularly ruled that Congress intended the Sherman Act to apply even to acts done wholly abroad, by Americans or foreigners, if those acts have "intended and actual" or "substantial and foreseeable" effects on U.S. commerce.[3] These limitations on Sherman Act jurisdiction are inferred by the courts not only from an analysis of congressional intent but also by assuming that international law exists, that it creates limits on the legislative jurisdiction of states, and that it permits jurisdiction based on the direct and foreseeable effects of conduct abroad but not based on "indirect" or "unforeseeable" effects stemming from such conduct.[4] Unfortunately for smooth diplomatic relations, not all nations have the same view of what international law tells us about antitrust jurisdiction.[5] U.S. courts have recently sought to refine this area of law by using the concept of "comity" among nations and a balancing test similar to that employed in conflict of law cases.

To illustrate, assume two rival American firms each discover a supply of a rare metal in Antarctica needed primarily in the United States, and then conspire to sell it to U.S. buyers at secretly fixed prices. Application of the Sherman Act to this scheme would probably be held not to involve any jurisdictional, international law, comity or balancing considerations, simply because there are no conflicting factors to balance. But assume a challenge to a rationalization cartel among two German firms in Germany, where the cartel was legal, and where the challenge involved a range of products sold worldwide, only two percent of which reach the United States. In those circumstances, assertion of jurisdiction under the Sherman Act to punish or prevent the arrangement would undoubtedly raise jurisdictional, international law and political issues. Application of the new comity-balancing test, as enunciated by the Ninth Circuit Court of Appeals in *Timberlane Lumber Co. v. Bank of America*,[6] and the Third Circuit Court of Appeals in *Mannington Mills v. Congoleum Corp.*,[7] would probably lead to dismissal on the grounds that the United States' minor contacts with and interest in the transaction is

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[3] *See* Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 704-05 (1962); Steele v. Bulova Watch Co., 344 U.S. 280, 285-89 (1952); United States v. Aluminum Co. of America, 148 F.2d 416, 443-44 (2d Cir. 1945); *see also* RESTATEMENT (SECOND) FOREIGN RELATIONS LAW OF THE UNITED STATES, § 18 (1965).

[4] 148 F.2d 416; Timberlane Lumber Co. v. Bank of America, 549 F.2d 597, 608-15 (9th Cir. 1976). Some have criticized the distinction between "substantial and foreseeable" and "indirect and unforeseeable" effects as inadequate. *See, e.g.*, Fortenberry, *Jurisdiction Over Extraterritorial Antitrust Violations—Paths Through the Great Grimpen Mire*, 32 OHIO ST. L.J. 519, 534-36 (1971).

[5] *See, e.g.*, Rio Tinto Zinc Corp. v. Westinghouse Electric Corp., [1978] 1 All E.R. 434, [1978] 2 W.L.R. 81 (House of Lords).

[6] 549 F.2d 597.

[7] 595 F.2d 1287 (3d Cir. 1979).

outweighed by Germany's contacts and interests. In a related development, the Justice Department has announced that it will take comity into account in deciding whether to prosecute a foreign-based transaction where another nation's interests predominate.[8]

A final issue concerning the scope of Sherman Act substantive jurisdiction is whether a restraint of U.S. commerce is exempted because it causes no adverse effects to the United States, as when only foreigners abroad are injured by it. The Justice Department's answer, contained in the introduction to its 1977 *Antitrust Guide for International Operations*,[9] is that it normally will prosecute only those restraints which would be likely to injure consumers in the United States or lessen trading opportunities for those exporting from the United States. The answer of the courts has been somewhat more equivocal. Moreover, the Justice Department warned that conspiracies injuring foreigners might well run afoul of newly strengthened antitrust laws abroad or occasion an international inquiry pursuant to antitrust codes of conduct adopted by the OECD and being negotiated at the United Nations.[10]

Congress' intent not to incriminate joint selling to foreigners that causes no injury at home is codified in the Webb-Pomerene Act of 1918,[11] which expressly exempts commodity export associations registered with the Federal Trade Commission from the Sherman Act. The exemption is rarely sought. Fewer than thirty associations are active, accounting for less than two percent of U.S. exports. Three associations, dealing in motion pictures, sulphur, and phosphate, account for the bulk of the transactions. It appears that most U.S. exporters prefer to sell abroad on an independent basis, or are convinced by the Antitrust Division's assurances that joint conduct meeting the standard of the Webb-Pomerene exemption would not be treated as illegal even in the absence of such a statute, and even if the association deals in services rather than products. The National Commission to Review Antitrust Laws and Procedures reported in early 1979 that the export exemption creates opportunities for domestic spillover, hinders diplomatic negotiation of procompetitive rules, and is unnecessary, since its procompetitive purposes could be accomplished without an antitrust exemption.[12] The members of the Commission divided on whether Webb-Pomerene should be re-

[8] Address by Michael J. Egan, Associate Attorney General, before the International Bar Association, Business Law Section, Nov. 3, 1977; Address by Griffin B. Bell, Attorney General of the United States, before the American Bar Association, Aug. 8, 1977.

[9] U.S. DEP'T OF JUSTICE, ANTITRUST DIVISION, ANTITRUST GUIDE FOR INTERNATIONAL OPERATIONS 7 (1977) [hereinafter cited as ANTITRUST GUIDE]. *See Remarks of Douglas E. Rosenthal, of the Antitrust Division, On Guide for International Operations*, [1977] 805 ANTITRUST & TRADE REG. REP. (BNA) G-1.

[10] *Id.*

[11] 15 U.S.C. §§ 61-66 (1976).

[12] REPORT TO THE PRESIDENT AND THE ATTORNEY GENERAL OF THE NATIONAL COMMISSION FOR THE REVIEW OF ANTITRUST LAWS AND PROCEDURES 295-306 (statement of majority) (Jan. 22, 1979); 393-96 (separate view of Commissioner Javits).

pealed outright or should be amended to make the exemption dependent on a showing of need.

The substantive reach of the Clayton Act merger control provision is somewhat more limited than that of the Sherman Act. The merger, acquisition, or joint venture is covered only if it would be likely to lessen competition substantially in any part of the United States. The provision is fully applicable to a merger or joint venture with a foreign firm, or even among foreign firms, but only if there will be an adverse effect in the United States. If, for instance, an American firm seeks to merge with a British company that has a subsidiary in the United States already competing with the U.S. firm, the merger may be illegal because of the horizontal overlap in America, the British parentage of the competing firm being largely irrelevant in analyzing the substantive legality of the transaction.[13] If a leading American firm seeks to merge with a foreign firm which exports competing products into the U.S. market, or any part of it, the merger would probably be illegal unless the parties could demonstrate that changed international conditions, such as exchange rate shifts or tariff increases, were going to make future export competition impracticable.[14] If the foreign merger partner has not competed in the U.S. market, but sells the same type of products and would have entered the market separately but for the merger, the transaction might be challenged as eliminating potential competition, which might be significant if the market were dominated by a few firms and there were not many outside firms capable of entering it. Nevertheless, the Second Circuit Court of Appeals has held that such a merger will be illegal only if it can be proved that competitive entry by the foreign firm would have occurred within a foreseeable time period.[15]

In sum, a rather low percentage of all mergers are challenged under the antitrust laws. Mergers involving foreign firms are challenged no more frequently than those only involving domestic firms. It is irrelevant to these cases whether the foreign firm seeks to buy a U.S. firm, or vice versa. Cases in which the firms are only potential competitors of each other have become less frequent, and challenges based solely on that issue have seldom been upheld in recent years.

The Scott-Rodino Antitrust Improvements Act of 1976[16] requires that prior to any merger or acquisition of substantial size (roughly speaking, a $10 million acquisition by a $100 million firm) detailed information regarding the products and markets of both firms must be submitted

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[13] *See* United States v. Merck & Co., [1979] 928 ANTITRUST & TRADE REG. REP. (BNA) A-33; United States v. Jos. Schlitz Brewing Co., 253 F. Supp. 129 (N.D. Cal. 1966) *aff'd per curiam*, 385 U.S. 37 (1966).

[14] United States v. Gillette Co., 406 F. Supp. 713 (D. Mass. 1975); *see also* the consent decree in the same action, [1976-1] Trade Cases (CCH) ¶ 60,691 (D. Mass. 1975).

[15] BOC International, Ltd. v. FTC, 557 F.2d 24 (2d Cir. 1977).

[16] 15 U.S.C. §§ 15(c-h), 18(a), 66 (1976).

to the FTC and the Antitrust Division.[17] International mergers are subject to these requirements, but care has been taken to avoid asking for burdensome information unrelated to operations in or directed toward the United States.[18]

### *B. Personal Jurisdiction*

It is usually not possible to obtain adjudication of an antitrust claim unless personal jurisdiction over the defendant can be obtained. In regard to a foreign defendant, the relevant test, stemming from the Supreme Court's decision in *International Shoe Co. v. Washington*[19] is whether there were sufficient minimum contacts with the forum so that the application of its law will work no injustice. Related questions of venue may also arise. There is often a further question of whether the foreign parent of a defendant may also be deemed to be within the court's jurisdiction. That issue turns on whether the parent firm exercised sufficient control over the functioning of the subsidiary in the transactions that provide the basis of the antitrust charge to warrant its inclusion.[20]

The Department of Justice has stated its willingness, where appropriate, to seek indictment even of an absent defendant against whom personal jurisdiction is not available. This is done to force the culprit to answer the antitrust charge or refrain from entering the United States for business or other purposes while the indictment pends—possibly indefinitely.[21]

### *C. Jurisdiction over Information*

The principal activity of the Antitrust Division is not prosecution but investigation. When the subject of the investigation is a transaction in foreign commerce, it often happens that crucial information is located abroad. If such information is owned or controlled by a firm in the United States, compulsory process can often be obtained to demand its production here.[22] There are, however, a significant number of occasions in which the country where the information is located may object to its production abroad. The potential objection is that the information is confidential or involves matters of state, or that the country objects to the application of U.S. antitrust laws to matters involving them.[23] It is now

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[17] *Id.* § 18(a).

[18] 16 C.F.R. §§ 802.50-.52 (1979).

[19] 326 U.S. 310 (1945).

[20] *See* Hoffman Motors Corp. v. Alfa Romeo S.p.A., 244 F. Supp. 70 (S.D.N.Y. 1965); Intermountain Ford Tractor Sales Co. v. Massey-Ferguson Ltd., 210 F. Supp. 930 (D. Utah 1962), *aff'd per curiam*, 325 F.2d 713 (10th Cir. 1963), *cert. denied*, 377 U.S. 931 (1964).

[21] United States v. N.V. Nederlandsche Combinatie Voor Chemische Industrie, [1974] 690 ANTITRUST & TRADE REG. REP. (BNA) A-6; ANTITRUST GUIDE *supra* note 9, at 56-7.

[22] United States v. First National City Bank, 396 F.2d 897 (2d Cir. 1968); *In re* Grand Jury Subpoena Duces Tecum, 72 F. Supp. 1013 (S.D.N.Y. 1947).

[23] *See* Societe Internationale v. Rogers, 357 U.S. 197 (1958); *In re* Westinghouse Elec.

fairly well settled that a rigid foreign prohibition against removing information ordinarily provides a defense against a charge of contempt of a subpoena in an American investigation or prosecution, although the firm may be required to seek a waiver of such prohibition.[24] Greater efforts are being made to solve these issues diplomatically by informing foreign governments as early as possible, employing voluntary requests when possible, and clarifying safeguards for ensuring the confidentiality of sensitive material which is produced. An interesting variation on this rule concerns the effect of foreign law on witnesses in the United States. In a recent case involving a Bahamas banker subpoenaed by a grand jury in Florida, the court of appeals held Bahamanian law could not operate extraterritorially to justify his refusal to answer the grand jury's questions.[25]

### *D. Jurisdiction in Regard to Relief*

Although there is jurisdiction as to the offense, the parties and the evidence, a full remedy may not be possible in some international antitrust cases because U.S. courts lack jurisdiction or effective power to alter legal relationships abroad. The courts have had difficulty in compelling the licensing of patents held abroad, dissolving a trade association in another country, or undoing a merger consummated in another country.[26] Conceivably, the court's power over the parties would enable it to use the contempt sanction to compel compliance in such situations, but foreign third parties who benefit from the status quo may be able to obtain a foreign court order or government directive. This would prevent compliance with the U.S. order and establish an impossibility defense to a charge of contempt of the U.S. relief order.

## II. Defenses

Most of the defenses available in international antitrust cases relate to the involvement of foreign governments in the restraint of trade being challenged. Many of the defenses are analogous to ones that can be raised when the U.S. Government, or the government of a state of the United States, is involved in a domestic restraint. The rationale for rejecting such defenses in certain circumstances is also similar.

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Corp. Uranium Contracts Litigation, 563 F.2d 992 (10th Cir. 1977); *In re* Uranium, [1980-81] Trade Cases ¶ 63,124 (N.D. Ill. 1979).

[24] 563 F.2d 992; Federal Maritime Comm'n v. De Smedt, 268 F. Supp. 972 (S.D.N.Y. 1967).

[25] United States v. Field, 532 F.2d 404 (5th Cir. 1976), *rehearing denied*, 535 F.2d 660 (5th Cir. 1976), *cert. denied*, 429 U.S. 940 (1976).

[26] *See* British Nylon Spinners, Ltd. v. Imperial Chemical Industries, Ltd., [1952] 2 All E.R. 780 (C.A. 1952); United States v. Watchmakers of Switzerland Information Center, Inc., [1963] Trade Cases (CCH) ¶ 70,600 (S.D.N.Y. 1962), *decree modified*, [1965] Trade Cases (CCH) ¶ 71,352 (S.D.N.Y. 1965); United States v. CIBA Corp., [1970] Trade Cases (CCH) ¶ 73,269 (S.D.N.Y. 1970) (consent decree).

In the *Noerr*[27] and *Pennington*[28] cases the Supreme Court found no violation of the Sherman Act when competitors jointly petition a state or federal legislator or administrative official for a law or regulation that will help those companies or hurt their rivals. U.S. cases are in disagreement concerning whether American companies have a protected right to seek monopoly rights from foreign officials.[29] The Antitrust Division has assured in its Guide that it will recognize such a right.[30]

A defense is normally available if trade is restrained by the sovereign act of a foreign state. Typical examples of this include cases where one U.S. firm sued another for inducing a foreign government to expropriate the first one's assets or seize its mining claim.[31] Generally, U.S. courts will not examine the motives for such sovereign acts, or award antitrust damages to those injured by them.

There is also a defense available if suspect conduct was compelled by foreign laws, regulations or directives.[32] There remains some uncertainty concerning the extent to which foreign government approval of a restrictive practice will provide a defense in a U.S. case. In the *Swiss Watchmakers*[33] case, the court held that tacit Swiss Government approval of the cartel would not excuse it. Analogously, in the more recent *Detroit Edison*[34] case, the Supreme Court held that state approval of a private utility's practices would not serve as a defense in the absence of proof that the practices were crucial to achieving an important policy of the state. In other words, the present analysis appears to be that if state approval simply reflects indifference about a practice, no deference to that approval is necessary. A comity approach to international jurisdiction and to act of state defenses, therefore, might justify allowing immunity based on foreign state approval only when important interests of the foreign state are served by the practices, and that state's contacts with,

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[27] *See* Eastern R.R. Presidents Conf. v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961).

[28] *See* United Mineworkers v. Pennington, 381 U.S. 657 (1965).

[29] *Compare* Occidental Petroleum Co. v. Buttes Oil & Gas Co., 331 F. Supp. 92, 107-08 (C.D. Cal. 1971), *aff'd per curiam*, 461 F.2d 1261 (9th Cir. 1972), *cert. denied*, 409 U.S. 950 (1972) (refusing recognition of defense) *with* Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690 (1962) (suggesting that defense would be recognized in a proper case). Commentators have generally favored allowing the defense. *See, e.g.*, Graziano, *Foreign Governmental Compulsion as a Defense in United States Antitrust Law*, 7 VA. J. INT'L L. 100, 132 (1967) and P. AREEDA, ANTITRUST ANALYSIS, ¶ 192, at 130 (2d ed. 1974). *But see* W. FUGATE, FOREIGN COMMERCE AND THE ANTITRUST LAWS, § 2.23, at 84-86 (2d ed. 1973).

[30] ANTITRUST GUIDE, *supra* note 9, at 62-63.

[31] *See, e.g.*, 331 F. Supp. 92; Hunt v. Mobil Oil Co., 410 F. Supp. 10 (S.D.N.Y. 1975), *aff'd*, 550 F.2d 68 (2d Cir. 1977), *cert. denied*, 434 U.S. 984 (1977); General Aircraft Corp. v. Air America, Inc., [1979-1] Trade Cases (CCH) ¶ 62,452 (D.D.C. 1979).

[32] Interamerican Refining Corp. v. Texaco Maracaibo, Inc., 307 F. Supp. 1291 (D. Del. 1970). Other cases strongly suggest that foreign sovereign compulsion is not a complete defense. Sabre Shipping Corp. v. American President Lines, Ltd., 285 F. Supp. 949, 954 (S.D.N.Y. 1968); Timberlane Lumber Co. v. Bank of America, 549 F.2d 597, 607 n.10 (9th Cir. 1976).

[33] United States v. Watchmakers of Switzerland Information Center, Inc., [1963] Trade Cases (CCH) ¶ 70,600 (S.D.N.Y. 1962), *decree modified*, [1965] Trade Cases (CCH) ¶ 71,352 (S.D.N.Y. 1965).

[34] Cantor v. Detroit Edison Co., 428 U.S. 579 (1976).

and interest in, the transaction clearly outweigh those of the United States.

It is important to note that there are a great number of circumstances in which the defenses discussed above will not ensure that a whole transaction is immune. The single most important caveat is that a complex scheme with unprotected and illegal elements will not be saved because joint approaches to foreign governments or foreign state action were involved.[35] Second, injuring a competitor by applying false information to a foreign administrative agency is probably not protected as *Noerr-Pennington* free speech.[36] Third, if a foreign official involved in the scheme is acting as a co-conspirator for private reasons, such as his receipt of a bribe, his participation will not immunize either him or the scheme.[37] Fourth, foreign compulsion or state action may be treated as *ultra vires* if the anti-competitive scheme is carried on outside that state's territory, such as by acts in the United States. For instance, in its suit against Bechtel for agreeing to boycott American firms on an Arab League blacklist, the Antitrust Division contended that Arab states had no right to compel boycotts of Americans by Americans in the United States.[38]

## III. Recent Enforcement Developments

There have been two types of significant enforcement developments in international antitrust in the last few years. One of these is the emphasis on advance guidance for Americans doing business abroad. The second is an increasingly vigilant investigation and prosecution of significant restraints on international competition.

### *A. Advance Guidance*

As noted above, the Department of Justice, after extensive consultations with the President's Export Council, issued an Antitrust Guide for International Operations in early 1977.[39] The Guide is organized into an introduction setting out the Antitrust Division's general approach to international cases followed by detailed discussions of fourteen hypothetical cases, most of which were suggested by American companies engaged in foreign trade and investment. The introduction states that the Guide is intended to be a "working statement of government enforcement policy . . . intended to help businesses plan transactions which the Department of Justice is not likely to challenge, and to see which transac-

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[35] *See, e.g.*, Dominicus Americanus v. Gulf & Western, 473 F. Supp. 680 (S.D.N.Y. 1979); United States v. Sisal Sales Co., 274 U.S. 268 (1927).

[36] *See* California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508 (1972).

[37] *See* 370 U.S. 690; 274 U.S. 268.

[38] United States v. Bechtel Corp., [1979-1] Trade Cases (CCH) ¶ 62,430 (N.D. Cal. 1979). *See also* Linseman v. World Hockey Ass'n, 439 F. Supp. 1315 (D. Conn. 1977); Outboard Marine Corp. v. Pezetel, 461 F. Supp. 384 (D. Del. 1978).

[39] *See* ANTITRUST GUIDE, *supra* note 9.

tions are likely to require detailed factual inquiry by the enforcement agencies."[40] It is emphasized that the Guide is not a substitute for the Antitrust Division's Business Review Clearance Procedure or for the advice of private counsel.

It is not possible to summarize all of the points made or suggested in the fourteen case discussions. A few highlights may be instructive. The Guide indicated, contrary to business concerns based on a few old cases, that the Antitrust Division usually would not challenge division of markets between a parent and subsidiary,[41] joint ventures abroad to sell to foreigners,[42] joint bidding on foreign projects, joint research ventures,[43] or the appointment of an exclusive distributor abroad.[44] On the other hand, the Division emphasized that it was likely to challenge restrictions on export to the United States by a foreign joint venture or licensee which exceeded the predictable life of the patents or know-how being transferred or extended to products not covered by the technology rights.[45] Exclusive grant-back requirements were also disfavored, as was cooperation with a foreign cartel seeking to raise prices to the United States—even a cartel supported by a foreign government.[46]

Through the good offices of the Commerce Department, 35,000 copies of the Guide have been sent to U.S. firms and associations interested in foreign commerce. At least one study, done for the Bureau of Mines, has reported that publication of the Guide has been effective in allaying fears of American firms engaged in business ventures abroad.[47]

The Antitrust Division's Business Review Clearance Procedure remains somewhat lightly used, probably because obtaining advice from private lawyers is so frequent. In the last ten years, about twenty-two business reviews were sought concerning proposed international activity. Eighteen, or about eighty-five percent, were answered in the affirmative, two were negative, and two were refused on grounds of mootness or vagueness.

Following President Carter's export message of September 26, 1978, the Division committed itself to accelerate the pace of clearances relating to export trade. In December, a procedure went into effect for processing such clearance requests within thirty working days.[48]

### *B. Investigations and Prosecutions*

During the last five years, the Antitrust Division has expanded its

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[40] *Id.* at 1.
[41] *Id.* at 12-14.
[42] *Id.* at 28-32.
[43] *Id.* at 19-27.
[44] *Id.* at 46-49.
[45] *Id.* at 28-36.
[46] *Id.* at 42-45, 53-57.
[47] BUREAU OF MINES, EVALUATION OF SELECTED FACTORS IMPACTING ON THE INTERNATIONAL COMPETITIVENESS OF THE U.S. MINERALS INDUSTRY 169 (1979).
[48] 28 C.F.R. § 50.6 (1978).

Foreign Commerce section from seven lawyers to twenty-two, with a more than corresponding increase in active investigation. Moreover, sections dealing with energy and transportation also investigate international developments in those fields. In particular, the Energy Section is conducting a major investigation of the role of the leading international petroleum companies in the world oil market. The Division's investigations may seek documents or interviews in foreign countries when doing so seems necessary and feasible and in accord with the law of the other nations. In order to avoid diplomatic incidents in that regard, a regular practice of informing affected governments of such investigations has been instituted and is operating quite satisfactorily.[49]

Prosecutions in the last five years have involved a great variety of practices and defendants. Nevertheless, there are a number of common threads running through the cases. In at least four of them, involving lithium,[50] safes,[51] watches,[52] and mink pelts,[53] an American firm or association pressured a foreign one to refrain from, or prevent, sales of competing goods into the U.S. market. The mink case, *United States v. National Board of Fur Farms*,[54] highlights two basic principles in this field. First, the case involved U.S. firms who sought a private agreement with their foreign rivals after failing to convince Congress to impose a quota on mink imports. The imposition of criminal sanctions reflects the principle that restraint of international trade is the prerogative of governments. Vigilante trade restraints may be dealt with harshly. Second, the court was unimpressed with the argument that agriculture is normally an industry where cooperative action is exempt from the antitrust laws. The court accepted that a purpose of the exemption was to enable American growers to compete more effectively with their foreign rivals, rather than to facilitate collusion with them.[55]

A number of other recent cases also stress the principle that regulatory exemptions will be construed narrowly, with antitrust being employed as a sanction against unauthorized anticompetitive conduct. In criminal prosecutions of U.S. and foreign airlines and shipping companies, the Justice Department attacked unfiled, unapproved agreements restrictive of international competition. In both cases pleas were entered, and substantial fines imposed.[56]

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[49] *See* Address by Michael J. Egan, Address by Griffin B. Bell, *supra* note 4.

[50] United States v. Foote Mineral Co., No. 74-1652 (E.D. Pa. 1974).

[51] United States v. Diebold, Inc. and Chubb and Son, Ltd., Cr. No. 76-9A (N.D. Ohio 1976).

[52] United States v. Norman Morris Corp., Civ. No. 76-495 (S.D.N.Y. 1976).

[53] United States v. Nat'l Bd. of Fur Farms Org., 395 F. Supp. 56 (E.D. Wis. 1974).

[54] *Id.*

[55] *Id.*

[56] United States v. Pan Am. World Airways, Inc., [1977] 843 ANTITRUST & TRADE REG. REP. (BNA) A-14; United States v. Atlantic Container Line, Ltd., [1979] 917 ANTITRUST & TRADE REG. REP. (BNA) A-25; [1979] 918 ANTITRUST & TRADE REG. REP. (BNA) A-29.

The important *Bechtel* (Arab Boycott)[57] and *Gulf* (Uranium Cartel)[58] cases involve another principle of antitrust law. The existence of foreign government support for a cartel will not excuse American companies whose cooperation with the cartel involves boycotting U.S. firms in U.S. commerce beyond the point where any direct foreign compulsion is present or valid.

Lastly, the *Everest & Jennings*[59] wheelchair monopolization case clarifies the directives of the Guide in regard to the operations of a multinational. The defendant firm controlled roughly seventy percent of the U.S. market and prevented its English affiliate from selling its lower-priced chairs to American buyers. The complaint charged Everest & Jennings not with a conspiracy in violation of section 1 of the Sherman Act, but with monopolization and attempted monopolization in violation of section 2 of the Act. The case was settled on the basis of "affirmative" relief. All restrictions on exporting foreign wheelchairs from E&J affiliates to the United States were removed, and the parent company was ordered to reward managers of its affiliates for so doing.[60] This case falls far short of rules suggested by the developing countries in international code negotiations. The case involved a multinational with a dominant market that was preventing export to the market in which it was dominant. The rule in *Everest & Jennings* would certainly not apply to every multinational preventing exports to any market. Also, the case involved a refusal to sell for export to the United States a product that was already for sale and for which the buyer was prepared to pay the customary price. The refusal to sell was solely for the purpose of protecting the higher price structure of the parent in the United States.

*United States v. Studiengesellschaft Kohle, M.B.H.*[61] is indicative of the Division's continuing vigilance against unduly restrictive international technology licensing. The court in *Studiengesellschaft* condemned an effort to use the licensing of a patented process to restrict the resale of the resulting product.

In its selection and disposal of cases, the Antitrust Division has been careful to avoid letting elements of nationalism or mercantilism skew the application of U.S. antitrust laws. This position has also been emphasized when the Division has become involved in cases of alleged dumping or unfair foreign competition before the International Trade Commission. The Division has sought to ensure that exclusion of foreign goods is not done unnecessarily, especially when this would leave U.S. consumers

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[57] [1979-1] Trade Cases (CCH) ¶ 62,430.

[58] United States v. Gulf Oil Corp., [1978] 863 ANTITRUST & TRADE REG. REP. (BNA) A-13.

[59] United States v. Everest & Jennings Int'l, [1979-1] Trade Cases (CCH) ¶ 62,508 (C.D. Cal. 1979) (consent decree).

[60] *Id.*

[61] [1978-2] Trade Cases (CCH) ¶ 62,291 (D.D.C. 1978).

with a domestic monopoly or oligopoly as their only source of supply.[62]

Lastly, the Division has participated actively at the OECD and the UN in the negotiation of international principles and guidelines concerning the control of restrictive business practices. The Division's purpose in these negotiations has been to engender harmonious, uniform conditions under which U.S. and foreign firms compete in world markets, to draft international norms calling for due process and non-discrimination in antitrust laws and proceedings, to create procedures for airing and resolving grievances about multinational corporations under agreed standards, and to work toward a climate favorable to free competition and the preservation or expansion of free market sectors in national economies.[63]

## Question and Answer Period

*Mr. Davidow*: In at least two recent monopoly cases—the *Berkey Photo*[1] case, and the *SCM*[2] case—each holding largely for the defendant, the court has emphasized that there really is no such thing in today's law as no-fault monopolization. The courts are quite clearly not going to find a company guilty of Sherman Act section 2 monopolization unless they find conduct that is somewhere between exclusionary and abusive. While its exact words are hard to formulate, the test requires some conduct by the monopolist that, rather than merely advancing his product to the public, throws tacks under the tires of the competitor. In effect, it must be some conduct whose primary purpose is not to advance any legitimate interest of the monopolist, but to disadvantage the person who has come in to compete with him. Therefore, under this hypothetical, no possible case could be made because there is no suggestion of exclusionary or abusive conduct.

*Question*: Why did the U.S. Department of Justice settle for only misdemeanor action against Gulf and the Uranium cartel and why did it not pursue charges against foreign uranium producers?

*Mr. Davidow*: Almost any audience will tell us that we are not tough enough on some cases and far too tough on others. In fact, the Senate has held hearings on exactly this question. Because antitrust violations were a misdemeanor until December 1974 and became a felony thereafter, a whole series of cases has posed a difficult decision for us. For example, suppose a cartel began in 1971, and the last overt act was in early 1974 but there was no specific withdrawal of the cartel until sometime in 1975. Since cartels often just fade away, there is no moment when everybody rushes in and says "we disband" and announces the cartel is over.

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[62] Address by John H. Shenefield, Assistant Attorney General, before the ALI-ABA Course of Study on International Antitrust Law, May 26, 1978.

[63] *See* Davidow, *Toward an International Antitrust Code*, 65 A.B.A.J. 631 (1979).

[1] Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263 (2d Cir. 1979).

[2] SCM Corp. v. Xerox Corp., 463 F. Supp. 983 (D. Conn. 1978).

Consequently, for a cartel clearly within the misdemeanor period with no absolutely certain withdrawal later than 1974, the courts have held that if the prosecutor charges a felony and cannot convince the jury beyond a reasonable doubt that important aspects of the cartel existed during the felony period, he loses the whole case. So the prosecutor must decide whether to risk a perfectly good misdemeanor conviction to try to push the cartel into the next year and get the felony. This issue will largely disappear in a year or two because there will not be many pre-1975 cartels to examine. A question regarding the selection of defendants in a foreign case is the defendant's *mens rea*. For purposes of fairness and equity, we have taken the view when indicting an individual for a criminal offense, that there should be some reason to believe that he knew he was violating the antitrust law. Conceivably, in cases with Americans and foreigners involved, particularly if there were some affirmative action by the foreigners' government, the American might be held to a higher standard of knowledge than the foreigner. One might be a little more sympathetic to the argument that the foreigner could have believed, on the basis of his government's attitude to the cartel, that what he was doing was not illegal, but one would be less convinced about the American who had in-house antitrust counsel on U.S. law.

*Question*: What about a U.S. firm exchanging detailed price product and sales information with a foreign trade organization whose members then exchange the data knowing which company submitted it?

*Mr. Davidow*: People sometimes forget that there is no rule in itself in the antitrust law which says that exchanging any kind of information is illegal. If two companies want to invite each other's president to the research labs, that in itself is not illegal. The difficulty is that if prices later behave uniformly, the exchange may be circumstantial evidence of an intent to accomplish something. Therefore, we have given advice, and private lawyers have given advice, that suggest a full series of precautions: that, in general, information should be on past transactions, not current ones; that it should not break down transactions customer by customer; and that there should be some neutral or objective group that is screening the information and producing general data that is not identifiable by company. The thing that is illicit or illegal is agreeing to restrain prices or production; agreeing to exchange information may be circumstantial evidence or may involve a tacit agreement to refrain from price competition.

*Question*: Is there a formal procedure for obtaining a clearance or opinion from the antitrust division?

*Mr. Davidow*: Yes. 28 CFR § 50.6 is the relevant passage, and is mentioned in the Guide. However, any letter expressing such a desire will cause a lawyer to call you up and read the right statute to you. But the forms are not particularly complicated, and they basically deal with getting the information in a way we can understand it.

*Question*: Doesn't the EEC exercise broader relief jurisdiction as in the *Commercial Solvents*[3] case than the United States?

*Mr. Davidow*: The answer is rarely, but occasionally. The *Commercial Solvents* case involved a large American company that had been prepared to supply products to one European licensee, but not to another. It was held that this was a monopolistic refusal or abusive refusal to deal. The American company was ordered to ship this chemical from St. Louis to the Italian licensee, or ex-licensee, and this was obviously extraterritorial relief. But it probably is an unusual case in that very few American cases turn on refusals to deal; it is not as clearly an offense under possible abuses of a dominant position, and the Common Market would allow a dominant position to be found for a firm with twenty-five or forty percent market share, whereas we probably would not. Therefore, since this is one of the very rare cases where their relief has extended that far, on balance we still are more aggressive.

[3] Sharp v. Commercial Solvents Corp., 232 F. Supp. 323 (D. Tex. 1964).