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The Application of Section One of the Sherman Act to East-West Trade Resale Restrictions

by Peter B. Fitzpatrick*

In this article the author is concerned with the extraterritorial application of the United States antitrust law to resale trade restrictions agreed to between American and foreign corporations. Following an explanation of and comparison between the various judicial, statutory and administrative standards applicable to resale trade restrictions, it is concluded that the law remains unclear and unsettled, but capable nevertheless of being applied with practical advantages for the American businessman.

I. INTRODUCTION

THE DILEMMA OF the international application of the antitrust laws lies in the post-war success of the American multinational corporation. In reaching to control the actions of these corporations abroad those who apply the antitrust laws seek to maintain control over the extraterritorial activities of entities which they have clear authority to regulate in the domestic sphere. The use of the antitrust laws to assert such control has a great deal of political appeal in a period when the United States is increasingly conscious of the image projected by American corporate activity abroad.¹ At the same time, increasing the reach of the antitrust laws abroad opens the United States to criticism for attempting to control the internal affairs of sovereign nations. Critics say it smacks of imperialism.

Detente accentuated the dilemma of the antitrust laws in the international arena. For the first time American corporations could begin to tap the vast potential of the Soviet market. But the opportunity held a hidden threat, the potential competition of Soviet state corporations. In seeking to limit this threat, United States corporations have run head-on into the problem of the international application of the antitrust laws.

The predictability and stability of applicable laws are major elements in establishing a foundation for trade relationships. In part,

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¹ The Foreign Corrupt Practices Act, while not part of the antitrust laws, is a recent expression of Congressional concern for the American business image abroad. Pub. L. No. 95-213 (1977), 92 Stat. 1494, Title 1.

the confusing application of the antitrust laws can have a chilling effect on East-West trade.² This article will attempt to delineate the extent to which Section One of the Sherman Antitrust Act applies to East-West trade, focusing upon statutory and case law and the enforcement policy of the Antitrust Division of the United States Justice Department.

II. SALE RESTRICTION: A MEANS OF LOWERING THE RISK OF EXPORTING TECHNOLOGY AND KNOW-HOW

In the Spring of 1966, the thaw which was to become detente found expression in the wilds of the Eurasian steppe. The Soviet Union sought to build an automobile factory and came looking for a business partner in the United States. After the Ford Motor Company rejected a Soviet request to build the factory,³ the Russians entered the enthusiastic embrace of Giovanni Agnelli of the Fiat Motor Company. In a gesture of solidarity, the \$800,000,000 plant, built on a bend in the Volga River southeast of Moscow, was named Togliatti, after the famous Italian Communist. Togliatti was to produce a version of the Fiat 124 to be sold in the Soviet Union under the trade name "Zhiguli." The same car is produced for export to the West under the name "Lada." Total production was projected to reach 660,000 cars a year by 1975.⁴

Agnelli viewed the building of Togliatti as one in a series of moves to improve Fiat's world-wide market position. In Poland, Fiat's licensee is Zeran; in Egypt, it is Nasr; in Yugoslavia, it is Zavodi Crvena Zastava. The objective of the Togliatti operation, as well as the other Fiat licensees, was to improve and diversify Fiat's world-wide product line and to give Fiat an entree into Communist and developing country markets.⁵

Other Western auto makers failed to perceive the advantage in Fiat's Eastward move. They regarded it as a gamble of no mean proportions. What they saw was Fiat creating keen competition for itself and for them. Selling plants and know-how to the Soviet Union was infusing the Soviet economy with the basic ingredients it lacked to be

² U.S. DEP'T OF COMMERCE, ANTITRUST IN EAST-WEST TRADE 1 (Advisory Committee on East-West Trade Meeting of March 10, 1976).

³ M. GOLDMAN, DETENTE AND DOLLARS 37 (1975).

⁴ *Multinationals: A Fiat is a Lada is a Zastava*, BUS. WEEK, Feb. 12, 1972, at 32.

⁵ *Id.*

able to compete in the West. The Soviet desire to earn hard currency was well recognized.⁶ But of more concern to Western auto producers was the economic effect of the Soviet system of control. The Soviet Union has a large, cheap, controlled labor pool and the capability of diverting the flow of raw materials and finished products from the internal market to an external one. Coupling these aspects of a controlled economy with advanced equipment and know-how created the potential of driving the Western auto producers from their traditional markets.

The experience since 1966 has supported Fiat's critics. Without drastically improving the roads and service infrastructure within the Soviet Union, it would be difficult for the country to absorb 660,000 new cars a year. Thus a major portion of the Togliatti product has been available for export with the benefit of producing hard currency for the Soviets.

In 1972 the Soviet Union exported more than double the number of cars exported in 1971. By 1973 the world-wide export of Soviet cars was 121,000.⁷ The Soviet-built Lada 1200 is reputed to be both sturdier and more powerful and sells for ten percent less than its Italian counterpart, the Fiat 124.⁸ Several years ago, it was noted that while a Soviet citizen had to pay as much as \$7,300 American, at official exchange rates, for a Togliatti Fiat, the Lada was being sold abroad for \$2,400 American.⁹ The Soviet sale of Ladas in the West have not driven anyone from the market, but it is posing a challenge to Fiat and other Western auto producers. The Lada has just entered the North American market through Canada and is selling there for \$3,645 Canadian, almost 22 percent below the price of a Honda, the foreign car with the greatest sales volume in Canada.¹⁰

The Fiat experience is one which has not been lost upon subsequent detente traders; however, attempts to restrict the resale of Eastern produced goods in the West have raised the specter of prosecution under the United States antitrust laws. The continuing concern of Western businessmen with regard to limiting Soviet and Eastern European resale in the West of products produced by plants and know-how purchased from the West was brought out at a 1976 meeting of the

⁶ *Id.*

⁷ M. GOLDMAN, *supra* note 3, at 137.

⁸ *Multinationals: A Fiat is a Lada is a Zastava*, note 4 *supra*.

⁹ M. GOLDMAN, *supra* note 3, at 138.

¹⁰ N. Y. Times, Nov. 13, 1978, at D-1, col. 1.

Advisory Committee on East-West Trade. Mr. Alfred Wentworth of the Chase Manhattan Bank asked Mr. Joel E. Davidow of the Antitrust Division of the Justice Department the following question:

I think many of us in American business live in a horror (*sic*) of creating another Fiat deal with the Soviet Union, where they set up the plant to manufacture for the Soviet market, but neglect to block the Soviet exports of the same car, such as the Fiat, throughout the rest of the world, with the result that the Lada is in Western Europe, competing very advantageously with the Fiat.

Suppose we turn this around, and substitute instead of a Fiat a United States manufacturer of some sort of equipment. He goes in and negotiates a contract, and that contract says that the production of this plant may be sold only in the Soviet Union, or can be sold only in the Soviet Union and Eastern Europe, but specifically blocks them from Western Europe and the United States.

Then if I, as the prospective distributor in this country of this equipment, bring suit with the Justice Department claiming that you are denying by this contract the American public from a very inexpensive piece of wonderful equipment, is there a case there?¹¹

Mr. Davidow did not directly respond to the question. Indeed, the answer remains unclear. However, the deep concern of the American business community about its liability in this area¹² warrants a review of the law as it exists.

Let us take the above suggested fact pattern. A United States manufacturer (XYZ Corp.) wishes to contract to sell a plant built according to the technological and know-how specifications of XYZ Corp., including the necessary production machinery, to a Soviet trade organization. XYZ Corp. wishes to include a clause in the sales contract to prevent the sale of plant product in the United States and Western Europe where it has a well-established market position. The question to be answered is, can the United States antitrust laws reach these contract restrictions on sale of plant product?

It should be noted that although this article will not deal with the problems of transgressions of Soviet law or European Community antitrust law, there may be issues under these laws which must be fully resolved before entering into a contract for sale.

¹¹ U.S. DEPT OF COMMERCE, *supra* note 2, at 15.

¹² See *Confusion on Issue of How Antitrust Laws Apply to U.S. Firms Abroad Seen Rising*, Wall St. J., Nov. 16, 1977, at 13, col. 1.

III. SHERMAN ACT ANALYSIS OF A RESTRICTION ON SALE OF PLANT PRODUCT

Since our hypothetical situation involves a contract which is arguably in restraint of trade, it is appropriate to restrict our analysis to the jurisdictional reach of Section One of the Sherman Act. That provision states that "[e]very contract . . . in restraint of trade or commerce . . . with foreign nations is hereby declared to be illegal."¹³

A. "Every Contract"

The "every contract" language of Section One is subject to the "rule of reason" under which the court scrutinizes the conduct involved and determines whether such conduct is unreasonable when its legitimate purpose is compared to its effect as a restraint on free competition.¹⁴ Over time, certain categories of conduct have come to be regarded as illegal *per se* under the Sherman Act. The illegal *per se* categories generally include price-fixing agreements, agreements among competitors dividing geographic markets or groups of customers, tying agreements, concerted refusal to deal and certain kinds of reciprocity agreements;¹⁵ however, the *per se* illegality concept has recently been questioned.¹⁶

¹³ 15 U.S.C. § 1 (1976). While the Sherman Act prohibits anti-competitive trade restraints, the Clayton Act prohibits anti-competitive acquisitions of corporate stock and assets. 15 U.S.C. § 18 (1976). The contractual sale to the Soviet trade corporation entails no such acquisition. Therefore, the Clayton Act does not apply to our case. International merger cases under the Clayton Act will therefore not be discussed. *See* United States v. CIBA Corp., [1970] Trade Cas. (CCH) ¶ 73, 269 (S.D.N.Y. 1970); *FTC v. Procter and Gamble Co.*, 386 U.S. 568 (1967); *United States v. Gillette Co.*, [1968] 1 TRADE REG. REP. (CCH) ¶ 4345.19 (D.C. Mass. 1968); *United States v. The Standard Oil Co.*, [1970] Trade Cas. (CCH) ¶ 72,988 (N.D. Ohio 1969). While they will not be discussed in this article, it should be noted that private persons and the Federal Trade Commission also have standing to sue for antitrust violations. The antitrust laws have been given greater reach through the vehicle of the Federal Trade Commission Act. 15 U.S.C. §§ 44, 45 & 64 (1976). *See* *FTC v. Brown Shoe Co.*, 384 U.S. 316 (1966), which indicates that the FTC can declare trade practices unfair if they conflict with, even though they do not actually violate, 15 U.S.C. §§ 1-7 & 12-27.

¹⁴ *See* *Standard Oil Co. v. United States*, 221 U.S. 1,63 (1911).

¹⁵ *See* Baker, *Antitrust and World Trade: Tempest in an International Teapot?*, 8 CORNELL INT'L L.J. 16, 20 (1974).

¹⁶ *Continental T.V., Inc. v. G.T.E. Sylvania, Inc.*, 433 U.S. 36, 47-59 (1977).

B. The Sherman Act will apply to those activities which have an effect on United States commerce.

In the international sphere, only those contracts which "restrain" United States commerce with foreign nations can be reached. The "restraint of trade or commerce . . . with foreign nations" language of Section One of the Sherman Act requires that a restraint affect the flow of goods imported into or exported from the United States.¹⁷ The restraint of foreign commerce rule has been applied when the restraining parties were foreign nationals,¹⁸ or United States citizens.¹⁹ Acts committed by parties to restrain commerce have been prosecuted whether committed within a foreign country,²⁰ or within the United States.²¹

C. Varying positions regarding the threshold effect on United States commerce which permit application of the Sherman Act

1. Case - Derived Standards

The statutory language "commerce with foreign nations" has presented no barrier to extending the extraterritorial reach of the antitrust laws. In *United States v. Aluminum Co. of America*, Learned Hand addressed this issue saying "it is settled law . . . that any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends"²² "Consequences within its borders" allows a fairly broad reach for the Sherman Act, conceivably including a contractual sale of plant and know-how to a Soviet trade corporation such as contemplated by the XYZ Corp.

Economic interdependence in the post-war period is of such a character that almost any restrictive practice could qualify under the *Alcoa* language. Judge Hand recognized this and suggested that Congress never intended that the antitrust laws should apply with unreasonable breadth:

Two situations are possible. There may be agreements made beyond our borders not intended to affect imports, which do affect them, or

¹⁷ See *Continental Ore Co. v. Union Carbide and Carbon Corp.*, 370 U.S. 690 (1962).

¹⁸ *Timken Roller Bearing Co. v. United States*, 341 U.S. 593 (1951).

¹⁹ *United States v. Sisal Sales Co.*, 274 U.S. 268 (1927).

²⁰ *Timken Roller Bearing Co. v. United States*, 341 U.S. 593 (1951).

²¹ *United States v. Sisal Sales Co.*, 274 U.S. 268 (1927).

²² 148 F.2d 416, 443 (2d Cir. 1945).

which affect exports. Almost any limitation of the supply of goods in Europe, for example, or in South America, may have repercussions in the United States if there is trade between the two. Yet when one considers the international complications likely to arise from an effort in this country to treat such agreements as unlawful, it is safe to assume that Congress certainly did not intend the Act to cover them. Such agreements may on the other hand intend to include imports into the United States, and yet it may appear that they have had no effect upon them. That situation might be thought to fall within the doctrine that intent may be a substitute for performance in the case of a contract made within the United States; or it might be thought to fall within the doctrine that a statute should not be interpreted to cover acts abroad which have no consequence here. We shall not choose between these alternatives; but for argument we shall assume that the Act does not cover agreements, even though intended to affect imports or exports, unless its performance is shown actually to have had some effect upon them.

Both agreements would clearly have been unlawful, had they been made within the United States; and it follows from what we have just said that both were unlawful, though made abroad, *if they were intended to affect imports and did affect them.*²³

Thus, Judge Hand suggests that Congress did not intend the Act to cover situations where there is no intent to affect commerce and there is an indirect effect. Where there *is* an intent to affect commerce, but no effect results, Judge Hand defers judgment on whether the antitrust laws apply. Judge Hand concludes his analysis by arriving at a two-part standard: The antitrust laws will apply to those agreements which are intended to affect imports or exports, and do, *in fact*, affect them.

Notwithstanding Judge Hand's analysis, other courts have altered the standard. For example, a stricter test was employed in *United States v. General Electric Co.*,²⁴ wherein foreign and domestic manufacturers of incandescent lamps negotiated licenses and agreements to establish territorial restrictions to minimize foreign competition in domestic markets. The court conditioned liability under the Act upon the requirement that the activities exercise a "direct and substantial effect" upon United States trade. At the same time, the court suggested that "intent" to restrain trade need not be shown if the result occurs in fact and as a consequence of the business arrangement.²⁵

²³ *Id.* at 443-44 (emphasis added).

²⁴ 82 F. Supp. 753 (D.N.J. 1949).

²⁵ *Id.* at 891.

A similar standard was applied in *United States v. R. P. Oldham Co.*,²⁶ although without discussion of the "intent" element. In response to the question whether the court's jurisdiction could extend to a conspiracy to restrain trade which, for the most part, took place outside the United States, the court concluded that it had jurisdiction where the activities operated as a "direct and substantial restraint" on United States commerce.²⁷

In contrast, the court in *United States v. Imperial Chemical Industries*²⁸ articulated a standard requiring a lesser showing of effect on United States commerce. Certain United States and British corporations had conspired to divide world markets in chemicals and explosives through patents and processes agreements, and they were found to have violated Section One of the Sherman Act. The defendants argued that a decree of divestiture would be an extension of control beyond the court's jurisdiction. The court responded: "We are directing that these defendants take definite action to remove restraints of trade . . . because their concerted acts have, in part, been committed here and the result of their agreement has *directly affected* our trade and commerce."²⁹ The court made no mention of the substantiality requirement.

The picture is even further obscured when one considers an old decision by the Supreme Court which suggested that a mere effect would justify application of the antitrust laws as against a domestic steamship company which entered into a monopolistic arrangement formed wholly abroad by foreign steamship lines.³⁰

The clear distinction between a "direct" effect and a "substantial" effect which exists with respect to interstate commerce has yet to be made with respect to international commerce.³¹ It is clear that

²⁶ 152 F. Supp. 818 (N.D. Cal. 1957).

²⁷ *Id.* at 822.

²⁸ 105 F. Supp. 215 (S.D.N.Y. 1952).

²⁹ *Id.* at 237 (emphasis added).

³⁰ *Thomsen v. Cayser*, 243 U.S. 66, 68 (1917). The decisions referred to in the text do not represent the entire spectrum of legal standards which have been applied by the courts. See generally J. VON KALINOWSKI, *Antitrust Laws and Trade Regulation*, in 16 BUSINESS ORGANIZATIONS § 5.02[2] at 5-124 nn. 22-25 (1978).

³¹ There is a clear and well-established difference between a "direct" effect and a "substantial" effect upon *interstate* commerce. A direct effect arises when a restraint is placed upon and limited to goods or services that flow in interstate commerce. The effect is assumed from the fact that the restraint was directly applied to those goods or services and does not have to meet any quantitative standards. A substantial effect, on the other hand, justifies federal jurisdiction only if its quantitative effect on commerce

restraints which "directly affect" United States foreign commerce are subject to the Sherman Act. In the cases in which "substantially affect" has been used, the term has been used in conjunction with "directly affect."³²

Some comment exists indicating that an indirect effect will not fall afoul of Section One of the Sherman Act. In a report prepared under the supervision of the United States Attorney General, a Committee member's note on discussion of the term "restraints" stated:

Of course "restraints" must be direct as well as substantial No case has been found in which the court has applied the antitrust statutes to activities of an American enterprise within a foreign country in the absence of its being a party to some concerted action in direct and substantial restraint of the commerce of the United States.³³

Indeed, there is some case law indicating that anything short of a direct effect does not bring the activity within the Sherman Act.³⁴

Finally, one case, *Pacific Seafarers, Inc. v. Pacific Far East Line, Inc.*,³⁵ stands by itself in relation to the other foreign commerce decisions. It represents a break from the direct/substantial line of reasoning. In *Pacific Seafarers*, the plaintiff had charged a conspiracy among defendant American Shipping Lines and the two conferences to which they belonged to destroy the plaintiff's business of carrying AID-financed cement and fertilizer cargoes between Taiwan and South

is sufficient. Whether an effect is substantial becomes relevant when a restraint *indirectly* affects goods and services in their interstate flow. J. VON KALINOWSKI, *supra* note 30, at 5-124. Consistent with this view, von Kalinowski has said that "any effect that is not *both* insubstantial and indirect will support Federal jurisdiction under Section 1." *Id.* at 5-125 n.31 and accompanying text. Given the complexity of the semantic debate involved, it is unlikely that the courts will soon move away from their present declarative standards of "direct" and "substantial" effect to embrace von Kalinowski's more ambiguous negative standard.

³² See notes 24-27 *supra* and accompanying text.

³³ REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 70 n.21 (1955).

³⁴ See *Alfred Bell & Co. v. Catalda Fine Arts, Inc.*, 191 F. 2d. 99, 105-06 (2d Cir. 1951), where the court states:

So far as the evidence discloses, the output restriction was not imposed with sales in the United States in mind. Accordingly, we take it that the restriction was meant to have and did have, at most, only an incidental, peripheral, reference to sales in the United States of America.

³⁵ 404 F.2d 804 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1093 (1969).

Vietnam. The defendants first sought to erect legal barriers to stop the plaintiffs from obtaining this shipping business and, when they failed in that effort, they dropped their prices and drove the plaintiff out of business. The Federal Maritime Commission dismissed the plaintiff's complaint on the ground that this trade between foreign ports, of goods owned and shipped by foreigners to foreigners, was not within the Commission's jurisdiction under the Shipping Act. Subsequently, the plaintiff's complaint under the Sherman Act was dismissed by the District Court, presumably on the jurisdictional ground that the complaint made no allegation of restraint of United States foreign commerce. The Circuit Court, in rejecting the defendant's contention that the Sherman Act is inapplicable unless United States foreign commerce itself is restrained, stated:

[W]e hold that, since there is an identifiable, distinctive market for American-flag shipping service where the American characteristic is dominant—a market defined as involving the transportation of AID-financed cargoes, which has a definite nexus with significant interests of the United States—the Sherman Act is applicable to a conspiracy to exclude newcomers from the trade.³⁶

The Court was particularly influenced by the fact that the trade involved was entirely a product of the United States policy of subsidizing its merchant marine and that all the parties had to be Americans to participate in serving the market for American-flag shipping.

Pacific Seafarers contains the seeds of a potentially disturbing extension of the antitrust laws to facts which on their face don't appear to restrain or substantially affect United States imports or exports. The troublesome aspect of this decision is that it is an extension of the antitrust laws to apply to trade between foreign ports of goods owned and shipped by foreigners to foreigners. The application of United States antitrust laws to cases where the United States interest is less than direct is fraught with problems. American leadership in asserting jurisdiction internationally has been perceived as an invasion of the sovereignty of other nations affected by our decisions. Recently the British House of Lords declined to enforce letters rogatory issued by a United States District Court for evidence which the House of Lords felt was not subject to United States jurisdiction. Viscount Dilhorne, reflecting his annoyance, stated:

³⁶ *Id.* at 816.

For many years now the United States has sought to exercise jurisdiction over foreigners in respect of acts done outside the jurisdiction of that country. This is not in accordance with international law and has led to legislation on the part of other States, including the United Kingdom, designed to protect their nationals from criminal proceedings in foreign courts where the claims to jurisdiction by those courts are excessive and constitute an invasion of sovereignty.³⁷

The Antitrust Division has recently acknowledged its concern with the problem of extraterritorial enforcement and has indicated that it is trying to increase its communications with foreign jurisdictions which may be or which have been offended by such enforcement.³⁸

The distinguishing characteristics of *Pacific Seafarers* are that the Court treats the American shipping industry as the relevant market in this case and that the United States Government financed the entire program. The result that the shipping industry was less competitive after the defendant's action than before, because the plaintiff had been put out of business, finds no parallel in the proposed contractual arrangement of the XYZ Corp. In addition, the case may be distinguished because it involves a peculiar and unique industry, an industry which can earn payments that benefit the United States economy by providing transportation services involving neither United States ports nor United States products. Perhaps the best analysis of *Pacific Seafarers* was made by a member of the Antitrust Division when he

³⁷ Rio Tinto Zinc Corporation and Others and Westinghouse Electric Corporation *et e Contra*, [1978] A.C. 547, Opinion of Viscount Dilhorne at 631. This view is consistent with the attitude of Mr. Justice Holmes in *American Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909). In that case, United Fruit Company was alleged to have induced the Costa Rican government to seize a competitor's banana crop land. Justice Holmes, writing for the Supreme Court, stated:

The general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done For another jurisdiction, if it should happen to lay hold of the actor, to treat him according to its own notions rather than those of the place where he did the acts, not only would be unjust, but would be an interference with the authority of another sovereign, contrary to the comity of nations, which the other state concerned justly might resent. *Id.* at 356.

³⁸ Address by Michael J. Egan, Assoc. U.S. Attorney General, before the Business Law Section, International Bar Ass'n (Nov. 3, 1977), *excerpted in* Stanford, *The Application of the Sherman Act to Conduct Outside the United States*, 11 CORNELL INT'L L. J. 195, 208 (1978).

suggested as its principle: "Where the U.S. Government is financing the transactions involved and reserving the business to U.S. firms, we have no national interest in having American firms restrain commerce in that area."³⁹ Such a principle would not apply to a resale limitation in a contract with a Soviet trade corporation.

2. Standards suggested by the Antitrust Division

In its recent publication entitled *Antitrust Guide for International Operations* (the Guide) the Antitrust Division describes two somewhat different standards. The Guide states that United States antitrust law should be applied to an overseas transaction when there is a substantial and foreseeable effect on United States commerce.⁴⁰ However, the cases cited as the source for this standard do not use the word "foreseeable."⁴¹ In fact, the only referenced articulation approaching a standard of "substantial and foreseeable" effect is language used by Learned Hand in the *Alcoa* case where he says, "[b]oth agreements would clearly have been unlawful . . . if they were *intended to affect imports and did affect imports*."⁴²

The confusion resulting from the multiple standards suggested by the Guide might have been avoided.

The standard "substantial and foreseeable" effect appears to be different from and to require greater proof than the case law standard "substantial and direct" effect. If this new wording is to be the new standard applied, then henceforth the Antitrust Division will be looking for foreseeability where formerly they had not been concerned with it. However, the Guide states at a different point: "[T]o apply the Sherman Act to be a combination of United States firms for foreign activities which have no *direct or intended* effect on United States consumers or export opportunities would . . . extend the Act beyond the point Congress must have intended."⁴³

This "direct or intended" effect language appears to refer specifically to Learned Hand's statement quoted above, although Hand

³⁹ Baker, *supra* note 15, at 32.

⁴⁰ ANTITRUST DIVISION, U.S. DEPT OF JUSTICE, ANTITRUST GUIDE FOR INTERNATIONAL OPERATIONS 6 (1977) [hereinafter cited as ANTITRUST GUIDE]. For discussions of the ANTITRUST GUIDE, see Fugate, *The Department of Justice's Antitrust Guide For International Operations*, 17 VA. J. INT'L L. 645 (1977); Seki, *The Justice Department's New Antitrust Guide for International Operations—A Summary and Evaluation*, 32 BUS. LAW 1633 (1977).

⁴¹ See ANTITRUST GUIDE, *supra* note 40, at 6 n.13.

⁴² United States v. Aluminum Co. of America, 148 F.2d 416, 444 (2d Cir. 1945) (emphasis added).

⁴³ ANTITRUST GUIDE, *supra* note 40, at 7.

used the conjunctive and the Justice Department has used the disjunctive. Whether the Antitrust Division would use the "substantial and foreseeable" effect or the "direct or intended" effect standard is unclear. However, both standards appear to require greater proof than the "direct and substantial" effect standard. While both Justice Department standards appear to be drawn from the *Alcoa* opinion, intent and foreseeability are not the same thing. It is likely that an intended result would also be foreseeable but that a foreseeable result would not necessarily be intended. The distinction between direct and substantial is well established in United States domestic cases.⁴⁴

Section 18 of the *Restatement (Second) of Foreign Relations Law of the United States* uses "direct and foreseeable" language, in conjunction with substantial, stating:

A state has jurisdiction to prescribe rules of law attaching legal consequences to conduct that occurs outside its territory and causes an effect within its territory, if

. . . .

(b) the effect within the territory is *substantial*, occurs as a *direct and foreseeable* result of the conduct outside the territory, and the prescribing of a rule of law with a view to preventing or regulating such effect is not inconsistent with the principles of justice generally recognized by states that have reasonably developed legal systems.⁴⁵

3. Advantages of the *Restatement* Standard

The better standard for courts to follow and for Justice Department enforcement purposes is the standard established by the *Restatement*. The value of this standard is that it maximizes the effectiveness of the law, focusing upon prohibiting acts which clearly violate the intent of the statute. Less demanding standards do not recommend themselves as highly because they tend to violate the sovereignty of other nations and because they fail to reflect the realities of international trade, leaving the American businessman at a competitive disadvantage.

The attempt to assert United States jurisdiction over actions of American corporations in the international arena has resulted in negative reactions by the sovereign states on whose sovereignty such assertions impinge. Jurisdictional extensions by the United States are

⁴⁴ See note 31 *supra*.

⁴⁵ RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 18 (1965) (emphasis added); See also Fugate, *supra* note 40, at 652 n.40.

perceived as judicial expressions of American hegemony. Jurisdictional conflicts between the United States Government and foreign sovereigns will probably increase rather than decrease in the future as the world moves further away from a bi-polar to a multi-polar system. The *Restatement* standard would minimize these conflicts.

In addition, it must be remembered that the concept of economic competition reflected in the United States antitrust laws finds little support in the laws of other nations. State-supported private monopolies and oligopolies and state monopolies and oligopolies dominate most of the economies of the world.⁴⁶ The *Restatement* standard would allow American corporations abroad to compete with foreign corporations on the same footing.

Finally, while American multinationals may have dominated the post-war international marketplace through the early 1960's, this condition no longer exists. The ascendancy of American corporations after World War II was substantially a product of the course of the war. No other major industrial center expanded production throughout the war and sustained this expansion after the war. In fact, a large part of the remainder of the industrialized world lay in ruins. The re-emergence of the industrial centers of Europe and Japan as well as the development of new centers such as India and Brazil have erased the dominant position of the United States multinational. In short, the world is entering a period in which United States corporations will have to compete with foreign multinationals which have newer infrastructures, cheaper labor and significant state support. The viability of the American multinational will be sorely tested in the remainder of this century. The *Restatement* standard would clearly establish the regulations which would apply to American corporate activity abroad with an effect on United States commerce. The resulting predictability and stability of applicable law would improve the competitiveness of the United States multinational.

IV. THE LIKELIHOOD OF JUSTICE DEPARTMENT ACTION ON A RESTRICTION OF SALE

The most significant enforcer of the antitrust laws is the Justice Department. Therefore, it is worth reviewing the perspective of the

⁴⁶ Foreign Sovereigns can now use not only their Sovereign position to eliminate United States competition, but they can also invoke the United States antitrust laws as a result of the Supreme Court's decision in *Pfizer, Inc. v. Gov't of India*, 434 U.S. 308 (1978), which gave foreign sovereigns standing to sue for treble damages under the American antitrust laws.

Antitrust Division on enforcement of the antitrust laws in the international sphere, including the cases they stress.

A. Past Enforcement

In the international arena, the United States antitrust laws have been enforced to achieve two objectives; to insure that American consumers receive the benefit of import competition and to protect the export opportunities of United States firms.⁴⁷ The history of Justice Department prosecutions reflects both of these objectives.

1. The classic international cartel cases—insuring import competition

The primary effort of the Justice Department in enforcing the antitrust laws in the international sphere has been to challenge classic international cartels. The typical arrangement in the international cartel cases is that substantial firms in different countries agree not to compete in each other's home markets.⁴⁸ Thus, in *United States v. National Lead Co.*, the District Court found that the doctrine validating covenants in restraint of trade when reasonably ancillary to a lawful principal purpose—such as a sale of a business—doesn't apply when the United States corporation has no foreign markets to sell and the foreign corporation has no United States markets to sell.⁴⁹ In addition, in *United States v. Imperial Chemical Industries Ltd.*, a conspiracy to divide up the world market was found illegal as being in restraint of trade.⁵⁰

In *United States v. Timken Roller Bearing Co.*,⁵¹ the Supreme Court found to be unreasonable restraints established ostensibly as steps to implement a valid trademark licensing system, because the United States manufacturer entered into a business agreement regulating the manufacture and sale of antifriction bearings. The Court also found unreasonable the contention that Timken's activities were legitimate joint ventures. Timken was dominant in its field, controlling seventy-to-eighty percent of the United States tapered roller bearing output and twenty-five percent of all antifriction bearing out-

⁴⁷ Baker, *supra* note 15, at 23, 27.

⁴⁸ [1973] 5 TRADE REG. REP. (CCH) ¶ 50,161 at 55,283.

⁴⁹ 63 F. Supp. 513, 524 (S.D.N.Y. 1945), *modified and aff'd*, 332 U.S. 319 (1947).

⁵⁰ 100 F. Supp. 504, 592 (S.D.N.Y. 1952).

⁵¹ 83 F. Supp. 284 (N.D. Ohio 1949), *modified and aff'd*, 341 U.S. 593 (1951).

put from the United States. Timken was charged with long-term international allocation of markets with a British and French firm.⁵² The Justice Department alleged that Timken had allocated trade territories, fixed prices on products sold, cooperated to protect markets, and participated in cartels to restrict imports to and exports from the United States.⁵³ The Supreme Court upheld the District Court's finding that the trademark provisions were secondary to the central purpose of allocating trade territories.⁵⁴

2. Protecting export opportunities of United States firms

In addition to insuring import competition, the antitrust laws seek to protect the export opportunities of United States firms. A number of activities in the export field have been found suspect by the Justice Department. Classic cartels which limit United States exports are unacceptable,⁵⁵ as are arrangements where American firms conspire to drive another American firm out of the export market.⁵⁶

In *United States v. Minnesota Mining & Manufacturing Co.*,⁵⁷ the United States brought suit against Minnesota Mining & Manufacturing Co. (3M Co.) and others, seeking injunctive relief against a combination in restraint of foreign trade. The United States manufacturers controlled four-fifths of the export trade in coated abrasives. They conspired to establish jointly-owned factories abroad and to refrain from exporting from the United States to countries in which products of such foreign plants could be sold more profitably. The foreign factories also precluded United States competitors from receiving business they might otherwise have received from the markets served by these jointly-owned foreign factories. The United States District Court found this to be a restraint of trade with foreign nations under Section One of the Sherman Act.

⁵² Timken held 30 percent control over the British company and owned, with an English business man, all of the stock of the French company. *Id.* at 294.

⁵³ *Id.* at 287-88.

⁵⁴ 341 U.S. at 598-99. The Justice Dept. has continued to attack agreements which create an "aggregation of restraints." See Reeves, *Antitrust and International Technology Licensing: A Primer*, 11 CORNELL INT'L L. J. 263, 269-70 (1978).

⁵⁵ *United States v. Timken Roller Bearing Co.*, 341 U.S. 593, 599 (1951).

⁵⁶ See *Pacific Seafarers, Inc. v. Pacific Far East Lines*, *supra* note 35, at 811. Compare ANTITRUST GUIDE, *supra* note 40, at 5.

⁵⁷ 92 F. Supp. 947 (D. Mass. 1950).

Joint ventures formed by leading firms in an industry to export to a foreign country may be illegal if they exclude other United States firms, thus depriving them of the benefit of making export sales.⁵⁸ Exclusive long-term contracts between leading United States firms and leading foreign customers may be illegal. The contract would be scrutinized in terms of its competitive effect, with particular attention given to the foreign buyer's importance in the total market of United States exports.⁵⁹ Foreign buying cartels which combine to allocate their purchases among various United States sources limit competition within the United States economy for exported goods and are also illegal.⁶⁰

B. *Public statements of the Antitrust Division*

The Justice Department's Antitrust Division has indicated in a number of instances that a contractual arrangement similar to the XYZ Corp. hypothetical would probably not be a violation of the antitrust laws if it sought only to limit resale in Western Europe. A limitation of resale in the United States *would* fall afoul of the antitrust laws. In a memorandum entitled "Concerning Antitrust and Foreign Commerce", the Antitrust Division suggested a hypothetical case (Case 3) in which an American company would license technology to a foreign corporation. The American company wished to provide that the licensee could not sell the completed product in other countries. The Antitrust Division Memorandum commented: "Restrictions on sales in other foreign markets would not affect United States foreign commerce and, therefore, not be subject to United States antitrust jurisdiction. Consequently no problems under the United States antitrust laws would exist."⁶¹

Consistent with this view, Joel E. Davidow of the Foreign Commerce Section of the Antitrust Division stated before the Department of Commerce Advisory Committee on East-West Trade on March 10, 1976: "If the purpose of a restriction is to prevent the licensee or distributor in the Soviet Bloc from selling into Western Europe, there probably is no issue under American antitrust law, for there is no intended or actual effect on American commerce."⁶² Later in the ques-

⁵⁸ Baker, *supra* note 15, at 28 n.31.

⁵⁹ Cf. Tampa Electric Co. v. Nashville Coal Co., 365 U.S. 320, 329 (1961).

⁶⁰ Baker, *supra* note 15, at 29.

⁶¹ [1972] 5 TRADE REG. REP. (CCH) ¶ 50,129 at 55,209-10.

⁶² U. S. DEPT OF COMMERCE, *supra* note 2, at 4.

tion period Mr. Davidow stated as an example: "If I sell to Russia with an agreement not to sell to China, there is no United States conflict. I mean, it is just outside the scope of United States antitrust law."⁶³ Davidow encouraged the use of the Justice Department's Business Review Procedures⁶⁴ in cases where United States participants seek to ascertain the enforcement intentions of the Antitrust Division with respect to a specific proposal.⁶⁵

The Davidow comments of March 1976 are a recent example of what has been a public position of the Antitrust Division for some time.⁶⁶ The Antitrust Division's commitment to this position has been confirmed in the Guide. A new hypothetical case, similar in some respects to Case 3 referred to above, is presented, entitled, "Case H: Licensing a Non-Market (State-owned) Enterprise." The facts are as follows:

An American company, FX Incorporated, has negotiated a license agreement providing for transfer of unpatented technology to an agency of X, a non-market economy country, for an extremely handsome price payable in dollars. The license covers know-how necessary to manufacture a special chemical compound. A state enterprise in Country X has exported to Western Europe automobiles manufactured under license from a Western European company which had expected (but not required) sales to be confined to Country X. Furthermore, the automobiles are rumored to have been sold at a non-compensatory price. Accordingly FX writes into the license a prohibition against export to the United States or other Western Hemisphere countries of products produced under the license.⁶⁷

The Antitrust Division had no problem with export prohibitions to Western Hemisphere countries. However, it did express concern about export prohibitions to the United States, saying:

The focus of concern here is the prohibition on reexport back to the United States of licensed products manufactured in Country X.

⁶³ *Id.* at 16. Davidow also commented that it was "irrelevant" whether a foreign buyer was a Communist or non-Communist country. *Id.* at 10. Therefore, we may read "France" or "West Germany" for "China."

⁶⁴ 28 C.F.R. § 50.6 (1977).

⁶⁵ *Id.*

⁶⁶ See [1973] 5 TRADE REG. REP. (CCH) ¶ 50, 169; [1973] 5 TRADE REG. REP. (CCH) ¶ 50,160; [1972] 5 TRADE REG. REP. (CCH) ¶ 50,129; [1973] 5 TRADE REG. REP. (CCH) ¶ 50,161.

⁶⁷ ANTITRUST GUIDE, *supra* note 40, at 40.

This prohibition does affect U.S. import competition. The prohibition on reexport to other Western Hemisphere countries does not directly affect U.S. commerce and therefore probably raises no objection under U.S. antitrust law.⁶⁸

The prohibition on re-export to the United States was further explained in the following manner:

A know-how license may contain a limited territorial restriction which is ancillary and limited in duration to the reverse-engineering period, or some other specific period which the parties can establish is justified by the facts of their situation.

We question . . . the permanent prohibition on sales into the United States. We believe the licensor may have alternative means available to protect it from the "unfair" advantage enjoyed by its state-owned, non-market licensee.⁶⁹

The Guide stresses that the facts surrounding the relationship are important in determining whether a violation will be found. Case law supports this position. In *Timken*, when the defendants claimed their combination was a joint venture, the Court rejected this contention based on the fact that the District Court found that the dominant purpose of the restrictive agreements was to avoid competition.⁷⁰ Similarly, the Court found the defendants' trademark protection argument to be unacceptable as the restrictions went beyond protecting a trademark. Finally, it is worth noting that the Court rejected the contention that what the defendants did was reasonable under their existing foreign trade conditions.⁷¹ The surrounding facts did not sustain Timken's contentions.

Similarly, in the *Westinghouse* case, the Justice Department contends that the restrictions and royalty provisions in the Westinghouse-Mitsubishi agreements cover broader fields of commerce than the scope of the technology transferred. The Justice Department also contends that the agreements establish territorial restrictions, compulsory package licensing, and allocation of international markets.⁷²

⁶⁸ *Id.*

⁶⁹ *Id.* at 41.

⁷⁰ 341 U.S. 593, 597 (1951).

⁷¹ *Id.* at 599.

⁷² See [1973-2] Trade Cas. ¶ 74,712; [1974-2] Trade Cas. ¶ 75,312; see also Brunsvold, *The Effects of the Scott Amendments, If Enacted, on the Antitrust Action filed against Westinghouse and the Mitsubishi Companies*, in THE LAW AND BUSINESS OF LICENSING 223 (Finnegan & Goldscheider eds. 1977).

A short period of restriction on the sale of plant product in the United States may be possible in certain circumstances. Any territorial restriction should be ancillary to the primary purpose of the agreement.⁷³ The length of time of a territorial restriction prohibiting resale in the United States should be limited to the reverse engineering period of the know-how unless special conditions exist. The reverse engineering period is the time it would take the purchaser to develop equivalent know-how on its own.⁷⁴

Special conditions which might justify a longer resale prohibition are the size of the licensee relative to the purchaser and the size of the investment. In the case of a small company selling to a large state-owned corporation which is making a large investment, a slightly longer period might be justified. Thus, for example, if Mack Trucks, Inc. had contracted to produce the Kama River Truck Project in the Soviet Union, Mack might have been in a position to claim a longer period for prohibiting resale in the United States.⁷⁵ The Guide specifically notes that "the availability or lack of effective alternative remedies and the degree to which a United States enterprise is in fact at an unfair disadvantage in dealing with a nonmarket enterprise may be important in determining the legality of any competitive restraint. . . ."⁷⁶

While resale in the United States should not be limited for more than a short period in a contractual arrangement with a Soviet trade organization, United States legislation limits abuses which might result from Soviet entry into the United States market. First, if the processes involved are patented in the United States, then resale in the United States is effectively limited to those with licenses under the patent. Second, as long as Most Favored Nation (MFN) status is not granted to the

⁷³ See *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 280-81 (6th Cir. 1898); *United States v. E. I. DuPont De Nemours & Co.*, 118 F. Supp. 41, 219 (D. Del. 1953).

⁷⁴ See McLaren, *Licensing Patents and Technology Under the United States Antitrust Laws*, 40 ANTITRUST L. J. 931, 936 (1971); see also Goldscheider, *International Licensing from the American Point of View*, in INTERNATIONAL LICENSING AGREEMENTS 446 (Pollzien & Langen eds. 1973).

⁷⁵ For a description of the Kama River Project and Mack Trucks' role in it, see Fitzpatrick, *Soviet-American Trade, 1972-1974: A Summary*, 15 VA. J. INT'L L. 39, 45 (1974); see also Pearson, *The Big Breakthrough in East-West Trade*, BUS. WEEK, June 19, 1971, at 84.

⁷⁶ ANTITRUST GUIDE, *supra* note 40, at 41.

⁷⁷ Zakhmatov, *Prospects for Economic Development*, 49 INT'L AFF. 42 (1973).

Soviet Union, the ability of Soviet-produced manufactured goods to compete will be limited. It has been estimated that granting MFN status will reduce duties on certain goods by between fifty and seventy-five percent.⁷⁷ In past years the debate over the linkage of Soviet immigration policy and the granting of MFN status appears to have decreased the possibility of granting the Soviet Union MFN status in the immediate future.⁷⁸ Third, if and when the Soviet Union enters the United States market, it will be subject to United States regulations with respect to dumping and other anti-competitive practices which should limit predatory pricing.⁷⁹

V. CONCLUSION

In conclusion, the application of Section One of the Sherman Act in the international arena remains unclear. Case law in the area is limited. A rather poorly delineated group of standards is the sum total of the case law that exists. Congress has not attempted to remedy this problem and the Justice Department, in attempting to effectively respond to numerous business inquiries, is the only branch of the government which has provided businessmen with a useful set of examples for purposes of avoiding antitrust problems in their international business arrangements. The Antitrust Division states in the Guide two new standards which they may seek to apply in the future—the “substantial and foreseeable” effect standard and the “direct or intended” effect standard.⁸⁰ Unfortunately, the Division has muddied the waters by referring to two new standards whereas it might have laid the question to rest by embracing the standard articulated in the *Restatement*. It may be that the Antitrust Division is trying to ease the concern of the United States business community by indicating that prosecutions will

The effect of MFN status depends a great deal on the product involved. See Trade Act of 1974, 19 U.S.C. §§ 2431-41 (1976).

⁷⁸ See *Detente and Politics*, N. Y. Times, Jan. 16, 1975, at 18, col. 7. Some indication of an improved political atmosphere here in recent months which may lead to a new attempt to grant the Soviet Union MFN status is that Jewish emigration figures have risen again and are expected to reach 30,000 this year. At the height of detente in 1973 Jewish emigration was approximately 35,000; whereas, in 1977 it was 17,737. *Id.*, Dec. 1, 1978, at A-7, col. 1. In addition, higher level efforts to improve trade relations have recently been undertaken. *Id.*, Dec. 5, 1978, at D-13, col. 1. Of course, these efforts must be put in the context of overall Soviet-American relations.

⁷⁹ 19 U.S.C. §§ 160-71 (1976).

⁸⁰ See notes 40-45 *supra* and accompanying text.

be based on a higher standard. However, the derivation of the standards remains unclear, and anyone anticipating applying one of them would do well to inquire as to its applicability through the business review procedures of the Antitrust Division.

With respect to the hypothetical problem of XYZ Corp., under both the case law standards and the hypotheticals in the Justice Department's Guide, restrictions on resale in Western Europe appear to be acceptable. Restrictions on resale in the United States for short periods may be acceptable under the Guide and yet they may run afoul of the unclear case law standards. Therefore, restrictions on resale to the United States do not generally appear to be advisable.