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American Antitrust and Foreign Operations: What Is Covered?

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My remarks will be addressed to the question—What foreign operations of American firms are reached by American antitrust law? To what does it apply?

Some firms answer this question by simply telling their executives and sales personnel operating abroad to assume that American antitrust rules are always applicable. This approach comes from uncertainty as to what the actual territorial scope of American law is; from concern that evidence of what the firm does abroad, even if lawful there under both American and foreign law, might be used as evidence of illegal activities at home; and from a belief that, since American law is generally stricter than foreign laws, compliance with its rules will bring automatic compliance with foreign law as well.

There are a small number of instances in which foreign antitrust rules are stricter than American law. For example, the French antitrust

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law prohibits some refusals to sell which would be lawful under our law. By and large, however, this is not a bad rule of thumb for practical management purposes, although it has given foreigners an exaggerated idea about the real extraterritorial scope of American law and has thus increased our diplomatic problems.

This approach could end my speech right now. But some of you prefer a more sophisticated system, as you are certainly entitled to do, so I will go on. The real scope of American law, while very broad, is by no means unlimited, and following it everywhere is certainly not required. It does not attach with citizenship and run wherever an American happens to go. Congress probably could pass such an antitrust law, but it has not done so.

In the remaining discussion, I will refer first to recent Government policy statements on this subject. Second, I will discuss the "commerce" scope of American law. Third, I will refer to the effect on our law of foreign government activity and to international law principles; and finally, I will mention the impact of all of this upon certain key types of transactions. Time does not permit much discussion of procedural questions, of the Webb-Pomerene Act, or of foreign antitrust laws.

I

RECENT GOVERNMENT POLICY STATEMENTS

In the past two years, there have been several statements of policy on these questions by Antitrust Division officials. The most important was that by Deputy Assistant Attorney General Comegys in January, 1972, before the Subcommittee on Foreign Commerce and Tourism of the Senate Commerce Committee.[1] It was made when that Subcommittee was considering proposed legislation (which did not pass) which would greatly have expanded the exemptions for restraints of competition in exports now found in the Webb-Pomerene Act and would have substituted a wholly new enforcement system, with the Department of Justice reduced to a minor role. Much less sweeping legislation is currently before Congress.[2]

Attached to the testimony by Mr. Comegys is a Memorandum of the Department outlining 12 hypothetical examples of how American

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1. *Hearings on S. 2754, the "Export Expansion Act of 1971", before the Subcomm. on the Study of Foreign Commerce and Tourism of the Senate Comm. on Commerce,* 92d Cong., 2d Sess., at 807-12 (1972), *partially reprinted in* 5 CCH TRADE REG. REP. ¶ 50,129, at 55,207 (1974).
2. S. 1483-1488, 93d Cong., 1st Sess., (1973).

antitrust laws have been alleged to injure U.S. exports.[3] The examples deal with patents and know-how, distribution, joint ventures, and compliance with foreign laws. These are followed by brief comments by the Department designed to clarify the law applicable to them. In a number of cases, the Memorandum undertakes to demonstrate that American law would not apply as broadly as might be thought, and would not be as injurious as supposed.

In three published speeches cited in my outline, by Messrs. Kauper, Baker and Clearwaters, the present top administration of the Antitrust Division has reaffirmed the Comegys statement and the Memorandum, together with some additional commentary.[4]

Anyone with a problem in this area should of course study these statements. Although they involve what someone recently called "law-making by luncheon speech," they will probably not spoil your lunch. They are commendable efforts to clarify an area in which heretofore we have had to do an inordinate amount of guessing. If your kind of problem is dealt with, you may gain a greater feeling of certainty; you will often be surprisingly comforted; and if not, at least you will be forewarned.

But a word of caution is also in order. These statements are better guides to enforcement policy than they are to the law itself. The Justice Department cannot make law at luncheons, or by testimony in Congress. It not only cannot bind its successors, but it cannot control the actions of the Federal Trade Commission, nor of the courts in private suits, nor indeed of the courts in its own suits. Moreover, the statements are accompanied by very little case citation, analysis and exposition of underlying legal theory. Some decisive issues lie beneath the surface and are not explicitly recognized, or are treated only summarily.

It is especially important to remember that private suits and antitrust and patent misuse defenses continue to grow in significance without regard to Government enforcement policies. The *Consumers Union* case

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3. *Reprinted in* 5 CCH TRADE REG. REP. ¶ 50,129, at 55,208 (1974) [hereinafter cited as *Memorandum*].

4. Address by Thomas E. Kauper, Asst. Attorney General, Antitrust Division, before the New York State Bar Ass'n., New York City, Jan. 24, 1973, *reprinted in* 5 CCH TRADE REG. REP. ¶ 50,160, at 55,280 (1974); Address by Donald I. Baker, Director of Policy Planning, Antitrust Division, before the New York State Bar Ass'n., New York City, Jan. 24, 1973, *reprinted in* 5 CCH TRADE REG. REP. ¶ 50,161, at 55,284 (1974); Address by Keith I. Clearwaters, Special Asst. to the Asst. Attorney General, Antitrust Division, before the Ass'n. of General Counsel, Hot Springs, Virginia, May 4, 1973, *reprinted in* 5 CCH TRADE REG. REP. ¶ 50,169, at 55,300 (1974).

is a striking example of the independence displayed in such proceedings.[5] Now pending on appeal before the Court of Appeals for the District of Columbia, the case has included an antitrust claim against the Secretary of State and some U.S. and foreign steel companies arising out of the so-called "voluntary" restraints upon exports of steel to the U.S., agreed to by foreign companies at the urging of the State Department. The Justice Department is in the uncomfortable position of defending the case. Neither the plaintiff nor the District Court Judge, Judge Gesell, were swayed by the Government's assertions that the law permits the President to authorize such restraints, nor, I must confess, am I.

An overall theme runs through the recent Justice Department statements which throws considerable light on enforcement policy. This theme is that the Antitrust Division is concerned largely only with two broad types of restraint of competition in foreign commerce:

(1) the first are restraints which deprive the domestic economy of the benefits of competition from imports, or entry of foreign firms into production in the United States; and (2) the second are restraints which seriously bar or restrict exports by American firms.[6]

These two categories will indeed cover most of the cases which have been brought. Undoubtedly, they should be the primary concern of policy-makers. But they do not cover all of the cases. And the theoretical reach of the statutes, particularly the Sherman Act, is broader.

This apparent attempt by the Justice Department to narrow the focus of the antitrust laws in foreign commerce should not have been necessary to establish that antitrust is not damaging to this nation's foreign trade. While I know full well that the problems of individual firms are sometimes greatly complicated by American antitrust rules and that plans sometimes have to be changed or even cancelled, it does not follow that, overall, our firms have been rendered less able to compete at home or abroad, or that either our balance of trade or our balance of payments have been hurt on this account. There is every reason to believe that, on the contrary, our rules of competition have kept American firms out of countless arrangements abroad which would have limited their expansion and that the spur of competition

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5. Consumers Union v. Rogers, 352 F. Supp. 1319 (D.D.C. 1973). [As this issue went to press, the decision in *Consumers Union v. Rogers* was reversed *sub nom.*, Consumers Union v. Kissinger,—F.2d—(D.C. Cir. Oct. 11, 1974)—Ed.]

6. *See* 5 CCH TRADE REG. REP. ¶ 50,161, at 55,283 (1974) (Statement by Donald I. Baker noting the Division's concern with these types of restraints).

has greatly benefited the growth of American business, the outflow of exports, and the inflow of dividends and other payments. The Justice Department, it seems to me, should develop this kind of evidence and bring it to public attention, and not limit itself to defensive maneuvers and possible retrenchments in the law.

In the following discussion of the substantive scope or "subject-matter jurisdiction" of the statutes, I will illustrate a few of the differences between the broad reach of the laws, insofar as cases and theory go, and the narrower approach of recent Justice Department statements, although that is not my only purpose in this discussion.

II

SUBSTANTIVE SCOPE, OR "SUBJECT-MATTER JURISDICTION"

The language of the Sherman Act, applying to restraints or monopolizing conduct where "commerce among the several states, or with foreign nations," is involved, supplies a very broad base for the substantive reach of the statute. This subject-matter scope of the Sherman Act should not be, but often is, confused with problems of so-called "personal jurisdiction," involved in obtaining service of process and venue. Where foreign firms are concerned, the subject-matter scope of the Act often greatly exceeds the ability of courts to obtain personal jurisdiction. There is seldom any question about the ability to obtain such jurisdiction over American firms, however, or over their foreign branches and subsidiaries, although assertions of personal jurisdiction over them abroad occasionally cause conflict with foreign nations.

The Sherman Act, unlike sections 2 and 3 of the Clayton Act, applies to prohibited conduct involving all kinds of "commerce," defined by the Attorney General's Committee to include "the entire range of economic activity."[7] To invoke the Act, a relation to either interstate or foreign commerce will suffice. "Foreign" commerce normally refers to U.S. exports or imports. But the concept may reach transactions whose impact is entirely outside the United States, if the court thinks that U.S. interests are heavily involved. In the *Pacific Seafarers* case,[8] the Act was

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7. REPORT OF ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 77-80 (1955).

8. Pacific Seafarers, Inc. v. Pacific Far East Lines, Inc., 404 F.2d 804 (D.D.C. 1968), *cert. denied*, 393 U.S. 1093 (1969); *See also* ABA ANTITRUST DEVELOPMENTS 1955-1968, at 55 (1968).

held applicable to restraints used solely in shipping between foreign ports, where the shipments were financed by the U.S. Government and were limited by law to transportation in U.S. ships.

The great majority of decided cases have involved international market-sharing arrangements which excluded competition from the United States and thus affected interstate commerce.[9] No foreign commerce clause is needed to reach such cases. The clause is important, however, in reaching cases in three remaining categories —interference with foreign commerce, such as through boycotting or exclusive agreements in export trade;[10] restraint of competition in the course of foreign commerce, such as through price-fixing;[11] and restraints in foreign markets, to which the Act seldom applies, but which can be reached sometimes, as in the *Sanib* case,[12] where a refusal to sell abroad affected the ability of the buyer to export to the United States.

It has often been said that the restraint must "directly *and* substantially affect" commerce.[13] My research indicates, however, that this language overstates what the cases have generally required. It is more accurate to say that the restraint must either occur "in" the course of interstate or foreign commerce, or if it is not in it, then it must "substantially affect" commerce.[14] The question dealt with by the test is

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9. J. RAHL, COMMON MARKET AND AMERICAN ANTITRUST: OVERLAP & CONFLICT 67 (1970).

10. *See* Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690 (1962) (The Court found sufficient evidence to go to the jury on the issue of whether there had been a section 1 Sherman Act conspiracy between Union Carbide and its Canadian subsidiary to prevent plaintiff's exports from the United States.); Pacific Coast Agricultural Export Ass'n v. Sunkist Growers, 5 CCH TRADE REG. REP. (1973-1 Trade Cas.) ¶ 74,523 (N.D. Cal. 1973) (exclusive selling agreement between Sunkist and a Hong Kong distributor held to restrain American export trade in the export of oranges); United States v. Minnesota Mining & Mfg. Co., 92 F. Supp. 947 (D. Mass. 1950) (a combination of American firms having joint ventures abroad which restricted the firms' exports from the United States was found to violate section 1 of the Sherman Act).

11. *See* United States v. Concentrated Phosphate Export Ass'n., 393 U.S. 199 (1968) (price fixing and allocation of sales by a combination of U.S. firms was held not to be exempt from U.S. antitrust laws despite the Webb-Pomerene Act exemption; the sales under scrutiny were made to foreign purchasers under U.S. foreign aid programs); United States v. Learner Co., 215 F. Supp. 603 (D. Hawaii 1963) (a combination of steel scrap exporters to fix prices in export sales was found to violate the Sherman Act). *But see* K. BREWSTER, ANTITRUST AND AMERICAN BUSINESS ABROAD 105 (1958); W. FUGATE, FOREIGN COMMERCE AND THE ANTITRUST LAWS 102-104 (1958).

12. Sanib Corp. v. United Fruit Co., 135 F. Supp. 764 (S.D.N.Y. 1955) (After the defendant had entered into the banana dehydrating business in Honduras, it stopped its sales of bananas to Sanib, a banana dehydrating competitor in the market. This allegedly resulted in the inability of the plaintiff to export to the U.S. and was held to state a cause of action.).

13. *See* Rahl, *supra* note 9, at 61 n.25.

14. Occidental Petroleum Corp. v. Buttes Gas & Oil Co., 331 F. Supp. 92, 102-103 (C.D. Cal. 1971), *aff'd per curiam*, 461 F.2d 1261 (9th Cir. 1972), *cert. denied*, 409 U.S. 950 (1972). *See also* Burke v. Ford, 389 U.S. 320 (1970); Rahl, *supra* note 9, at 59-67.

not whether the law is violated, but only whether the law applies. There is little question that the law can apply to any restraint, however small, which takes place in the course of commerce. On the other hand, if the restraint occurs before, or after the interstate or foreign commerce phase, or is somehow tangential to it, it becomes important to decide whether there is an effect on commerce. In such cases, Congress simply has not regulated the conduct unless it affects commerce substantially.

For example, if competing American exporters agree upon selling prices, the restraint of competition is *in* export trade, and the Act will apply without regard to whether the prices charged have any abnormal effect on sales. None need be shown. But if an American firm producing abroad enters into a price-fixing agreement with competitors as to sales abroad of its foreign-produced goods, the Act will not apply, unless it can be shown that the price fixing would—at least in theory —have a substantial impact on American exports or imports. This is rare, but it might be possible if the prices were so high as to discourage a flow of raw materials from the United States, or by analogy to the *Sanib* case, if foreign buyers who would ordinarily resell to the United States could not do so because of the high prices.

There is great confusion over whether the restraint must in some way *adversely* affect the commerce involved. The common, if not prevalent, impression is that it must—that the volume must be diminished, or the flow distorted. But this popular view, however widely held, does not, in my view, withstand analysis. It is obviously inapposite as to restraints occurring "in" commerce, where no effect at all need be shown. Most foreign commerce cases are of this type.[15] Even where effect is necessary to support subject-matter jurisdiction, the effect need not be adverse, although it usually is. The adverse effect which the Act requires is adverse effect on competition, not adverse effect on the volume of commerce. I think that people are often erroneously led to take literally the statutory phrase, "restraint of trade or commerce." After 83 years of interpretation, this phrase clearly means "restraint of competition" in or affecting commerce, not restraint of commerce as such. Hijacking an airliner certainly restrains commerce, but it is probably not an antitrust violation.

Here, I confess that the Justice Department Memorandum attached to Mr. Comegys' statement seems to imply a different view on the issue.[16] The first hypothetical case discussed involves tying of exported

15. Rahl, *supra* note 9, at 67-86.
16. *Memorandum* (case 1), *supra* note 3, at 55,208; *see also* REPORT OF ATTORNEY

components to licensing of patented or unpatented technology. The Memorandum says that this tying would be allowable if, but for the tying, no such goods could be sold from the United States by any American seller, because foreign sellers have lower costs and can undersell American firms. That is, the restraint would be allowable apparently because it increases U.S. commerce, and by implication, it is therefore not covered by the Act. But in my view, the restraint is readily reached. It occurs in the course of export trade, and also it obviously affects it. The issue should thus be, not whether the Act covers it, but whether, being covered, it is a lawful restraint as a matter of substantive law.

Perhaps the Justice Department means that the tying is lawful because it is reasonable, not because the Act does not apply. The Memorandum is not entirely clear. But this would be a strange version of the rule of reason and an odd test for a tying arrangement. Since tying is a per se offense domestically, and doubly so when attached to a patent license, the Justice Department may be saying that different substantive rules of law will apply to foreign transactions. Elsewhere, the Memorandum states that "most restraints of trade involving foreign commerce will be governed by the rule of reason. . . ."[17] If this means that domestic per se rules will not be followed, and a restraint in foreign commerce, whether domestically per se or not, will be weighed against evidence that the restraint benefits export trade or the balance of payments, this is not the rule of reason that I am familiar with, but is a wholesale departure from it, and without any support in the case law, so far as I know.[18]

If you decide to rely upon these parts of the Memorandum, you will incur certain risks. My more cautious view may sound less pleasant, but it is safer, particularly in areas where the patent misuse doctrine might be available, and where potential private plaintiffs and counterclaimants are just around every corner.

But it may be said, if the restraint does not hurt U.S. commerce, or if it actually helps it, why should the Act apply? Foreign trade and foreign markets, it is argued, should be viewed differently from domes-

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GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS, *supra* note 7, at 76; ABA ANTITRUST DEVELOPMENTS 1955-1968, *supra* note 8, at 47.

17. *Memorandum*, *supra* note 3, at 55,208.

18. Timken Roller Bearing Co. v. United States, 341 U.S. 593 (1951); Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219 (1948); Occidental Petroleum Corp. v. Buttes Gas & Oil Co., 331 F. Supp. 92, 103 n.15 (C.D. Cal. 1971); United States v. Learner, 215 F. Supp. 603, 605 (D. Hawaii 1963).

tic problems—in our own self-interest, and because it is not the business of Congress to concern itself with restraints inflicted by Americans upon foreigners abroad. One answer might be the direct one that it would not be so strange for Congress to be concerned with what our businesses do to foreigners. If we are concerned with warfare and crime carried on by Americans abroad, we might reasonably be concerned with the infliction of economic damage abroad by conduct considered illegal at home.

But that answer might still miss the point. Personally, I would stick to what I consider to be the only reliable guide to the scope of the Act—that is, that the Act is concerned with restraints of competition which occur in, or which substantially affect any of the commerce, interstate or foreign, which Congress regulates. This is what I think the Supreme Court decided in the *Timken* case,[19] and it is what antitrust policy is all about. From there on out, it is a question of the particular substantive rules of effect on competition to be applied to determine the ultimate legality of the conduct.

Neither the scope of antitrust nor its substantive rules can be, or should be, manipulated to serve other Government policies on balance of trade, balance of payments, or whatever else happens to be upsetting Washington at any given moment.

Time does not permit discussion of the extraterritorial application of the Clayton or Federal Trade Commission Acts in general, although I will mention certain problems under section 7 of the Clayton Act later.

III

EFFECT OF FOREIGN AND INTERNATIONAL LAW

Time also prevents a full exploration of the impact of foreign government activity and of international law, but I will mention certain key points. Quite a few American businesses have come to antitrust grief as a result of participating in foreign combinations, believing their conduct to be lawful because the combination was lawful abroad, and in some instances was positively encouraged by foreign law or governmental action. It is quite clear that foreign government approval, exemption or encouragement will not provide an effective American law defense. The *Swiss Watch, Continental Ore* and *Holophane* cases all

19. 341 U.S. 593 (1951).

stand for this in one way or another.[20] The Justice Department Memorandum attached to the statement by Mr. Comegys, in Case 12, may seem to be somewhat inconsistent with what I have said, in that it says that "officially desired," though "not imposed," private arrangements to "rationalize" competition in some foreign industries through price and other agreements "will not in general create antitrust hazards for American companies."[21] The whole statement should be read very closely, however, for the next sentence says that "In particular, . . . restrictions in the foreign market imposed at the insistence of the foreign government and not involving exports to the United States should not violate U.S. antitrust laws."

If there are no exports to the United States, there may well be no U.S. commerce involved, making the whole example pointless. If U.S. commerce is present, the *insistence* of a foreign government may amount to compulsion, not merely encouragement. Foreign government compulsion is a good defense, as Cases 1 and 11 of the Memorandum indicate.[22] From *American Banana* to *Interamerican Refining,* the courts have been saying this.[23]

An area of continuing uncertainty, not touched by the Memorandum, is that covered domestically by the doctrine of *Noerr* and *Pennington,* as limited in *Trucking Unlimited.*[24] Does the Act permit efforts to induce a foreign government to exercise its powers of compulsion? The recent opinion of the district court in the *Occidental Petroleum* case, affirmed *per curiam,*[25] states that the *Noerr-Pennington* doctrine does not apply to persuasion of foreign governments, partly on the theory that the doctrine rests upon a First Amendment privilege. I do not see why our Constitution would not protect freedom to petition a foreign gov-

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20. United States v. The Watchmakers of Switzerland Information Center, Inc., 5 TRADE REG. REP. (1963 Trade Cas.) ¶ 70,600, at 77,457 (S.D.N.Y. 1962); Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690 (1962); United States v. Holophane Co., 119 F. Supp. 114 (findings and conclusions), 5 TRADE REG. REP. (1954 Trade Cas.) ¶ 67,679 (S.D. Ohio 1954) (judgment) *aff'd per curiam,* 352 U.S. 903 (1956).

21. *Memorandum, supra* note 3, at 55,212.

22. *Id.* at 55,208-212.

23. American Banana v. United Fruit Co., 213 U.S. 347 (1909); United States v. The Watchmakers of Switzerland Information Center, Inc., 5 TRADE REG. REP. (1965 Trade Cas.) ¶ 71,352 at 80,492 (S.D.N.Y. 1965); British Nylon Spinners, Ltd. v. Imperial Chem. Indus., Ltd., [1954] 3 All E.R. 88, 92, (Ch.), (quoting order of American court which excepted compliance with foreign law); Interamerican Refining Corp. v. Texaco Maracaibo, Inc., 307 F. Supp. 1291 (D. Del. 1970).

24. Eastern Railroad Pres. Conf. v. Noerr Motor Frgt., Inc., 365 U.S. 127 (1961); United Mine Workers v. Pennington, 381 U.S. 657 (1964); California Motor Transport v. Trucking Unlimited, 404 U.S. 508 (1972).

25. 461 F.2d 1261 (9th Cir. 1972).

ernment against interference by our own laws. But in any case, it seems to me unrealistic to say that compulsion by a foreign government is not covered by the Act, while inducement of such compulsion is. Moreover, I understand the Sherman Act to be, as explained in *Parker v. Brown,*[26] a regulation of privately-imposed restraints. Merely talking about a restraint with a government is not privately imposing a restraint.

A further uncertain area is that described by my research assistant as "market compulsion." Suppose the American firm simply cannot do business successfully in a foreign market as a practical matter (not because of government action) without entering into a restraint of competition? I have often heard this abstract claim made, but have rarely seen such facts. Assuming such a case and adequate connection with commerce to exist, the Sherman Act will apply. Perhaps there will be no violation, however, on the theory that market conditions, rather than the firm's conduct, compel the restraint.[27] For example, where only a consortium of companies can accomplish a large job, the resulting restraints might be tolerated on a reasonableness theory.[28] This is a borderline area of law, however.

Insofar as international law is concerned, the situation really is that there is no general agreement among nations as to what is permissible in the way of extraterritorial antitrust enforcement.[29] The American view is that the scope of our law as I have described it is justified by our version of international law principles.[30] To them might be added the recent order by a District Judge in *Calnetics v. Volkswagen,*[31] prohibiting importation of Volkswagens with installed air conditioners, thus in effect regulating manufacturing in West Germany. That nation understandably has protested, but the court also understandably was not deterred.

IV

SPECIFIC TYPES OF TRANSACTIONS

By far the greatest number of cases have involved "international cartel" situations, most often including some kind of division of market

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26. 317 U.S. 341 (1943).
27. *Cf.,* United States v. Minnesota Mining & Mfg. Co., 92 F. Supp. 947, 958 (D. Mass. 1950).
28. *Memorandum, supra* note 3, at 55,211.
29. Rahl, *supra* note 9, ch. 7.
30. United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945); A.L.I. RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 18.
31. 353 F. Supp. 1219 (D.C. Cal. 1973).

arrangement among horizontally-related competitors, and sometimes also including price-fixing and other types of restraints.[32] Many hammer blows have been struck by American enforcement efforts against the textbook types of such combinations, and few corporate counsel need additional warnings about them today.

Nonetheless, there are some serious hazards around the perimeter of this category which might be worth brief mention. One is the problem presented by foreign patent pools, some of which may include restrictive understandings which impinge upon American commerce. Hazeltine Research put its patents into such pools abroad for licencing and found itself liable to Zenith for millions of dollars in damages because the pool refused licences to firms exporting from the United States and not manufacturing in the foreign country.[33] Westinghouse and Mitsubishi are being sued by the Government for long-term technology interchange arrangements alleged to result in market division. I do not know the facts, but it appears to me possible that all or most of the numerous interchange agreements individually might have been innocent enough, but cumulatively, they seem to have impressed the Government as amounting to an overall market division between the companies.[34]

Finally, on the horizontal level, one must be very careful about cooperation agreements which gain approval under Common Market antitrust law, or the law of some foreign nation. An arrangement may enjoy Common Market exemption and still violate our law. There are different situations of this kind where reliance on foreign exemption or negative clearance, or even application for exemption or clearance, can produce American consequences. Conversely, reliance upon an American exemption under Webb-Pomerene, for example, can lead to foreign antitrust prosecution. I have been waiting for the axe to fall in this area, as it surely must one of these days, unless the governments themselves have a division of territory agreement.

There have been a number of alleged cases of monopolizing some aspect of foreign commerce. The *Sanib* case already referred to is still the most interesting one to me, because the conduct seems to have occurred entirely in a foreign market. Note well that this was a private suit, as were several of the most drastic decisions to which I have

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32. Rahl, *supra* note 9, at 68 n.38.
33. Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100 n.8 (1969).
34. United States v. Westinghouse Elec., Civ. No. C70-852 SAW (N.D. Cal.) (complaint) [1961-1970 Transfer Binder] CCH TRADE REG. REP. § 45,070, at 52,756.

referred, including—to repeat, *Pacific Seafarers, Continental Ore,* and *Zenith Radio v. Hazeltine.*

In the area of mergers and joint ventures, we can see most clearly the Government's self-imposed limitations to which I referred at the beginning. To my knowledge, the Government has never attacked an acquisition or a joint venture which did not involve alleged elimination of, or foreclosure of actual or potential competition in the American domestic market, as in the decided merger cases involving *Schlitz,*[35] and *Litton Industries,*[36] the settled cases of *BP*[37] and *Ciba-Geigy,*[38] the pending merger case involving *Gillette,*[39] the settled joint venture case involving *Monsanto,*[40] and the recently dissolved joint venture between *Hercules* and *Mitsui.*[41] The Government, I think wisely, has noted that mergers and joint ventures abroad with foreign firms are a very important and sometimes indispensable means of entry into foreign markets, and it has refrained from pushing possibly applicable theories of impact on exports or on competition in foreign markets to upset these transactions.

A possible additional reason for this self-restraint is that section 7 of the Clayton Act requires that the merging firms both (1) be "engaged in commerce," which is not always true of the foreign party, and (2) that the adverse effect on competition be found in a "section of the country," meaning a section of the United States, rather than merely in foreign commerce. On the latter point, the Government did attempt a theory in the *ITT-Grinnell* case which it might some day transfer to a foreign acquisition case in order to meet the "section of the country" problem.[42] I would regard the theory as rather far-fetched, however.

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35. United States v. Jos. Schlitz Brewing Co., 253 F. Supp. 129 (N. D. Cal. 1966), *aff'd per curiam,* 385 U.S. 37 (1966).

36. Litton Indus., Inc., FTC Docket No. 8778, [1970-1973 Transfer Binder] CCH TRADE REG. REP. ¶ 20,267, 3 CCH TRADE REG. REP. ¶ 20,333 (1974).

37. United States v. Standard Oil, Civ. No. C69-954, 5 TRADE REG. REP. (1970 Trade Cas.) ¶ 72,988 (N.D. Ohio) (consent decree).

38. United States v. CIBA Corp., [1961-1970 Transfer Binder] CCH TRADE REG. REP. ¶ 45,070, at 52,770, 5 CCH TRADE REG. REP. (1970 Trade Cas.) ¶¶ 73,319, 73,269 (S.D.N.Y. 1970) (consent decree).

39. United States v. Gillette Co., Civ. No. 68-141, [1961-1970 Transfer Binder] CCH TRADE REG. REP. ¶ 45,068, at 52,672 (D. Mass.) (complaint).

40. United States v. Monsanto Co., 5 CCH TRADE REG. REP. (1957 Trade Cas.) ¶ 72,001 (W.D. Pa. 1967) (joint venture; consent decree); *see* Rahl, *supra* note 9, at 183.

41. United States v. Hercules, Inc., 5 CCH TRADE REG. REP. (1973-1 Trade Cas.) ¶ 74,530 (D.C. Del. 1973) (consent decree).

42. *See* United States v. ITT Corp., 324 F. Supp. 19, 38-39 (D. Conn. 1970), *dismissed,* 404 U.S. 801 (1971) (The Government contended that the acquisition of Grinnell would produce profits abroad which could be used to lessen competition domestically. The case

ITT seems to be everywhere, including on the plaintiff's side. Its claim against General Telephone, in which the court accepted jurisdiction,[43] dares to tread where the Government so far has not. It alleges that General's acquisition of a Canadian company cut off ITT's export opportunities to that market, a theory of attack on a merger which the Government has not used. The spectacle of ITT outdoing the Government in antitrust enforcement theories is something to conjure with, even in the present-day mind-boggling world.

There has been very little Government activity against the foreign distribution arrangements of American companies. Case 5 of the Justice Department Memorandum, however, indicates that the Government will apply the doctrines of the *Schwinn* case where a vertical territorial allocation abroad restricts reselling to the United States.[44] Here, the Antitrust Division's principle of protecting competition in our domestic market would be invoked. On the other hand, the statement does not mention distribution restraints which occur in American export commerce, and have their ultimate impact in foreign markets, such as exclusive selling agreements with foreign buyers, and resale price restraints. I would consider neither to be *ipso facto* safe, however. The law may reach both, and they should be analyzed to determine their doctrinal and competitive status.

Once again, the private suit underscores the importance of a broader view of the scope of the law. In *Pacific Coast Agricultural Export Ass'n v. Sunkist Growers, Inc.*,[45] the court holds illegal Sunkist's exclusive selling agreement with a distributor in Hong Kong because it led to refusal by Sunkist to sell to other American firms who sought to buy from it for export to Hong Kong. This restraint barred U.S. exports sufficiently that the Government itself might have attacked it. It could be the beginning stage in further antitrust litigation generally as to foreign exclusive buying and selling arrangements affecting U.S. exports.

I have already commented upon certain problems of licensing of patents and technology, and will add just a little more. The Justice Department Memorandum is extremely important on these questions. It has put to rest for the time being fears that the Government might

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was not sustained on the facts, but the theory might conceivably be used to attack a foreign acquisition).

43. ITT Corp. v. GT & E Corp., 5 CCH TRADE REG. REP. (1972 Trade Cas.) ¶ 74,094 (D. Hawaii 1972).

44. United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967).

45. Pacific Coast Agricultural Export Ass'n. v. Sunkist Growers, Inc., 5 CCH TRADE REG. REP. (1973-1 Trade Cas.) ¶ 74,523 (N.D. Cal. 1973).

be getting ready to attack as divisions of territory mere licensing of counterpart patents in different countries to different licensees.[46] It has gone a good deal further than that, in what I find to be the most important of the statements in this area, *i.e.*, it indicates that under some circumstances even express restrictions against exports by foreign licensees to the United States will be allowed, not only as to patents but as to unpatented know-how and technology.[47] The 6th Circuit in the *Dunlop* case has just added the surprising fillip that the Patent Code itself is authority that express patent license restrictions against export to the United States are allowable.[48] That decision does not reach the know-how question, however.

SUMMARY AND CONCLUSION

I should say, by way of conclusion, that a Justice Department which gives partial blessing to express prohibitions of exports to the United States and to patent license tying is not, strictly speaking in all respects, the Department I had come to know. We have known all along, however, of its self-restraint in the foreign commerce area generally. We should probably be thankful for its insistence that genuine and important American interests be present before it attacks, though we may disagree on what those interests are. We should also applaud its efforts to clarify the law. If some of them leave room for disputation, as an academic, I of course am grateful for that too. And if some of them seem to hold out sanctuaries which may be blasted to bits by private plaintiffs at any time, none of us should be too surprised. This is one reason we need corporate counsel, and antitrust counsel as well.

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46. *Memorandum* (case 3), *supra* note 3, at 55,209-210.
47. *Id.* (case 2), at 55,209.
48. Dunlop Co., Ltd. v. Kelsey-Hayes Co., 5 CCH TRADE REG. REP. (1973-2 Trade Cas.) ¶ 74,671 (6th Cir. 1973) (the court held that territorial restrictions in foreign patent licenses were lawful even though they prohibited exports to the U.S.).