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Sol M. Linowitz

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THE INTERNATIONAL BUSINESSMAN MEETS THE ANTI-TRUST LAWS

*Sol M. Linowitz**

Recently the Senate Judiciary Subcommittee on Antitrust and Monopoly opened hearings on the effect of our anti-trust laws abroad. In doing so, it focused attention on one of the most vexing problems confronting American business and industry today.

During the past several years it has become increasingly obvious that an ever greater number of American manufacturing companies will be looking abroad for expansion of their consumer markets. Such a program on the part of American industry will not only help advance the inter-relationship between our economy and that of the rest of the world, but will do so in a manner precisely designed to further the objectives of our Government. For ever since World War II it has been established national policy to make the benefit of our scientific advance and industrial progress available to the other countries of the world. This has necessarily meant that private American business must be encouraged to seek investment outside of the United States.

But any company which considers foreign manufacture immediately finds itself confronted with a myriad of complex problems requiring thorough analysis and careful appraisal. Such matters as exchange barriers, tariff restrictions, import licenses and quotas, relationship of a particular government to a specific industry, taxation problems, patent working requirements, local favoritism—all play an important part in reaching a decision as to whether to set up a plant in one country rather than another. Inevitably, the answer reached will reflect a juggling of various considerations and the striking of a balance which will make most sense to the particular company in the light of its own specific situation. All of this is, of course, reasonably to be expected by the American businessman as he ventures abroad. What may not be so clear, however, is that the American manufacturer seeking to go into business in a foreign country must also keep one eye carefully cocked on the United States anti-trust laws, which will hover threateningly over his activities even outside of the United States.

It was not always this way. For a number of years courts construed the anti-trust laws as only indirectly pertinent to foreign operations, and then only if action was taken by an American company in the international

* See Contributors' Section, Masthead, p. 241, for biographical data.

field which was glaringly unreasonable or unlawful.¹ The Sherman Anti-Trust Act by its terms does, of course, refer specifically to foreign commerce. Section 1 of the Act provides:

Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several states, or *with foreign nations*, is declared to be illegal. (Emphasis added.)²

And section 2 says:

Every person who shall monopolize, or attempt to monopolize, or combine, or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, or *with foreign nations*, shall be deemed guilty of a misdemeanor. (Emphasis added.)³

In the past, American companies doing business in other countries have been led to expect that they might operate under the same rules as the foreign companies with which they would have to compete.⁴ The federal district court in the *United States Steel* case summarized the basic reason for such a view:

To hold otherwise would be, practically and commercially, to enjoin the . . . trade of the United States from using the best methods which are necessary in order to build up and maintain a dependable business abroad, and if the Sherman Law were so construed, it would itself be a restraint of trade and unduly prejudice the public by restraining foreign trade.⁵

During the last few years, however, the Supreme Court and other federal courts have moved far away from this position.⁶ And the American manufacturer who presently seeks to go into business abroad must bear in mind that an agreement carefully worked out with another company thousand of miles from the United States may get him into trouble under the anti-trust laws here at home, if it is ultimately considered to have an

¹ *Thoms v. Sutherland*, 52 F.2d 592 (3d Cir. 1931); *United States v. United States Steel Corp.*, 223 Fed. 55 (D.N.J. 1915), aff'd, 251 U.S. 417 (1920); *United States v. Keystone Watch Case Co.*, 218 Fed. 502 (E.D. Pa. 1915), appeal dismissed, 257 U.S. 664 (1921).

² 26 Stat. 209 (1890), as amended, 15 U.S.C. § 1 (1952).

³ 26 Stat. 209 (1890), 15 U.S.C. § 2 (1952).

⁴ In *American Banana Co. v. United Fruit Co.*, 213 U.S. 347, 356 (1909), the Court said: 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.

⁵ *United States v. United States Steel Corp.*, 223 Fed. 55, 114 (D.N.J. 1915), aff'd, 251 U.S. 417 (1920). Under any circumstance, of course, arrangements between American and foreign companies designed solely for the purpose of controlling prices in the United States and to exclude competitors from the American market would be branded illegal. See *United States v. American Tobacco Co.*, 221 U.S. 106 (1911); *United States v. General Electric Co.*, 80 F. Supp. 989 (S.D.N.Y. 1948).

⁶ See pages 218-21 *infra*, and full discussion in Bergson, *Antitrust Problems of American Companies Doing Business Abroad*, in *Lectures on Federal Antitrust Laws* (U. of Mich. 1953).

adverse effect on the domestic, export, or import markets of the United States.

Let's take the usual case of the American manufacturer who decides to enter into foreign manufacture. He has essentially three choices before him.

First, he can set up a branch factory in which he does his own manufacturing and arranges for his own distribution. Since such a branch would not be a separate legal entity, this kind of an arrangement obviously does not involve any problem under the anti-trust laws.⁷

A second possibility is for the American manufacturer to establish a wholly-owned subsidiary in the foreign country. Again, it is clear that the thrust of the anti-trust laws is not directed at such a relationship and this will ordinarily be the position of the Department of Justice and the courts. (As a case in point, the consent decree which the Justice Department signed with the United Engineering and Foundry Company in 1952 by its terms specifically provided that it was not applicable to transactions solely between the American company and its wholly-owned foreign subsidiary.⁸)

As a practical matter, however, neither of these first two possibilities

⁷ *United States v. Minnesota Mining & Manufacturing Co.*, 92 F. Supp. 947, 962 (D. Mass. 1950):

Nor is it any excuse that American export trade might have been equally adversely affected if there had been—or if there should now be—established plants in Great Britain, Canada and Germany by one or more of the manufacturing defendants acting independently. Such supposititious individual action would, it is true, be a restraint upon American commerce with foreign nations. But such a restraint would not be the result of a combination or conspiracy. Hence it would not run afoul of Sec. 1 of the Sherman Act. Nor would it, so far as now appears, have the purpose or effect of promoting one company's monopoly in violation of Sec. 2 of the Sherman Act.

⁸ *United States v. United Engineering and Foundry Co.*, CCH Trade Reg. Rep. (1952-53 Trade Cas.) ¶ 67378, at 67977 (W.D. Pa. Dec. 3, 1952). This does not mean that a wholly-owned subsidiary entirely escapes the possibility of antitrust involvement but that the dangers are to a very substantial extent minimized. See *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons*, 340 U.S. 211 (1951); *United States v. Columbia Steel Co.*, 334 U.S. 495 (1948). But cf. *Justice Black in Timken Roller Bearing Co. v. United States*, 341 U.S. 593, 599 (1951):

We also reject the suggestion that the Sherman Act should not be enforced in this case because what appellant has done is reasonable in view of current foreign trade conditions. The argument in this regard seems to be that tariffs, quota restrictions and the like are now such that the export and import of anti-friction bearings can no longer be expected as a practical matter; that appellant cannot successfully sell its American-made goods abroad; and that the only way it can profit from business in England, France and other countries is through the ownership of stock in companies organized and manufacturing there. This position ignores the fact that the provisions in the Sherman Act against restraints of foreign trade are based on the assumption, and reflect the policy, that export and import trade in commodities is both possible and desirable. Those provisions of the Act are wholly inconsistent with appellant's argument that American business must be left free to participate in international cartels, that free foreign commerce in goods must be sacrificed in order to foster export of American dollars for investment in foreign factories which sell abroad. Acceptance of appellant's view would make the Sherman Act a dead letter insofar as it prohibits contracts and conspiracies in restraint of foreign trade. If such a drastic change is to be made in the statute, Congress is the one to do it.

may be very real. There may be limitations on company finances available for investment abroad; and there frequently are a number of sound reasons why significant local participation in a new foreign company is strongly to be desired.⁹

A third possibility, therefore, is to form a jointly-owned company in which the American manufacturer and a foreign company engaged in business in the country join forces. This may frequently involve the contribution of patent rights, trade-marks, know-how, and technical data by the American company, and working capital, raw material, and possibly administration by the foreign co-adventurer. Each then obtains shares of stock in the new company and, occasionally, the American contributor also is entitled to a royalty.¹⁰

Assuming the American company decides on a jointly-owned enterprise, then, how far can it go in limiting the market of the new company? For example, can the American manufacturer insist that the new company not sell its products in the United States? By the same token, can the American company, as part of the agreement, undertake not to sell in competition with the new company in the latter's home market? In short, can the American company, the foreign partner, and the new company explicitly agree that each will undertake to develop the market in certain designated areas without undue intrusion into the market of the other? The questions are, unfortunately, a great deal clearer than the answers.

The United States Supreme Court decision in the *Timken Roller Bearing Company*¹¹ case five years ago has become the bête noire for American investors faced with some of these problems. In that case American Timken had issued certain licenses under its patents to British Timken and imposed certain restrictive agreements. When the licenses expired, American Timken bought into British Timken. At the same time, British and American Timken each held 50% of the stock of French Timken. The agreements among the three companies undertook to allocate world territories and to fix prices on products which one might sell in the territory of the other; provided for cooperation to protect each other's market and to eliminate outside competition; and involved certain restrictions of

⁹ For example, the manner in which a particular government may regard and deal with a company having local management participation is often important, as is local favoritism toward locally owned or managed industries.

¹⁰ A fourth possibility if patents or trade-marks are involved is issuance of licenses to foreign companies. For the purposes of this discussion, however, such a license arrangement would be subject to almost identically the same problems as the joint company since it would similarly involve having two companies agree on working together abroad and, therefore, pose the same issues with respect to the effect on competition and on commerce with the United States.

¹¹ *Timken Roller Bearing Co. v. United States*, 341 U.S. 593 (1951).

imports to, and exports from the United States. Four opinions were written by the Supreme Court, each taking a quite different view of the agreements and their standing under the Sherman Anti-Trust Act.

The majority of the Court held that the agreements violated the Sherman Act and that the French and British companies—partly owned by the American—were separate entities which could and did conspire with American Timken in the violations. The opinion written by Justice Black, in which he was joined by Justices Douglas and Minton, squarely found that the combination was “not for lawful business enterprise” but “to eliminate competition”; that if it were not for these “rigid contractual restrictions,” American Timken would have done considerable foreign business; and that American Timken should be divested of its holdings in the French and British companies. Justices Reed and Vinson concurred in the Black opinion in finding that there were violations of the anti-trust laws, but did not agree that there should be divestiture of the foreign holdings. Justice Frankfurter wrote a dissenting opinion in which he contended that the anti-trust laws had not been violated. “The circumstances of foreign trade,” he said, “may alter the incidence of what in the setting of domestic commerce would be a clear case of unreasonable restraint of trade.”¹² And the fourth opinion, by Justice Jackson, stated that the conspiracy doctrine just had no application to a joint venture such as the one involved in the *Timken* case and that it should be possible for an American corporation to organize such subsidiaries and joint ventures in order to go after foreign markets in a realistic manner.

The innuendoes and implications of the *Timken* decision were greeted with dismay by legal, economic, and political analysts, who agreed with Justice Jackson’s comment that “this decision will restrain more trade than it will make free.”¹³ With the passage of time, however, and in the light of fuller analysis, it seems clear that such appraisals of the effect of the decision were hardly justified.

In the first place, careful study of the record of the case clearly shows that the *Timken* situation presented an aggregate of out-and-out restrictions, including price fixing, which were illegal per se. Secondly, the primary purpose of the arrangement was manifestly one of restraint rather than (as the defendants argued) the ancillary objective of exploit-

¹² *Id.* at 605.

¹³ *Id.* at 608. See Government Regulation of Business—Antitrust, The Supreme Court, 1950 Term, 65 Harv. L. Rev. 107, 114 (1951); “Increasing International Trade Through Product Licenses,” International Chamber of Commerce, U.S. Council (1953); cf. Oppenheim, “Foreign Commerce Under the Sherman Act,” 42 Trade-Mark Rep. 3 (1951); Note, “The Sherman Act and Multi-Corporate Single Traders: Competition Among Affiliates,” 100 U. Pa. L. Rev. 1006 (1952).

ing trade-mark rights. Finally—and most importantly—all the opinions made clear that a jointly-owned company arrangement is not in and of itself illegal, but each case must be weighed in the light of its own particular circumstances including the purpose for which it is organized, the nature of the restrictions imposed and controls exercised, and the effect on the entire competitive relationship, both domestic and foreign.

Other cases dealing with similar problems support such a view. Four years before the *Timken* case the Supreme Court had decided the *National Lead*¹⁴ case and held that National Lead, Titan, Inc. (a subsidiary of National Lead Company once controlled by Norwegian interests), and duPont were all involved in an unlawful restraint of trade. National Lead and duPont, controlling 100% of the domestic titanium pigment industry, had joined together in an arrangement whereby National Lead was to have exclusive rights in North America and the Norwegian participants in the rest of the world; patents were not to be challenged; patent applications were to be exchanged; and prices were to be fixed. Imports of finished materials were approved provided they did not interfere substantially with local sales. The Court found that by this arrangement patents had "been forged into instruments of domination of an entire industry," and, therefore, held the agreement to be illegal.

In the *Minnesota Mining*¹⁵ case, decided in 1950, Judge Wyzanski of the District Court of Massachusetts held illegal a combination of American manufacturers controlling four-fifths of the export trade in coated abrasives in order to organize jointly-owned factories abroad and to refrain from exporting where the foreign-made products could be sold more profitably. He decreed the dissolution of the joint foreign manufacturing and sales corporations.

In the *General Electric Lamp*¹⁶ case, General Electric, with 92% of the domestic incandescent lamp industry under its control, was held to have illegally entered into certain agreements providing for exchange of patent rights, manufacturing information, and allocation of foreign territories. Significantly, the court rejected the argument that these agreements were merely incidental to the sale and exchange of know-how abroad since it appeared to the court that the actual information, patents, know-how, etc. involved were insufficient in value to justify such restraints.¹⁷

¹⁴ *United States v. National Lead Co.*, 63 F. Supp. 513 (S.D.N.Y. 1945), *aff'd*, 332 U.S. 319 (1947).

¹⁵ *United States v. Minnesota Mining and Manufacturing Co.*, 92 F. Supp. 947 (D. Mass. 1950).

¹⁶ *United States v. General Electric Co.*, 82 F. Supp. 753 (D.N.J. 1949).

¹⁷ *Id.* at 845.

The complicated *ICI*¹⁸ case, decided in 1951 and 1952 by the District Court for the Southern District of New York, found ICI, duPont, and Remington Arms guilty of violating the anti-trust laws because patent license arrangements were intertwined with international territorial allotments in an illegal fashion which restrained commerce. The court there ordered compulsory licensing of certain patents, restraint on the right of exclusion of certain imports, and divestiture of a number of jointly-owned companies. Again, however, it emphasized that in its judgment the defendants had sought to overcome legal and economic obstacles to trade abroad not by legal methods but by a comprehensive plan with a multitude of restraints designed to curtail competition.

All of these cases held the anti-trust laws to have been violated, yet in each the court found an absence of a bona fide effort to promote foreign trade; for in every instance companies dominant in an industry agreed among themselves to try to divide up world markets against competition. Neither in the *Timken* case nor in any other case has a court said that American and foreign companies may not join together for a valid purpose of expansion of trade, including as part of such agreement restrictions and understandings reasonably and realistically related to the protection of legitimate property, patent, and trade-mark rights and consistent with the maintenance or encouragement of competition. In short, there is still every reason to believe that if and when faced with the precise issue, courts would hold that the same "rule of reason" applied in other anti-trust situations should also apply here.¹⁹ Under this rule a court after analyzing the facts, the objectives, and the probable effects, would determine whether, all things considered, the arrangement was reasonable and in the public interest, rather than a conspiratorial effort to achieve an improper restraint of trade.

As early as 1931, the Third Circuit Court of Appeals had, as a matter of fact, applied this "rule of reason" to such an arrangement in *Thoms*

¹⁸ *United States v. Imperial Chemical Industries, Ltd.*, 100 F. Supp. 504 (S.D.N.Y. 1951), 105 F. Supp. 215 (S.D.N.Y. 1952).

¹⁹ The doctrine as announced by the Supreme Court in *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1 (1911), would authorize the court to examine relevant economic data in order to determine the reasonableness of the relationship under scrutiny and its effects. As the Court said in the *Standard Oil* case, *supra* at 68:

Unaided by the light of reason it is impossible to understand how the statute may in the future be enforced and the public policy which it establishes be made efficacious. While judicial application of the rule of reason in domestic matters has covered a wide arc, today the Supreme Court does not tend to regard competition as "an absolute," and will invoke the rule of reason in determining whether the statute has been violated. See *FCC v. RCA Communications Inc.*, 346 U.S. 86 (1953). See also *Bergson*, *op. cit. supra* note 6.

v. Sutherland,²⁰ and the recent *Beneflux*²¹ case followed the same doctrine. Moreover, as time goes on, we can probably expect that foreign governments, which have begun to resent the application of the United States anti-trust laws to activities under their jurisdiction, will react as did the British Court of Appeal a short time ago. In the *British Nylon Spinners*²² case, the British court held that it was not required by rules of comity to give effect in Great Britain to the United States federal court decision in the *ICI* case.

How does all this add up for the American manufacturer who wants to do the right kind of a job abroad by means of a jointly-owned company?

The first rule is to exercise considerable care and caution in the selection of the foreign partner. If the co-owner in the joint enterprise is a competitor, it is especially important that his contribution be substantial, realistic, and continuing. Any arrangement with a competitor is, it must be remembered, certain to be carefully scrutinized. If the partner is not a competitor, his participation must be justifiable on sound legal, economic, or political grounds and involve a sensible quid pro quo.

Secondly, any agreement which is made between the American and the new company should avoid reference to those things which are already established under existing laws. For example, patent laws may grant a right to exclude certain exports by the new company into the United States, but that does not mean that a provision to that effect should also be included in an agreement. Reliance, in short, must be placed on the

²⁰ *Thoms v. Sutherland*, 52 F.2d 592 (3d Cir. 1931), where the court held that a restrictive covenant against competition by the vendor was proper as incidental to the sale of a secret process.

²¹ *Foundry Services, Inc. v. Beneflux Corp.*, 110 F. Supp. 857 (S.D.N.Y.), rev'd on other grounds, 206 F.2d 214 (2d Cir. 1953). The plaintiff, a subsidiary of an English corporation, owned certain secret processes and had an exclusive license to manufacture and sell in the United States and Canada upon the understanding that the English corporation would not sell there and that the plaintiff would not export without the English company's approval. In granting the plaintiff an injunction against the cancellation of its agreement, the district court held the agreement reasonable and lawful, since the parties were not competitors and ". . . common sense and justice as well as the 'normal' and 'usual' business custom of rational men dictate that a principal refrain from undertaking to perform at the same time and in the same place the precise functions it has engaged a representative to perform." 110 F. Supp. at 861.

²² *British Nylon Spinners, Ltd. v. Imperial Chemical Industries, Ltd.*, [1952] 2 All E.R. 780, [1953] 1 Ch. 19, aff'd, [1954] 3 All E.R. 88. In *United States v. Imperial Chemical Industries, Ltd.*, supra note 18, the court ordered a British corporation to assign back certain British patents to duPont and to receive no licenses under these British patents unless there was involved a right of United States manufacturers to export and sell the patented product in the United Kingdom. The British Court of Appeal held that the United States judgment could not undertake to affect British nationals in a judgment directed against a British national and involving different property rights created under British law.

patent laws rather than on the language of the contract for enforcing such exclusion.

Finally, any restraint imposed should be genuinely designed to protect legitimate property, patent, trade-mark, or similar rights in international trade. Even geographical limitations could conceivably be justified on such a ground. An American company might, in a proper case, have good reason to seek assurance that a new jointly-owned company will properly exploit a new market and may, therefore, want to ask that the new company devote itself to that area rather than try to intrude into another market. Or the American manufacturer may have agreed to the joint venture on the basic assumption that the patent rights, data, and know-how which it contributes would be based on the value of getting a new market in an indicated geographical area rather than in having the new company export to the United States and other areas in competition with the American company. Such considerations will strike a businessman as reasonable and persuasive and, in a proper case and in due course, may so impress a court.

The report of the Attorney General's National Committee to Study the Anti-Trust Laws,²³ released a few months ago, reflects some of the uncertainty in this whole area but also offers some hope. While the Committee rejects "any proposal for blanket exemption of foreign commerce from the anti-trust laws,"²⁴ it also takes the position that the extra-territorial jurisdiction of the Sherman Act "applies only to those arrangements between Americans alone or in concert with foreign firms, which have such substantial and competitive effects on this country's trade or commerce . . . with foreign nations as to constitute unreasonable restraints."²⁵

At the present time, however, the American businessman moving into the foreign field must continue to proceed with caution and crossed fingers. For the best counsel in the whole realm of anti-trust law, domestic and foreign alike, is still that once given to a client by Louis Brandeis: "I can tell you where the edge of the cliff is but not whether the wind will be blowing, or from which direction, as you pass by."

²³ Report of the Attorney General's National Committee to Study the Anti-Trust Laws 65-114 (1955).

²⁴ *Id.* at 66.

²⁵ *Id.* at 76.