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# RESTRICTIVE INTERNATIONAL TRADE AGREEMENTS AND APPLICATION OF UNITED STATES ANTI-TRUST LAWS

MARCELLUS R. MEEK

## INTRODUCTION

**S**PEAKING generally, it is not without legal consequence to say that the field of Anti-trust legislation is one which is fraught with inconsistencies and legal anomalies, out of which grows confusion—thrice compounded by charge and counter-charge from the business, legal and governmental camps.

There are few, if any, fields of law in which there is the same high degree of dissension among lawyers and even law-makers themselves. This is a natural consequence of the mass of legislation designed to satisfy a myriad of dissimilar, if not conflicting, interests. Since 1890, when the Sherman Anti-trust Act was passed, there have been no less than thirty-four regulatory acts passed, whose function it was and is to protect small businesses, prevent discriminatory practices, regulate foreign trade or interstate commerce, and otherwise restrict the operation of free enterprise.

Many of these Acts are conflicting. For example, the Sherman Anti-trust Act was directed principally to group activity designed to regulate the market, preventing competition and charging high prices, while the Robinson-Patman Act passed in 1936, was specifically designed to protect the small retailer from price-cutting practices and favors stable and uniform prices. This is perhaps explained by the fact that the Sherman Act and the Robinson-Patman Act were passed in very different climates, but this fact in no wise affects the proposition that both legislative enactments are still enforced and still present an area of law into which businessmen must look before taking any measures which will have the effect of disturbing the competitive *status quo*.

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Many of the laws referred to above have application, either by design of the legislators or by judicial construction, to the foreign operation of a domestic United States subsidiary or international trade generally.

This introduction to the confused state of the law is intended to acquaint the reader with the fact that the legal principles involved are not settled and that legal scholars differ widely in their approach to the subject, as well as in the conclusions which they draw in one or another particular set of circumstances.

GENERAL OBSERVATIONS ON THE APPLICABILITY OF UNITED STATES LAW TO INTERNATIONAL TRADE

Restrictive trade practices prohibited by the Sherman Act may be attacked under the broad interpretation of Sections 1 and 2 thereof, or such conduct may be enjoined under Section 4 of the Sherman Act, or it may be the source of a private civil remedy for damages under Section 4 of the Clayton Act.

Section 73 of the Wilson Tariff Act of 1894 specifically prohibits conspiracies, combinations, agreements, etc.:

- a) when the same is made by or between two or more persons or corporations, either of whom, as agent or principal, is engaged in importing any article from any foreign country into the United States, and
- b) is intended to operate in restraint of lawful trade, or free competition in any lawful trade or commerce, or to increase the market price in any part of the United States or any article or articles imported or intended to be imported into the United States, or any manufacture into which such imported article enters or is intended to enter.

In the case of *United States v. General Dystuff Corp.*,<sup>1</sup> it was held that the purpose of the Wilson Tariff Act was to make "explicit the prohibitions of the Sherman Act in the field of foreign commerce."<sup>2</sup> However, it is necessary that there be a showing that the alleged conduct affects imports into the United States in a prohibited manner before a violation of the Wilson Tariff Act is established. Thus, if a commodity is not being imported into the United States, a foreign restrictive agreement with respect thereto will not violate the Wilson Tariff Act, although it might result in a violation of the Sherman Act.

It should be remembered, however, that the fact that the restrictive agreement takes place outside of the United States does not exclude it from consideration under the Sherman Anti-trust Act. In the recent

<sup>1</sup> 57 F. Supp. 642 (S.D. N.Y., 1944).

<sup>2</sup> *Ibid.*, at 648.

case of *United States v. Timken Roller Bearing Company*,<sup>3</sup> it was held that the restrictive agreements made abroad and effected abroad were nevertheless violative of the Act when they had a direct effect on trade between the United States and foreign countries.

The question of whether or not the United States courts have jurisdiction over restrictive agreements which take place outside the United States, even though there is some effect within the United States, has long been litigated and it is generally well settled that such jurisdiction does exist. Other arguments have been made that such an extra-territorial extension of the jurisdiction of our courts was unconstitutional and in violation of general principles of International Law, but all of these arguments have been rejected by the United States Supreme Court.

The question of whether or not there exists an effect on the United States commerce goes to the merits of to whether or not a violation of the Sherman Act or the Clayton Act exists, rather than to the question of jurisdiction. It is specifically stated that the Act covers offenses which involve trade or commerce with foreign nations.

#### RESTRICTIVE TRADE AGREEMENTS

##### DIVISION OF TERRITORIES

Many cases have held that an exclusive license or one which is territorially limited is not illegal in and of itself, but patent licenses and agreements for the exchange of technical information cannot lawfully be used as a means for the division of world markets.<sup>4</sup>

Foreign subsidiaries, on the other hand, may be a means to a prohibited end. Such subsidiaries are of course not unlawful whether they be owned by a single United States manufacturer, as was the case in *United States v. Minnesota Mining and Manufacturing Company*,<sup>5</sup> or by a group of American and foreign manufacturers as in the *Timken* case. The *DuPont* case held that "it is not illegal *per se* for competitors to combine their resources in a manufacturing joint venture to exploit a particular product or a particular market," however, in all of these cases, there must be no restrictive effect on trade or com-

<sup>3</sup> 83 F. Supp. 284 (N.D. Ohio, 1949), *aff'd* *Timken Roller Bearing Co. v. United States*, 341 U.S. 593 (1951).

<sup>4</sup> *United States v. E. I. DuPont De Nemours and Co.*, 118 F. Supp. 41 (D.C. Del., 1953); *United States v. National Lead Co.*, 63 F. Supp. 513 (S.D. N.Y., 1945), *aff'd* 332 U.S. 319 (1947).

<sup>5</sup> 92 F. Supp. 947 (D.C. Mass., 1950).

merce with foreign nations. Thus, jointly-owned foreign companies may not be used as a means for effecting a division of territories and a restriction of competition between the owner-companies or as a method for carrying out a conspiracy in restraint of trade abroad which affects United States exports or imports.

Ultimately, whether a foreign subsidiary has been employed for an unlawful purpose is a question of fact and evidence must be introduced to establish such fact. For instance, in the case of *United States v. Imperial Chemical Industries*,<sup>6</sup> it was shown that an American and a foreign company were already established as competitors in a foreign market, before a jointly-owned company, formed for the exploitation of such market for their mutual benefit, violated the statutes. It was also proved that competition between the two companies had diminished. Pre-existing competition, however, between the parties to such an agreement is not absolutely necessary where the nature of the respective international businesses in the same industry indicated that competition between them in the market would be affected.

In every case, therefore, the particular facts of the case will control and all of the surrounding circumstances will be taken into account to determine whether or not a violation exists.

In order to understand the international application of the Anti-trust Acts, it would perhaps be well to discuss some of the factual situations existing in the cases which have been decided up to the present time.

In the case of *United States v. Imperial Chemical Industries*,<sup>7</sup> DuPont (an American company) and Imperial Chemical (an English company) entered into restricted agreements with various European companies with whom they had previously competed. Under these agreements, the territories of the world were divided up, prices were fixed, and profits determined.

These agreements were continued and effectuated by the formation of various jointly-owned subsidiaries. There was an exchange of patents and processes, but there had been no previous license arrangements. The products of the conspiring companies were different though of the same class. In Canada, a jointly owned company was formed on a fifty-fifty basis and exclusive license agreements were signed which contained restrictive cross-covenants having the effect

<sup>6</sup> 100 F. Supp. 504 (S.D. N.Y., 1951).

<sup>7</sup> *Ibid.* Supplemental opinion rendered 105 F. Supp. 215 (S.D. N.Y., 1952).

of restraining exports and imports. Similar arrangements existed in countries of South America.

The court held that the restrictive agreements were illegal and the use of a jointly-owned subsidiary did not change the effect. It said:

We have found that the jointly-owned companies were means designed and used by DuPont and ICI to avoid and prevent competition between themselves and with others in the non-exclusive territories. They were a means used for the accomplishment of the basic understanding for the division of world-wide territories. We have found that not only were they intended to affect the export and import trade of the United States but that the limitations placed on DuPont and other American companies on the exports to these jointly-owned companies and the restrictions placed on these companies with respect to sales and exports by them to the United States did achieve the purpose and end for which they were organized.<sup>8</sup>

The objectionable features of the arrangements in the *Imperial* case are clearly defined. They are (1) division of territories, (2) price fixing, (3) elimination of competition in world markets, thus of export and import.

The U.S. Supreme Court's decision was to order divestiture of the joint interests, cancellation of the contracts, and reassignment of patents.

In the case of *United States v. Timken Roller Bearing Co.*,<sup>9</sup> an injunction was sought under Section 4 of the Sherman Act for violations of Sections 1 and 3 thereof. The complaint alleged the allocation of territories, restrictive agreements as to each territory, and price fixing and elimination of outside competition. The American corporation and two foreign corporations had a substantial portion of the world market, and the American company had from 1941 to 1945, 71.0% to 78.9% of the U.S. market. British Timken had 90% of the British market.

British and American Timken had been competitors previously, and each owned fifty per cent of a French Timken company. The three companies entered into agreements whereby they assigned exclusive territories to each, and had a system of order referrals.

The Supreme Court ordered cancellation of the agreements, stating:

<sup>8</sup> 100 F. Supp. 504, 592 (S.D. N.Y., 1951). Cf., *United States v. Aluminum Co. of America*, 148 F. 2d 416 (C. A. 2d, 1945). The operations of these jointly-owned companies were in violation of the law. *United States v. National Lead Co.*, 63 F. Supp. 513 (S.D. N.Y., 1945). "Nor do we find any support in reason or authority for the proposition that agreements between legally separate persons and companies to suppress competition among themselves and others can be justified by labelling the project a 'joint venture.'" *Timken Roller Bearing Co. v. United States*, 341 U.S. 593, 598 (1951).

<sup>9</sup> 341 U.S. 593 (1951).

The fact that there is common ownership or control of the contracting corporations does not liberate them from the impact of the anti-trust laws. E.g., *Keifer-Stewart Co. v. Seagram & Sons*, supra at 215. Nor do we find any support in reason or authority for the proposition that agreements between legally separate persons and companies to suppress competition among themselves and others can be justified by labeling the project a "joint venture." Perhaps every agreement and combination to restrain trade could be so labeled.<sup>10</sup>

This case also illustrates the principle that it is not the method employed, but the ultimate effect of the restrictive agreements expressing the intent of the parties involved.

The case of *United States v. Holophane Co. Inc.*,<sup>11</sup> is one of great importance in the field and is the most recent to date. The principal defendant, Holophane Co. Inc., was a U.S. corporation. It was engaged in the manufacture and sale of prismatic glassware and illuminating appliances containing prismatic glassware, as were the other alleged conspirators in the case. The other companies involved were Holophane Ltd., a company organized under the laws of Great Britain and *La Societe Anonyme Française Holophane*, a French corporation.

In 1921, Holophane Ltd. entered into a patent license agreement with the French Holophane in which it conveyed the right to make and sell on an exclusive basis prismatic glassware under the existing and future patents of Ltd. in Belgium, Spain, Portugal, Switzerland and Italy. This was a five-year agreement, with an option to renew, which was exercised. There were provisions for royalties under which it was provided that the articles manufactured would be marked with the name Holophane; the French company would not use the inventions, designs, or trade name except in accordance with license; the parties would mutually exchange discoveries and improvements; the parties would not compete with each other; and the French company would prevent exportation from the licensed countries to other areas and Limited would prevent the export into France or the licensed countries of Holophane goods. Such an agreement continued until the time the action was filed in the instant case.

The controlling interest in both Limited and the French company was held by an individual. Limited held all of the stock of the Holophane Glass Company, Inc., a U.S. corporation. In 1925, a group of executives and employees of the Holophane Glass Company, Inc.

<sup>10</sup> Ibid., at 598.

<sup>11</sup> 119 F. Supp. 114 (S.D. Ohio, 1954), aff'd 352 U.S. 903 (1956).

organized what came to be the defendant Holophane Company, Inc., for the purpose of purchasing the Holophane Glass Company from Limited. This group actively managed the American corporation, and entered into a trading agreement with Limited, wherein the territory of the Holophane Company Inc. was defined as that part of the continent of America north of the Panama Canal and adjacent islands (not including the West Indies), the Philippine Islands, the Republic of Cuba, and the Empire of Japan. The territory of Limited was defined as the whole of the world except the territory of the defendant and the Republic of France and its colonies. The agreement contained other restrictive covenants relating to the export into each other's territory and each party agreed to communicate and assign every invention, design, discovery or other improvement and trademark to the other, and to render any aid necessary to enable the other to secure proper protection in its territory.

Various modifications were made in the agreements between the parties but they remained in substantially the same form, insofar as they provided for mutual interchange of improvements and the allocating of territories between them.

In fulfillment of their obligation, Limited and the French company refrained from competition with each other and imposed upon their customers and dealers contractual obligations not to export products purchased from them into the territory of the defendant and similar arrangements were made by Limited and the French company.

The court held that these practices were affecting adversely the foreign commerce of not only Holophane Company, Inc. but also of its customers and that the restrictive arrangement between the defendant and the co-conspirators, Limited and the French company were in unreasonable restraint of the interstate and foreign commerce of the United States in prismatic glassware and appliances.

The decision of the District court was affirmed by the U.S. Supreme Court without comment, but certainly not without far-reaching effect.

#### CONCLUSION

Speaking generally, so long as there are no restrictive arrangements entered into between domestic United States corporations and the foreign companies with whom they deal, or in which they have a stock interest, there can be no violation of the anti-trust laws.

It is simply necessary that economic factors alone determine the

conduct of companies with which American interests deal or in which they have an interest. If these factors determine what the subsidiaries are to produce and where the product is to be sold, there can be no adverse effects in the anti-trust area.

Formal agreements, however, are not the only objectionable form which restrictive practices can take. Other arrangements or understandings may serve as evidence of illegal restraints of trade and all memoranda, unsigned documents, as well as correspondence are admissible in evidence to show a violation of the United States anti-trust laws.

Trademark licenses must, of necessity, be exclusive, and are not subject to attack under the Sherman Act, so long as they are not coupled with a division of territories or other restrictive covenants such as have been outlined above. It is not unlawful to define the territory in which a distributor, licensee, or jointly owned enterprise is to operate, so long as there are no restrictive arrangements included.

While the Supreme Court of the United States has been firm in its over-all application of the U.S. anti-trust laws to American business abroad, there is widespread agitation for a re-evaluation of the adverse effect which the Court's position has produced in the relationship between the United States and foreign countries.

Analogies have been made between the principles underlying the decision in *Vanity Fair Mills v. T. Eaton Company Ltd.*,<sup>12</sup> which involved the extra-territorial application of U.S. trademark law and the principles of extra-territoriality of anti-trust law above outlined.

In the *Vanity Fair Mills* case, a Canadian corporate defendant, operating under a Canadian patent, infringed the plaintiff's trademark in the United States, but the District and Circuit Courts held that they had no power to regulate a case where an alien defendant whose infringing mark continued on the registry under the laws of his own nationality, even though the infringement of U.S. trademark registration affected the United States commerce.

A special committee of the Association of the Bar of New York City, under the direction of Harvard Law School Professor Kingman Brewster, Jr., investigated the broad considerations involved in the extra-territorial application of U.S. anti-trust laws and, in their report, recommended that authority be granted to the President to grant

<sup>12</sup> 133 F. Supp. 522 (S.D. N.Y., 1955), 234 F. 2d 633 (C.A. 2d, 1956), cert. denied 352 U.S. 871 (1956).

exemptions from the anti-trust laws in cases involving foreign relations or the national security.

The committee stated that the application by United States courts of the anti-trust statutes to cases involving enterprises abroad has aroused resentment in foreign nations and emphasized that an anti-trust violation in the United States might not only be condoned abroad but might be positively encouraged as a means of expanding business and developing industry. The committee felt that such an extra-territorial application of the law violated principles of international law which seek to "prevent a country's reaching beyond its borders to attach activities carried on within foreign nations."

Whether the specific proposal made by the committee vests too much power in the Executive Department in such cases, and whether such a plan would be workable at all, is not decided here. Suffice it to say that the seeming necessity for such an investigation indicates dissatisfaction with the application of the law under present conditions and foretells perhaps a re-examination of the Supreme Court's position in the anti-trust cases.