JOINT VENTURES ABROAD AND PER SE ANTITRUST VIOLATIONS

INTRODUCTION

Considerable disagreement exists as to what type of inquiry the courts are using or should use when applying Section One of the Sherman Antitrust Act to American activities overseas. Recent cases indicate that the Supreme Court is expanding the concept of *per se* illegality. If the restraint is of the type considered to be without redeemable virtue, the activity is conclusively presumed illegal *per se* without further inquiry or allowance of affirmative defenses. Restraints not so readily identifiable or with redeemable virtue are inquired into by the rule of reason. This article places special emphasis on the impact of the *per se* doctrine on joint ventures located abroad and the problems incurred in its application. Although Congress has made some attempt to correct suggested inadequacies, the best guidelines have come from the courts by way of direct litigation.

THE JOINT VENTURE CONCEPT

In the last twenty-five years, the growth of business investment abroad by the United States has been so immense that in 1967 it was predicted that within the next fifteen years the third industrial power in the world would be the American industry in Europe.[1] A large proportion of this business activity is shared by two or more corporations. The activity of the two or more companies becomes a joint venture when the parties join their property interests, skills and risks leading to varying degrees of participation in direction and management.[2] "In its simplest terms, . . . a joint

1. J. SERVAN-SCHREIBER, THE AMERICAN CHALLENGE 3 (1967). More than ten-billion dollars have been invested in Western Europe by American Corporations from 1958 until present. SERVAN-SCHREIBER attributes this growth and success to "the (American) ability to adapt easily, flexibility of organization, (and) the creative power of teamwork." *Id.* at 251-2. In fact, he states that European firms are and should continue copying U.S. methods of combining and joining with each other in order to better compete and progress. *Id.*

J. MCMILLAN AND B. HARRIS, THE AMERICAN TAKEOVER OF BRITAIN 4, 5 (1968). Over 1600 firms are operating in Britain with more than one-half million employees. Moreover, America's equity in Britain is now fifteen times what it was in 1939. In some cases such as with Yale locks, Kodak color films, and Singer sewing machines, American firms literally monopolize the market.

2. This is a combination of the definitions of two authors: Tractenburg,

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venture is the creation of a new business organization which is owned by two or more enterprises."[3] The joint venture is also known as the "jointly owned subsidiary," the "fifty-fifty corporation," the "business co-operative," and the "corporate partnership."[4] These jointly owned enterprises sometimes are composed of American and foreign firms in the foreign country, or an American company in cooperation with foreigners in a third country. In other instances the joint venture involves only United States corporations such as a group of American companies set up jointly abroad, or an American corporation and its wholly owned subsidiary located overseas.

PER SE—THE SHERMAN ANTITRUST ACT TEST

Despite the increasing joint venture activity, the scope of legality of joint venture relationships has not been decided. Section One of the Sherman Antitrust Act prohibits "Every contract, combination . . . conspiracy, in restraint of trade or commerce among the several states or with foreign nations. . . ."[5] The purpose of a joint venture is the pooling of interests to accomplish common objectives.[6] While many create mere transitory rela-

Joint Ventures on the Domestic Front: A Study in Uncertainty, 8 ANTITRUST BULL. 798 (1963); K. BREWSTER, JR., ANTITRUST AND AMERICAN BUSINESS ABROAD 200 (1958). Tractenburg states that a "joint venture is any association between business entities which results in their pooling resources and skills which eventually leads to participation in a business activity." Brewster advocates a rather narrowed definition: "a joint venture is an activity whose direction and management is shared by two or more actual or potential competitors." His test whether the venture is really joint is to ask whether two otherwise independent competitors have combined in the management and direction.

In the broadest form the joint venture comprises any form of association which implies collaboration for more than a very transitory period. FRIEDMAN AND KALMANOFF, JOINT INTERNATIONAL BUSINESS VENTURES 6 (1961). Joint ventures used in this indefinite fashion may take the form of a simple agreement for buying or selling arrangements restricted to a particular field or to a particular product. In addition, these non-equity joint ventures may consist of sharing technical resources, management or franchises. M. Gordon, *Joint Business Ventures in the Central American Common Market*, 21 VAND. L. REV. 315 (1968).

3. J. Backman, *Joint Ventures and the Antitrust Laws*, 40 N.Y.U. L. REV. 651 (1965).

4. P. Dixon, *Joint Ventures: What is Their Impact on Competition?* 7 ANTITRUST BULL. 397 (1962).

5. 26 STAT. 209 (1890); 15 U.S.C. § 1 (1958).

6. Joint ventures are formed (1) to spread the risk of new industrial developments, (2) to accumulate large amounts of capital, (3) to establish one joint facility for greater economy, and (4) to undertake programs too vast for individual companies to handle.

tionships, it is the more permanent ones that raise serious antitrust issues because a joint venture of long duration often eliminates competition between its participants.[7]

A large number of recent decisions of the Supreme Court concerning joint ventures denote a rigid antitrust policy of absolutes by application of the *per se* doctrine. *Per se* procedure merely requires establishing the existence of the restraint considered to be inherently anticompetitive and deems it conclusively illegal without further inquiry. The most famous statement of the concept of *per se* illegality, although a joint venture was not involved, was made in *Northern Pacific Railroad v. United States*:

> . . . [T]here are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use. The principles of *per se* reasonableness not only makes the type of restraints which are proscribed by the Sherman Act more certain to the benefit of everyone concerned, but it also avoids the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable—an inquiry so often wholly fruitless when undertaken.[8]

Thus *per se* rules are the means by which the courts eliminate evidentiary steps pertaining to the government's burden of proof concerning agreements and practices which are by their very nature anticompetitive and completely lacking in redeeming virtue. Proof that the defendant did in fact employ these types of restraints is sufficient to establish a *prima facie* case of a Section One violation.[9] Among practices which have been held to be *per se* violations are price fixing,[10] tying arrangements,[11] and division of

7. However, joint ventures abroad have been attacked by the United States Government only occasionally *U.S. v. National Lead*, 332 U.S. 319 (1947); *Imperial Chemical Industries v. U.S.*, 105 F. Supp. 215 (S.D.N.Y. 1952), while antitrust activity between joint ventures inside the boundaries of the United States continues at an increasingly vigorous pace.

8. Northern Pac. Ry. v. U.S., 356 U.S. 1, 5 (1958).

9. *Id.*

10. U.S. v. Socony-Vacuum Oil Co., 310 U.S. 150, 223, *rehearing denied*, 310 U.S. 658 (1940).

11. International Salt Co. v. U.S., 332 U.S. 392 (1947).

markets and territories.[12] However, the inquiry of the court continues if the restraint does not currently belong to the class that has been established as being illegal *per se*. The court then proceeds to determine if the identified restraint is so sufficiently anticompetitive that it should be deemed illegal *per se*. If the violation is not of the type which can be categorized as by its very nature anticompetitive and completely without redeeming virtue, then the nature of inquiry changes and *per se* rules are no longer applicable. As a preferred alternative, the courts have employed another type of inquiry commonly known as the rule of reason. The reasonableness under the fact is decided on a case-by-case basis, inviting an inquiry into the history, economical effect on competition, reason and purpose of restraint, and other factors.

Because the joint venture should operate completely independent of the parents, the *per se* doctrine applies whenever the parent subsidiary relationship vociferates with *per se* illegal type of restraints. However, where the degree or intensity is such that the restraint cannot be so clearly identified, then the inquiry may be more in the nature of the rule of reason. For example, the joint venture may operate autonomously except in the area of pricing. Mere approval of price schedules by the parent probably is outside any type of inquiry, but when the parent controls or establishes the pricing, then the joint venture is subject to *per se* approach procedure. Somewhere in between, depending upon the particular court deciding the case, operates the rule of reason.

The application of the *per se* concept to joint ventures abroad began when, in a series of decisions, the violation was based only upon findings of fact of a combination to achieve an unlawful purpose.[13] Thus, any conspiracy to which an American company is a party when the purpose is to restrain domestic or foreign commerce of the United States is violative of the Sherman Act regardless of the fact that the conduct complained of occurs in whole or in part in foreign countries.[14] To date those decisions governing overseas joint ventures differ little from the domestic results concerning joint ventures. On the other hand, there is not

12. Timken Roller Bearing Co. v. U.S., 341 U.S. 593 (1951).

13. American Tobacco v. U.S., 221 U.S. 106 (1911); U.S. v. National Lead, 332 U.S. 319 (1947); General Electric v. U.S., 80 F. Supp. 989 (S.D. N.Y. 1948); Timken Roller Bearing Co. v. U.S., 341 U.S. 593 (1951).

14. Zenith Radio Corporation v. Hazeltine Research, 395 U.S. 100 (1969); Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690 (1962).

sufficient judicial precedent to establish that there is absolutely one set of law in all cases for both foreign and domestic joint ventures.

RESTRAINTS PRESENTLY CONSIDERED PER SE ILLEGAL

Price Fixing

Price fixing according to the Supreme Court is "under the Sherman Act a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity, in interstate or foreign commerce and is illegal *per se*. . . ."[15] Because price fixing is conclusively *per se* illegal, the courts will refuse to permit evidence that price fixing has extenuating circumstances. Consequently, the only defense to a Section One violation involving price fixing is to prove that the joint venture abroad does not affect the United States commerce or that the restraint in issue does not constitute price fixing.[16]

The *per se* illegality concept was applied by the Supreme Court in 1969 to *Citizens Publishing Company*,[17] a domestic joint venture. Two competitive daily newspapers in Tucson, Arizona, entered into the agreement that each newspaper was to retain its news and editorial departments and corporate identity but the business operations were to be integrated. The Court held that these companies were in violation of the Sherman Antitrust Act because price fixing, profit pooling and market control are illegal *per se*.

Perhaps the most complete analysis of *per se* illegality to agreements among competitors involving price was expressed in *Trenton Potteries Co. v. U.S.*:

> The aim and result of every price-fixing agreement, if effective, is the elimination of one form of competition. The power to fix prices, whether reasonably exercised or not, involves power to control the market and to fix arbitrary and unreasonable prices. The reasonable price fixed today may through economic and business changes become the unreasonable price of tomorrow. Once established, it may be

15. U.S. v. Socony-Vacuum Oil Co., 310 U.S. 150, 221, *rehearing denied*, 310 U.S. 658 (1940).

16. U.S. v. Morgan, 118 F. Supp. 621 (S.D.N.Y. 1953).

17. Citizen Publishing Co. v. U.S., 394 U.S. 131 (1969).

> maintained unchanged because of the absence of competition secured by the agreement for a price reasonable when fixed. Agreements which create such potential power may well be held to be in themselves unreasonable or unlawful restraints, without the necessity of minute inquiry whether a particular price is reasonable or unreasonable as fixed and without placing on the government in enforcing the Sherman Law the burden of ascertaining from day to day whether it has become unreasonable through the mere variation of economic conditions. Moreover, in the absence of express legislation requiring it, we should hesitate to adopt a construction making the difference between legal and illegal conduct in the field of business relations depend upon so uncertain a test as whether prices are reasonable—a determination which can be satisfactorily made only after a complete survey of our economic organization and choice between rival philosophies.[18]

Price fixing may arise either horizontally when competitors engage in pricing agreements[19] or vertically when manufacturers, wholesalers or retailers enter into purchasing and selling arrangements.[20] The application of the *per se* doctrine to price fixing has judicial precedent for identical application to overseas ventures as to domestic.[21] Consequently, the court should continue finding that tight control of the pricing policies by the parent of the joint subsidiary abroad is *per se* unlawful.

Tying Arrangements

A tying arrangement is an agreement under which a seller agrees to sell one product only on the condition that the buyer agrees to purchase a second product from the seller.[22] Or, the agreement may be of the type as to prevent the buyer from purchasing the tied product from any other supplier. Although to date the Supreme Court has not passed on tying arrangements between joint venturers abroad, the writer believes that their anticompetitive nature and effect are such that the courts will not evaluate them by the rule of reason. In 1969, the Supreme Court

18. U.S. v. Trenton Potteries Co., 273 U.S. 392, 397, 8 (1927).
19. Timken Roller Bearing Co. v. U.S., 341 U.S. 593 (1951).
20. Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, 340 U.S. 211, *rehearing denied*, 340 U.S. 939 (1951).
21. Timken Roller Bearing Co. v. U.S., 341 U.S. 593 (1951).
22. Northern Pac. Ry. v. U.S., 356 U.S. 1 (1958).

in *Fortner Enterprises v. U.S. Steel Corporation*,[23] reaffirmed its position as to the *per se* doctrine's applicability to tying arrangements between domestic joint ventures. However, this is the first time the Supreme Court has applied the *per se* doctrine type of inquiry to tying arrangements between a parent and its wholly owned subsidiary. This is also the first time that the Court has found no basis for treating credit (the tying product) differently than goods and services. As a condition of obtaining loans from the credit corporation for the purchase and development of certain land, the plaintiff therein was required to agree to purchase at unreasonably high prices prefabricated houses manufactured by the steel corporations. The Court came to the conclusion that ". . . tying arrangements generally serve no legitimate business purpose that cannot be achieved in some less restrictive way . . . [consequently] the presence of any appreciable restraint on competition provides a sufficient reason for invalidating the tie . . . ." The dissent pointed out that tying arrangements are fundamentally evil because they ". . . use the power over one product to attain power over another, or otherwise to distort freedom of trade and competition in the second product . . . ." Tying arrangements according to the Court are "unreasonable in and of themselves whenever (1) a not insubstantial amount of interstate commerce is affected and (2) a party has sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product."

Divison of Markets

Horizontal market divisions occur when the competitors divide either the territories or customers among themselves; they have long been held illegal *per se* even when the joint venture is located abroad.[24] When a manufacturer allots territories or customers to his suppliers, the division is referred to as being vertical. Until recently, however, division of territories or customers was not illegal *per se* because it was felt that a vertical division did not eliminate competition but was a necessary method of distribution. It was therefore tested by the rule of reason. Then, with the *U.S. v. Sealy*[25] and *U.S. v. Arnold Schwinn & Co.*[26] decisions, per-

23. Fortner Enterprises v. U.S. Steel Corp., 394 U.S. 495 (1969).
24. Timken Roller Bearing Co. v. U.S., 341 U.S. 593 (1951).
25. U.S. v. Sealy, Inc., 388 U.S. 350 (1967).
26. U.S. v. Arnold, Schwinn & Co., 388 U.S. 365 (1967).

missible methods of vertical agreements became prohibited and a new *per se* category was added to the list. *Sealy* cited the *Timken Roller Bearing Co.* case[27] as its foremost authority. Because the territorial restraints were part of the unlawful price-fixing and policing activities, the Court found that there was an aggregation of restraints which was illegal *per se*.

Miscellaneous *Per Se* Restraints

Group boycotts or concerted refusals to deal is another restraint regarded as *per se* illegal.[28] The anticompetitive wrong of group boycotts is that they coerce parties who are not members of the group to follow a prescribed course of action. Therefore, in projecting the treatment of domestic group boycotts to group boycotts concerning joint ventures abroad, it is suggested that here, also, they will be conclusively presumed illegal without elaborate inquiry as to precise harm caused or business excuse. In *Hazeltine Research v. Zenith Radio Corporation*,[29] the Court in 1969 applied the *per se* doctrine to patent misuse by joint ventures located abroad. The Canadian patent pool was formed by General Electric and Westinghouse subsidiaries located in Canada. The pool prevented certain products manufactured in the United States from being imported into Canada by refusing the granting of licenses. Hazeltine, which knew of these restrictions against imports by the pools, permitted its patents to be used so that it could share in the pool's income. The Court found that Hazeltine Research Institute and Hazeltine conspired with the Canadian pool to deny patent licenses and in so doing violated the Sherman Antitrust Act.

In some cases the Court declines to consider the *per se* legality of the individual restraints apart from the overall conspiracy.

27. Timken Roller Bearing Co. v. U.S., 341 US. 593 (1951).

28. Fashion Originators' Guild of America, Inc., v. Federal Trade Commission, 312 U.S. 457, *rehearing denied*, 312 U.S. 668 (1941).

29. Zenith Radio Corporation v. Hazeltine Research, 395 U.S. 100 (1969). The facts in this case also presented a multiplicity of issues which are not related to *per se* or joint ventures. Zenith refused to pay royalties of large sums based on their entire production of receivers when in their estimation a Hazeltine patent was not employed in any of its products. Zenith also refused to purchase a package license in the pool for manufacturing in Canada. Therefore, the patent pool would threaten dealers that Zenith was attempting to sell with litigation on any infringement which might happen to fall within any of the 5000 patents listed within the pool. The dealers were thus coerced to refrain from handling American products.

Thus, in the case of *Perma Life Mufflers v. International Parts*,[30] agreements providing for an aggregation of trade restraints were prohibited by the Sherman Antitrust Act. Further, the Court cited *Timken* by saying that agreements between legally separate persons and companies suppressing competition among themselves cannot be justified by characterizing the project a joint venture.

The discussion in this article on *per se* illegal agreements is by no means exhaustive, but most recent decisions on joint ventures have been decided on a *per se* basis, applying the rule of reason only when the restraint is not of a *per se* category and does have redeemable virtue.

ARGUMENTS AGAINST TREATING RESTRAINTS BY JOINT VENTURERS ABROAD ILLEGAL PER SE

Additional Obstacles for Joint Venturers Overseas

Because joint ventures in foreign countries have numerous barriers which domestic ventures do not, many proponents feel that the *per se* doctrine should not be used at any time whenever a joint venture abroad is in violation of the Sherman Antitrust Act. Rather than conclusively presuming certain conduct *per se* unreasonable, these advocates would allow elaborate inquiry as to the precise harm that the restraint has caused and the business excuse. For example, some countries will not allow investment in their country unless jointly with local citizens.[31] Certain enterprises, such as communication facilities, transportation industries, public utilities, and extractive enterprises affecting natural resources are regarded by almost all countries as affecting the public interest. Accordingly, because they do not wish such enterprises to fall under foreign control, certain prohibitions are placed upon foreign participation in the ownership or management. To further protect these joint ventures, the local government often requires price and territorial agreements.

Other considerations affecting foreign commerce which are strikingly different than those affecting domestic commerce are

30. Perma Life Mufflers v. International Parts, 392 U.S. 134 (1968).

31. *See, e.g.*, Foreign Investment Laws and Regulations of the Countries of Asia and the Far East (United Nations, ST/ ECAFE/ 1, 1951); Obstacles to Direct Foreign Investment, Report Prepared for the Presidents' Committee for Financing Foreign Trade 1920 (National Industrial Conference Board, 1951).

import licenses[32] and quotas, currency restrictions, high tariffs, tax problems, governmental subsidies to a native industry, fear of expropriation and consumer favoritism to local goods. In addition to these legal, political and economic deterrents, the American company may not have the financial ability, the expertise, or the patent availability to proceed alone. Thus some joint activities may encourage rather than restrain trade by providing means for sharing risks of business operations located abroad. Is it any wonder that many proponents feel that finding an identifiable restraint is not sufficient when evaluating joint ventures overseas? Preferably, inquiry is needed as to whether competition is being promoted, suppressed or destroyed by the restraint.

Foreign Policy Objectives

Some foreign policy objectives require prohibiting the use of the *per se* doctrine if the promotion of export trade is determined to be an important part of our antitrust policy. Our written policy as expressed in the Webb-Pomerene Act[33] provides that "nothing in the Sherman Act shall be construed as declaring an association illegal unless such association restrains trade within the U.S., or restraints the export of a domestic competitor." This would seem to prohibit the *per se* type of inquiry, which does not require proof of actual interference of trade.

The *Attorney General's Committee Report*[34] might also be considered as authority that defendants should be permitted affirmative defenses to show that the conduct abroad constituted no undue restraint on our foreign commerce under certain conditions. For example, when the laws of another country require uniform,

32. *See, e.g.*, World Trade Information Service Economic Reports, Law on the Investment of Foreign Capital in Saudi Arabia at 1-8, Part 1, No. 57-75 (1957). Article 4 provides that non-Saudis may participate in the business listed in the regulations only after obtaining a license which is renewable annually. Article 6 states that applications will not be accepted unless at least one of the partners is a Saudi and the share of the Saudi partner or partners is not less than 51% of the total capital of the company. Article 7 indicates that Saudi personnel must consist of 75% of the total employees in the firm and they shall not receive less than 45% of the total salaries of the non-Saudis. The firm must train Saudi subjects in its work, particularly in the technical work, so that one who has received the training can replace one of the non-Saudi personnel. Article 10 provides that the amount of profits leaving the country annually shall not exceed the equivalent of 20% of the company capital.

33. 40 STAT. 516 (1918); 15 U.S.C. § 62 (1958).

34. 1955 Att'y Gen. Committee Report at 90-91.

non-competitive prices by companies doing business there, then compliance with that law should constitute a defense in this country to an antitrust charge of price fixing solely in that country. On the other hand, the *Attorney General's Committee Report* would limit the application of the rule of reason by not allowing it to justify concerted action among competitors to fix market prices, control production, divide markets, or allocate customers merely because that is a more profitable way of doing business. Something more substantial in the way of an affirmative defense is required if the rule of reason approach is to be employed. The degree of restraint should always be a critical factor as to whether an inquiry should be made into other factors which may be undue or unreasonable.

Moreover, the question arises as to whether we should be concerned about anticompetitive influences on our export commerce.[35] Should the U.S. instead concentrate on restraints on imports which deny its consumers the benefit of competitive selection? It has been argued that joint ventures manufacturing abroad compete with and therefore reduce United States exports;[36] consequently, they should be held invalid *per se*.

One writer advocates that *per se* illegality application of our antitrust policy offends other nations.[37] The contention is made that the application of U.S. antitrust law to arrangements made in other countries constitutes intrusion into the internal affairs of that country. In addition, that particular foreign country is then deprived of the benefits of important enterprises. The arrangement therefore should be deemed valid or not by the place of business location and not the laws of the United States.

35. The exact effect on United States prices for U.S. consumers is not directly affected by restraints caused by competitor agreements concerning exports. Information on the indirect effect is being gathered by certain agencies but until the data is complete, the courts are guided only by speculation.

36. U.S. v. Minnesota Mining & Mfg. Co., 92 F. Supp. 947, 961-2 (D. Mass. 1950). A correlation may be drawn although this may not be the only component between the tremendous production and expansion by the American joint ventures and branches located abroad and the loss in the relative competitive position of the United States exports in world trade. In 1955 through 1968 the United States export share in the world market dropped from 28% to 20%. While the manufactured goods from eleven major countries more than tripled, United States exports in the same types of goods just a little more than doubled. *Hearings Before the Subcomm. on Foreign Economic Policy of the Joint Economic Committee*, 91st Cong., 1st Sess. 67 (1968).

37. G. Haight, *International Law and Extraterritorial Application of the Antitrust Laws*, 63 YALE L.J. 639 (1954).

Thus, it is a common occurrence for an American who seeks to enter into a joint business arrangement abroad to find himself under greater restraint than his non-American competitor. According to one writer these additional restrictions lead to undesirable consequences.[38] Therefore, it may be argued that conduct should not be branded as illegal *per se*. Defendants should never be foreclosed from presenting evidence of economic or other justification. The *per se* barrier to affirmative defenses increases the probabilities of frustrating legitimate expansion of the overseas commerce of American companies faced with restrictions of foreign governments.

Flexibility and Fairness

The rule of reason permits the courts to decide whether the conduct in question is unreasonably anticompetitive in nature. The inquiry appraises the characteristics of the business and the condition before and after the restraints were imposed. The position of the company in the market place and the competitive relationship between the joint venturers are also examined.[39] Further, the rule of reason explores the character and purpose of the restraints.

The advantage of the rule of reason is based on its ability to be sufficiently flexible and fair by taking into account all possibilities and complications that might arise. By analyzing all pertinent economic and factual data, a decision regarding the effects of the joint venture can be made. This type of inquiry always

38. S. Linowitz, *Antitrust Laws: A Damper on American Foreign Trade?* 44 A.B.A.J. 853, 4 (1958); there is "(1) discouragement of U.S. investments overseas; (2) loss of income to the United States; (3) loss of association with overseas industry; (4) compulsion of overseas associates to make arrangements with other companies in other countries; (5) loss of great opportunity to promote international good will and friendship; (6) risk that the U.S. will become isolated." Author's note: Even though this argument is set out by those against the U.S. foreign policy, it seems weak and without merit when viewed in light of current expansion. *Id.*

39. U.S. v. Columbia Steel Co., 334 U.S. 495, 527 (1948). An in depth analysis of the rule of reason is beyond the scope of this paper. For further information on this subject, *see*, Federal Antitrust Laws, Lectures on Federal Antitrust Laws at the University of Michigan Law School (1953): B. Smith, The Rule of Reason Should Be Modernized 231; W. Berge, Proposals for Expanded Application of the Rule of Reason 243; J. Burns, Comments on Proposal for Expanded Application of the Rule of Reason 255. *See also* L. Loevinger, *The Rule of Reason in Antitrust Law*, 50 VA. L. REV. 23 (1964); and P. Marcus, *Monopoly Profits, Economic Impossibility, and Unfairness As Antitrust Test*, 14 VAND. L. REV. 581 (1961).

seeks to determine whether the agreement promotes more competition than it restrains. On the other hand, because this involves volumes of testimony, time and money, though constituting a fair method of attacking an antitrust violation, it is often impractical.[40]

Imperial Chemical Industries v. U.S. illustrates the application of the rule of reason.[41] In speaking of the Sherman Antitrust Act in relation to joint ventures, the Court states that joint ventures are not unlawful *per se* but become unlawful only if the purpose or effect of such ventures is to restrain trade or to monopolize.[42] However, the Court after examination of voluminous evidence found conspiracy to divide territories and to eliminate competition between themselves and with third parties in the trade and commerce of chemical products, sporting arms, and ammunition.

THE QUESTION PER SE ILLEGALITY OF JOINT VENTURES ABROAD

To date, the Supreme Court has had no occasion to pass on the validity of joint ventures involving lawful motives and limited restraints not harmful to the public interest. However, in *U.S. v. Minnesota Mining*, Judge Wyzanski of the U.S. District Court

40. One of the reasons for the necessity of *per se* rules is that antitrust cases on the average have taken five and a half years to complete. M. MASSELL, COMPETITION AND MONOPOLY 130 (1964).

41. Imperial Chemical Industries, 105 F. Supp. 215 (S.D.N.Y. 1952). The four corporate defendants were Imperial Chemical Industries (ICI) organized under the laws of the United Kingdom, Imperial Chemical Industries, Ltd. (New York), wholly owned by ICI, E.I. duPont de Nemours and Company, and Remington Arms Company. The defendants eliminated competition by establishing exclusive territories by contract, and by setting up jointly owned companies in the remaining territories which were non-exclusive by agreement. The rule of reason analysis was applied by the Court on the issue of establishing territories through arrangements and understandings. The defendants did not deny that these agreements involved division of territories but claimed that exclusive license territories were necessary to prevent exploitation of their own patents by their competitors. The Court, therefore, inquired into whether the major purpose of the agreements were entered into with a view to divide territories or to secure the benefit of technology. It concluded that the benefits of technology could be achieved without territorial allocation; thus the territorial division was the real purpose of the arrangement. Next, the Court examined the purpose of the joint ventures which were organized in the remaining non-exclusive territories, and concluded that their major function was to regulate competition. The Court would not allow violations of the act which affect American commerce by restraining American foreign trade to be justified by labeling such a project a joint venture.

42. *Id.*

strongly proclaimed that joint ventures by American companies located abroad are illegal *per se*.[43] Judge Wyzanski said:

> It may very well be that even though there is an economic or political barrier which entirely precludes American exports to a foreign country, a combination of dominant American manufacturers to establish joint factories for the sole purpose of serving the internal commerce of that country is a *per se* violation of this other clause of the Sherman Act. The intimate association of the principal American producers in day-to-day manufacturing operations, their exchange of patent licenses and industrial know-how, and their common experience in marketing and fixing prices may inevitably reduce their zeal for competition *inter sese* in the American market. . . . It may . . . be subject to condemnation regardless of the manufacturers' conduct in the foreign countries. In this aspect the reasonableness of the foreign conduct would, like the reasonableness of domestic price-fixing be irrelevant . . . . (cases cited) Joint foreign factories like joint domestic price-fixing would be invalid *per se* because they eliminate or restrain competition in the American domestic market. That suppression of domestic competition is in each case the fundamental evil, and the good or evil nature of the immediate manifestations of the producers' joint action is a superficial consideration.[44]

In other words, according to the dictum in this opinion, the joint formation of an integrated subsidiary which implies that the parents will not compete with each other in the sales area of their jointly owned subsidiary is not the major wrong involved. Even the parents dividing the territory among themselves is of small consideration. The harm or damage results from the joining and co-operating abroad toward common goals. Their cooperation abroad would sooner or later extend and affect the competitiveness between the companies within the American market. Encourag-

43. U.S. v. Minnesota Mining & Mfg. Co., 92 F. Supp. 947 (D. Mass. 1950). The abrasive manufacturers, Minnesota Mining and Mfg., Behr-Manning Corporation, Carborundum and Armour, who exported over 80% of the coated abrasives from the U.S., formed an export company and organized foreign manufacturing subsidiaries. Thereafter, each domestic organization agreed to export only through the export company. Thus, the foreign subsidiaries owned by those a party to the agreement were then able to acquire the business from those same foreign markets. U.S. exports decreased to only a few thousand dollars annually so that effect of this program was to cut off over 80% of the U.S. export trade in a major area.

44. *Id.* at 963.

ing and protecting competition in the United States is crucial. Consequently, joint ventures should be treated as conclusively unreasonable.

In addition, according to a strict interpretation of one decision,[45] certain justices of the Supreme Court would declare joint ventures illegal *per se*. Justices Black, Minton and Douglas in *Timken* stated that "if . . . [pertaining to the joint venture relationship] not severed, the intercompany relationships will provide in the future as they have in the past the temptations and means to engage in the prohibited conduct. These considerations alone should be enough to support the divestiture order . . . obviously, the most effective way to suppress further Sherman Antitrust violations is to end the intercorporate relationship which has been the core of the conspiracy."[46] On the other hand, this decision is also the most authoritative precedent for the legality of joint-ownership of foreign companies by competitors. The reasoning for this statement follows from the fact that the majority of the Court denied the remedy of divestiture and allowed two of them to continue owning the third, while striking down the three companies' agreement not to compete. The Court further held that (1) the joint venture of the three Timkens might not by agreement allocate trade territories or fix prices on products of one sold in the territory of the others, and (2) the purpose and effect of the Timken combination was to eliminate competition and therefore unlawful.[47]

The *Attorney General's Committee Report* states that *Timken* when read literally led many to believe that the Supreme Court was actually tending in the direction of holding as an unlawful conspiracy, action between a parent and wholly owned foreign subsidiary which would be lawful if engaged in by independent concerns.[48] But the *Timken* opinion when read further stated:

> . . . [W]e find . . . [no] support in reason or authority for the proposition that agreements between legally separate persons

45. Timken Roller Bearing Co. v. U.S., 341 U.S. 593 (1951). Timken Roller Bearing Company, an Ohio corporation which owned 30% of British Timken, joined with British Timken and formed French Timken. The Court said that these three companies, together, regulated the manufacture and sale of anti-friction bearings. American Timken sold 70% to 80% of the domestic tapered bearings in the U.S. market and 25% of the market in all anti-friction bearings. British and French Timken had similar sales percentage domination of their local markets.

46. *Id.* at 600.

47. Timken Roller Bearing Co. v. U.S., 341 U.S. 593 (1951).

48. 1955 Att'y Gen. Committee Report at 88.

> and companies to suppress competition among themselves and others can be justified by labeling the project a joint venture.[49]

In other words, joint ventures are to be treated in *per se* application in the same manner as two corporations of a non-joint venture nature. This is not to be confused with the circumstances which make the joint venture association more suspect as indulging in those practices which violate the Sherman Antitrust Act.

Further, the fear that joint ventures are in themselves *per se* illegal is unfounded, because the Supreme Court to date has found a violation of the antitrust laws only when the joint venture engages in a restraint of the type which has no redeemable virtue and the companies are dominant in the industry. Moreover, in both domestic and foreign joint ventures there is little prosecution of a joint venture whose share in the market is too small to make any real impact upon the competitive conditions within the industry.[50] This is not advocating that the rule of reason analysis is being applied when joint ventures are small rather than large.[51] However, the joint venture is more likely to restrain competition when dominant in the industry and is therefore more subject to prosecution.[52]

Thus, it may be concluded that although mere joint ownership is not of itself conclusively illegal, the joint venture may not engage in restraints in the *per* se classification. The joint venture must avoid agreements between the parents with respect to prices and territories. The subsidiary must be operated and managed independently and the management decisions made in its own best interests. The sales and purchases between it and the

49. Timken Roller Bearing Co. v. U.S., 341 U.S. 593 (1951).

50. *See* note 4, *supra* at 406.

51. A small joint venture which has adverse affect regionally may be as suspect of indulging in antitrust practices as giant corporations on a national scale.

52. *See* note 4, *supra* at 405. Dixon analyzed one anti-competitive reason that several corporations establish a joint venture, and pointed out the ultimate evils resulting therefrom. Large corporations, although not having a monopoly on future opportunities, secure a monopoly when all interested parties move together in one single venture. For example, a company may desire to join another competitor currently supplying a particular market. The admission of a new partner into the venture insures the elimination of an irritating competitor. The price consequently may become high and inflexible, "new technologies for production may be abandoned. . . . [D]ecisions relating to prices, territories, consumer discounts, and customer services may become a matter of consultation between the owners." *Id.*

parents must be on an arm's length basis. In other words, the actual practice and operation of the joint venture must be entirely separate from that of the parents. The joint venturer, by having a separate staff of employees and separate officers and directors, can avoid a jointness which is within the area of *per se* violations. It should be an investment for the parents rather than an enterprise under their management and direction. The antitrust concern arises when the parent, by virtue of its ownership and participation in the venture, effects restraints which are violative of the Sherman Antitrust Act.

LEGISLATIVE ATTEMPTS TO PROVIDE ANSWERS

Numerous writers have urged that joint ventures abroad be granted a legislative exemption from the antitrust laws so long as domestic commerce is unaffected.[53] Professor Brewster suggests presumptive validity for a joint venture if (a) "the parties were not in fact actual or potential competitors," or (b) "the size or risk of the venture make it unreasonable to be done by either party alone" or (c) "the host government required the pooling of all prospective investors."[54] Another suggestion is to grant the President the power to exempt specific foreign investment abroad if it will further our national security or foreign policy.[55] Both of these proposals would require an amendment of the antitrust laws.

It is doubtful that Congress will pass legislation for complete exemption for joint ventures from the antitrust laws. More probably, the approach will be to set out certain types of restrictions which should be tested by the rule of reason. It can be expected that some will appear during the 93rd Congress because many bills in the previous sessions have attempted to exempt certain industries. For example, the Multer Bill[56] proposed an amendment to the Federal Trade Commission Act to permit exclusive territories. This measure perished in the House Committee on Interstate and Foreign Commerce.

To date, most bills on legislative exemptions concerning joint ventures have been too extensive, thereby allowing defenses in anticompetitive circumstances which have no valid justification.

53. *Hearings Before the Subcomm. on Antitrust and Monopoly of the Comm. on the Judiciary, United States Senate*, 88th Cong., 2nd Sess. 229 (1964).
54. K. BREWSTER, JR., note 2, *supra* at 453.
55. *Id.* at 395.
56. H.R. 974, 90th Cong., 1st Sess. (1967).

Conversely, some exemptions were too narrow and privileged certain groups. Therefore, even those who support specific exemptions of certain restraints from the *per se* category have been against their passage. Consequently, legislators have accomplished few solutions to the problem.

THE ATTITUDE OF THE EXECUTIVE BRANCH TOWARD PER SE

The *Report of the White House Task Force on Antitrust Policy* was released in early 1969. The Committee recommended in regards to certain anticompetitive behaviors such as price fixing and market division that the present laws are generally adequate.[57] Their effectiveness depends upon sufficient enforcement of laws now in existence.

> Under . . . [the rule of reason][58] approach, general standards expressed in terms of broad policy goals require the trier of fact to make *ad hoc* judgments as to the relevant scope of inquiry in any case. The general effect of such an approach is to require consideration of a wide range of complex and difficult issues, some of them of marginal significance. Such issues may include economic issues which are beyond our present capacity to gather and evaluate economic information; they may include issues such as motive and intent, which are both elusive and of marginal relevance to the central issue of market structure; and they may include an indirect measurement of competitive behavior or structure through an evaluation of performance, an approach requiring judgments more appropriate to regulation than to antitrust policy. Such an approach generally expands the scope and complexity of lawsuits and makes decisions less useful as precedents.
>
> The . . . [*per se* doctrine][59] rules . . . are based on easily ascertainable criteria and avoid individualized consideration of complex factors which would be unlikely to af-

57. Task Force Report of the White House on Antitrust Policy (Neal Report), Full Text Reprint in ANTITRUST LAW AND ECONOMICS REVIEW at 11, Vol. 2 No. 2 Winter 1969.

58. Although the wording in the report does not indicate that the rule of reason theory is the one in discussion, this writer feels that sufficient clarity presents itself to make this insert.

59. Although direct reference is not made to the *per se* doctrine, the unnamed approach referred to in this report must through inference denote *per se* or a relatively unknown approach with similar effects.

> fect the outcome. This approach simplifies litigation. More importantly, it provides businessmen and law enforcement officials with a better idea of what will be lawful and what will be unlawful. . . .
>
> Therefore, we believe that carefully drawn rules yield results superior to highly general admonitions to weigh all relevant factors. . . . [The report then proposes rules which] are drafted to reflect general economic experience and theory, and they make allowance for factors which may be significant in individual cases. But they do not call for proof of an exactness beyond the present limits of economic knowledge. Of necessity, they are predicated not on rigorously proven theorems, but on a consensus of informed judgment which admittedly fragmentary economic knowledge tends to confirm.[60]

IMMEDIATE FUTURE OF PER SE AND JOINT VENTURES OVERSEAS

It does not appear that our present antitrust policy will change until there is more availability of economic data. The White House Task Force recommends the formation of a standing committee to develop techniques and procedures for collection of economic data by the Census Bureau and other government organizations.[61]

Moreover, while there is much that could be done under the antitrust laws to prevent new joint ventures abroad and prosecute existing ones, they have not yet been interfered with to any great extent for antitrust violations. Thus, in the present attitude of antitrust enforcement, it seems probable that the joint venture located overseas is subject to antitrust enforcement only (1) if the joint venture is brazenly obvious with readily identifiable restraints, and (2) if the joint venture actually affects trade within the United States or affects the exports of domestic competitors. And assuming that this policy continues, inquiries in the immediate future are likely to be of *per se* procedure rather than of the rule of reason.

In the author's opinion, many of the courts in silence have weighed the pertinent facts in the style of the rule of reason while applying *per se* concepts. Joint ventures abroad which are re-

60. *Id.* at 23, 24.
61. *Id.* at 14, 19, 20.

quired by the host country to participate with their local citizens, or joint ventures which are using restraints that possibly regulate or promote competition, are presently having limited antitrust difficulties and are being analyzed by rule of reason. The courts have rendered mostly *per se* decisions to date because they could not by any standard or measure, such as the rule of reason, bring the agreements of the joint venture into harmony with the antitrust law. Joint venturers can, by proper planning and by operating independent of the creators, minimize antitrust involvement. Only when the parents take too active a part in the venture's operation will the legality fall under a court's surveillance.

Keith Kellison