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by Thomas E. Johnson*

I. Introduction

Conscientious businessmen and attorneys have become familiar with the U.S. antitrust laws as they are applied to domestic transactions. Whether by formal education or in the "school of hard knocks" they have learned the pervasive reach of the antitrust laws and the substantial penalties attached thereto.[1]

When U.S. businesses become involved in international trade, however, certain ambiguities arise in the application of the U.S. antitrust laws which may leave the businessmen with a sense of uncertainty. Often, the most helpful indicia for determining the application of the U.S. antitrust laws to an international transaction is to review the domestic precedents as far as they are analagous. Against this more familiar backdrop, it is easier to understand whether any additional latitude exists for international transactions or whether they will be treated in the same way as domestic transactions.

Prior to analyzing specific laws and conduct, however, some general remarks will be helpful.

A. Effect on United States Foreign Commerce

Under section 1 of the Sherman Act,[2] "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). Substantially identical definitions appear in section 2 of the Sherman Act[3] and section 1 of the Clayton Act[4] in

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[1] *See, e.g.*, the "parade of the horribles" in J. GARRETT (PLI), ANTITRUST COMPLIANCE: A LEGAL AND BUSINESS GUIDE, ch. 1 (1978).

[2] 15 U.S.C. § 1 (1976).

[3] *Id.* § 2.

[4] *Id.* § 12.

regard to "foreign commerce."

There have been many attempts to clarify exactly what type of effect on U.S. foreign commerce is required before subject matter jurisdiction exists under the U.S. antitrust laws. The Restatement (Second) of the Foreign Relations Law of the United States, section 18,[5] attempts to codify one interpretation. This section requires that the effect be "substantial" and "foreseeable." The United States Department of Justice, in their *Antitrust Guide for International Operations*,[6] the latest comprehensive statement of their interpretation of the application of the U.S. antitrust laws to foreign commerce, purportedly adopts these tests. "When foreign transactions have a substantial and foreseeable effect on U.S. commerce, they are subject to U.S. law regardless of where they take place."[7] The *Guide* does indicate that application of the laws "should avoid unnecessary interference with the sovereign interests of foreign nations."[8]

In reality, however, the trend of recent years has been increasing application of the antitrust laws to foreign transactions. In *Pacific Seafarers, Inc. v. Far East Line, Inc.*,[9] the antitrust laws were applied to the transportation of goods by oceangoing vessels between two foreign ports. The very recent *OPEC* case,[10] however, where subject matter jurisdiction was not found, may indicate that the pendulum has begun to return. The dissatisfaction of foreign governments with this extension of the U.S. antitrust laws has been increasingly expressed. Recent rejection by the government of Great Britain of the extraterritorial reach of the U.S. laws is instructive.[11]

Nevertheless, in many instances the plaintiff will be able to establish a sufficient effect on United States foreign commerce to apply the laws.

B. Foreign Commerce Antitrust Deviations

There are two general areas, at least, in which the application of the United States antitrust laws to foreign commerce transactions deviate from domestic principles. The first is the so-called Webb-Pomerene[12] exemption, and the second is the parent-subsidiary relationship.

1. Webb-Pomerene Associations. Under the Webb-Pomerene Act, U.S. export associations are exempt from the application of the U.S. an-

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[5] RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 18 (1965).

[6] U.S. DEP'T OF JUSTICE, ANTITRUST GUIDE FOR INTERNATIONAL OPERATIONS (Jan. 26, 1977) [hereinafter cited as ANTITRUST GUIDE].

[7] *Id.* at 6.

[8] *Id.*

[9] 404 F.2d 804 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1093 (1969).

[10] International Ass'n of Machinists and Aerospace Workers v. OPEC, 5 TRADE REG. REP. (CCH) ¶ 62, 868 (C.D. Cal. 1979).

[11] *American Antitrust Law—Britain Says Go Home*, THE ECONOMIST, Sept. 15, 1979, at 79; *Antitrust: U.K. Government Will Sponsor Bill to Ban Enforcement of U.S. Law in Britain*, DAILY REPORT FOR EXECUTIVES (BNA), Oct. 15, 1979, at A-6.

[12] Webb-Pomerene Export Trade Act, 15 U.S.C. §§ 61-65 (1976).

titrust laws under certain conditions. Theoretically, this Act would permit the combination of U.S. manufacturers or producers to sell *en bloc* to foreign markets. The price of the goods may be fixed and production limited.[13]

In actuality, however, the Act has provided little in the way of exemption. First, the association is exempt if, and only if, it does not (1) artificially or intentionally restrain U.S. domestic trade, (2) affect U.S. domestic prices, or (3) restrain the export trade of any U.S. competitor of the association.[14]

In the litigated cases relating to such associations, the courts were always able to find some adverse effect on a U.S. competitor of the association.[15] Such abuses as exchanging price information with foreign competitors, allocating the U.S. market, restricting U.S. imports, or acting on behalf of non-members of the association were found to exceed the exemption granted by the Act. An important interpretation made by the Federal Trade Commission, the agency charged with administration of the Act, states that "[t]he Act was designed primarily to allow American exporters to compete more effectively with foreign combinations and cartels, not to join them."[16] This prohibition of effect on non-member competitors of the association substantially inhibits the exemption.

The second problem with Webb-Pomerene associations is that inevitably one of the members determines that it can be more successful on its own, and the association breaks down. As a result, as of this date it is estimated that less than two percent of the total U.S. export trade is accomplished through Webb-Pomerene associations.[17]

The Department of Justice, in its *Guide*,[18] apparently recognizes the Webb-Pomerene exemption; however, it emphasizes that an association must be limited to domestic firms—no agreements of any sort with foreign competitors are countenanced. Secondly, the Act applies only to goods, wares or merchandise, and, therefore, does not exempt service and licensing transactions. In sum, restrictive interpretation has substantially emasculated this exemption.[19]

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[13] *See generally*, United States v. Minnesota Mining & Mfg. Co., 92 F. Supp. 947 (D. Mass. 1950).

[14] 15 U.S.C. § 62 (1976); *accord*, ANTITRUST GUIDE, *supra* note 6, at 4.

[15] United States v. Minnesota Mining & Mfg. Co., 92 F. Supp. 947 (D. Mass. 1950); United States v. Concentrated Phosphate Export Ass'n, 393 U.S. 199 (1968), *on remand*, [1969] Trade Cases (CCH) ¶ 72, 719 (S.D.N.Y. 1969); United States v. United States Alkali Export Ass'n, 86 F. Supp. 59 (S.D.N.Y. 1949).

[16] FTC, EXPORT TRADE ASSOCIATION BULLETIN, No. 1-55, July 15, 1955; *quoted in* [1979] TRADE REG. REP. (CCH) ¶ 1314.16.

[17] Davidow, *U.S. Antitrust and Doing Business Abroad: Recent Trends and Developments*, 5 N.C.J. INT'L L. & COM. REG. at 25.

[18] ANTITRUST GUIDE, *supra* note 6, at 18.

[19] Compare the restrictive United States interpretation of the export exemption with the Export and Import Trading Law of Japan, Law No. 299, Aug. 5, 1952 (as amended), and the associations thereunder. When an export association is formed pursuant to articles 5 and 11, the

2. Parent-Subsidiary Relationships. On several occasions the United States courts have held that the antitrust laws are applicable to conspiracies between related domestic corporate entities. In *United States v. Yellow Cab Company*,[20] the Supreme Court stated:

> The test of illegality under the Act is the presence or absence of an unreasonable restraint on interstate commerce. Such a restraint may result as readily from a conspiracy among those who are affiliated or integrated under common ownership as from a conspiracy among those who are otherwise independent . . . . The corporate interrelationships of the conspirators, in other words, are not determinative of the applicability of the Sherman Act.[21]

Furthermore, in *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons*,[22] the Supreme Court stated that common ownership does not liberate corporations from the impact of the antitrust laws.

Similarly, in the case *Timken Roller Bearing Company v. United States*[23] the Court reaffirmed this proposition with respect to the international sphere. The Court further stated:

> It may seem strange to have a conspiracy for the division of territory for marketing between one corporation and another in which it has a large or even major interest, but any other conclusion would open wide the doors for violation of the Sherman Act at home and in foreign fields.[24]

Despite this apparently clear statement of the courts, the Department of Justice has taken the official position that "a parent corporation may allocate territories or set prices for the subsidiaries that it fully controls."[25] Full control is considered to be control of a majority of the voting stock of the subsidiary.

Thus, at least as far as prosecution by the Department of Justice is concerned, a parent and subsidiary may feel reasonably safe in such conduct. This will not necessarily immunize them, however, from attacks by private antitrust plaintiffs. This distinction leads us to the area of antitrust enforcement.

C. Antitrust Enforcement

A review of the statistics of the U.S. courts indicates that between 1973 and 1977 the Department of Justice brought approximately fifty to sixty suits per year to enforce the antitrust laws.[26] These suits, of course, generally relate to important issues and involve substantial companies.

Ministry of International Trade and Industry may require that all nonmembers also adhere to the export agreements reached by the association members. Art. 28.

Bills "to promote and encourage the formation and utilization of export trade associations" are presently pending before Congress. S. 864, 1499, H.R. 5061, CONGRESSIONAL INDEX (CCH), 96th Cong., ¶¶ 28,216, 28,411 (1979-80).

[20] 332 U.S. 218 (1947).

[21] *Id.* at 227.

[22] 340 U.S. 211, 215 (1951).

[23] 341 U.S. 593, 598 (1951).

[24] *Id.* at 602.

[25] ANTITRUST GUIDE, *supra* note 6, Case A at 12.

[26] ABA ANTITRUST SECTION, ANTITRUST LAW DEVELOPMENTS 99 (2d Supp. 1979).

As a result, their influence in formulating antitrust precedent is much greater than the mere number of suits.

On the other hand, between 1973 and 1977 approximately 1100 to 1300 private antitrust suits per year were brought in the federal courts, or about twenty times the number of government suits.[27] This, of course, emphasizes that the ordinary business may have a great deal more to fear from private lawsuits by its competitors than by the Department of Justice. As a result, U.S. businesses engaged in international transactions must be most sensitive to the effect of their conduct and agreements on the business opportunities of their U.S. competitors.

Other relatively recent developments add an additional potential plaintiff to the scene. In *Pfizer, Inc. v. Government of India*,[28] the Supreme Court held that foreign governments have standing under section 4 of the Clayton Act to sue U.S. businesses for treble damages for violations of the U.S. antitrust laws. Therefore, if a U.S. business is involved in exporting or selling to a foreign government, it should be aware that the foreign government may be a potential plaintiff. In the related case of *Pfizer, Inc. v. Lord*,[29] the Supreme Court denied the right of a foreign government to bring a *parens patriae* suit on behalf of its citizens for violations of the U.S. antitrust laws. However, the *ratio decidendi* of that decision was that American state governments could not bring such suits, and, therefore, it was illogical to extend that right to foreign governments. Subsequent to that decision, however, the Antitrust Improvements Act of 1976[30] did extend the right of bringing *parens patriae* suits to state governments. Arguably, Congress' omission of extension of that right to foreign governments in the Act was an acceptance of the *Pfizer, Inc. v. Lord* holding. However, this issue may be raised again now that the reasoning of the *Lord* case is no longer applicable.

II. Price Agreements, Including Resale Price Maintenance

The application of the United States antitrust laws in regard to price agreements in the area of foreign commerce transactions is best analyzed in comparison to the domestic precedents.

A. Domestically, Price Fixing Is Illegal Per Se

Domestically, the antitrust laws have been consistently interpreted to declare both horizontal and vertical price agreements to be illegal *per se*.

1. Horizontal Agreements. Agreements between competitors at

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[27] *Id.*

[28] 434 U.S. 308 (1978).

[29] 522 F.2d 612 (8th Cir. 1975), *cert. denied*, 424 U.S. 950 (1976).

[30] Hart-Scott-Rodino Antitrust Improvements Act of 1976, § 301, 15 U.S.C. § 15(c) (1976).

the same level of trade affecting prices, whether the purpose or effect is to raise, depress, fix, peg, or stabilize prices are *per se* illegal. This is so whether or not the participants possess market control.[31]

The *per se* illegality of such activity also encompasses forms of indirect price fixing, such as the exchange of information or the control of production.[32] Recently, the Supreme Court has clarified that the exchange of price information, even for the purpose of verifying the quotations of competitors in order to avail oneself of the meeting competition defense of section 2(b) of the Robinson-Patman Act, is an indirect form of price fixing and is prohibited.[33]

2. Vertical Agreements. Since the repeal of the Fair Trade Laws by the Consumer Goods Pricing Act of 1975,[34] the Fair Trade exemption inaugurated in 1937, permitting the fixing of minimum resale prices on trademarked goods in states permitting such agreements, has been abolished. This repeal reinstated the prior law that agreements between suppliers and customers as to the resale price of the customer were *per se* violations of the antitrust laws.[35]

It is important here to distinguish the limited holding of *Continental TV, Inc. v. GTE Sylvania, Inc.*[36] It is well understood that this case involved vertical restrictions. The Court there stated that it was "concerned only with non-price vertical restrictions. The *per se* illegality of price restrictions has been established firmly for many years and involves significantly different questions of analysis and policy."[37]

Thus, the Court not only recognized and affirmed the *per se* illegality of vertical price restrictions, but specifically indicated that the holding of *Continental TV* was limited to non-price vertical restrictions. A subsequent case, *General Beverage Sales Co. v. East Side Winery*,[38] has followed this distinction, finding vertical price restrictions outside the limits of *Continental TV*.

While it has been held that suggested prices in and of themselves are not unlawful,[39] when the supplier goes further and refuses to deal, partic-

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[31] United States v. General Motors Corp., 384 U.S. 127 (1966); United States v. McKesson & Robbins, Inc., 351 U.S. 305 (1956); United States v. Socony Vacuum Oil Co., 310 U.S. 150 (1940).

[32] United States v. Container Corp. of America, 393 U.S. 333 (1969); Plymouth Dealers Ass'n v. United States, 279 F.2d 128 (9th Cir. 1960); United States v. Nationwide Trailer Rentals Sys., Inc., 156 F. Supp. 800 (D. Kan. 1957), *aff'd per curiam*, 355 U.S. 10 (1957); United States v. National Container Ass'n, [1940-43] Trade Cases (CCH) ¶ 56,028 (S.D.N.Y. 1940); United States v. Standard Oil of Cal., [1959] Trade Cases (CCH) ¶ 69,399 (N.D. Cal. 1959).

[33] United States v. United States Gypsum Co., 438 U.S. 422 (1978).

[34] Consumer Goods Pricing Act of 1975, Pub. L. No. 94-145, § 3, 89 Stat. 801 (amending 15 U.S.C. §§ 1, 45(a) (1970)).

[35] Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384 (1951); Dr. Miles Medical Co. v. John D. Park & Sons, 220 U.S. 373 (1911).

[36] 433 U.S. 36 (1977).

[37] *Id.* at 51 n.18.

[38] [1978-1] Trade Cases (CCH) ¶ 61,815 (7th Cir. 1978).

[39] Klein v. American Luggage Works, Inc., 323 F.2d 787 (3d Cir. 1963).

ularly by terminating existing dealers for refusal to adhere to suggested prices, an unlawful refusal to deal will result.[40]

B. In Foreign Commerce Price Fixing Will Almost Always Be Illegal

The illegality of price fixing in foreign commerce turns upon the effect upon United States commerce. Amost always, the requisite effect will exist and the activity will be illegal under U.S. antitrust laws.

1. Horizontal Agreements. There are three possible combinations of competitors and markets which will be affected by horizontal price fixing agreements. The first occurs when U.S. and foreign competitors agree to fix prices at which products will be sold in the United States market by the United States or foreign company. These types of agreements with foreign competitors, or foreign competitors by themselves, have been held to be *per se* illegal.[41] As in the case of domestic agreements, indirect attempts to fix prices by exchanges of information, control of production, or limitation of imports to the United States, have been held to be *per se* illegal.[42] This is also the position taken by the Department of Justice in their *Guide*.[43]

The second possible combination occurs when a U.S. company and another U.S. competitor agree to fix prices at which products will be sold in foreign markets. As stated above,[44] within the ambit of a Webb-Pomerene association such activity may be exempt. However, outside of the protections of such an association, this activity almost always will have an adverse effect on U.S. foreign commerce and result in *per se* illegality.[45] The deleterious effect is found upon the other U.S. competitors—not the foreign purchaser. In addition, even if no such effect existed on U.S. competitors and thus American antitrust laws were not applicable, such conduct would almost always be a violation of the foreign law, with liability resulting if jurisdiction was obtained over the U.S. businesses in the foreign courts.[46]

The third possible combination occurs when a U.S. company and a

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[40] United States v. Parke, Davis & Co., 362 U.S. 29 (1960).

[41] United States v. Timken Roller Bearing Co., 83 F. Supp. 284 (N.D. Ohio 1949), *modified and aff'd*, 341 U.S. 593 (1951); United States v. General Elec. Co., 80 F. Supp. 989 (S.D.N.Y. 1948).

[42] United States v. United States Alkali Export Ass'n, 86 F. Supp. 59 (S.D.N.Y. 1949); United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945); United States v. Watchmakers of Switzerland Information Center, Inc., [1963] Trade Cases (CCH) ¶ 70,600 (S.D.N.Y. 1962), *order modified*, [1965] Trade Cases (CCH) ¶ 71,352 (S.D.N.Y. 1965).

[43] ANTITRUST GUIDE, *supra* note 6, Case L at 53.

[44] *See* note 13 *supra*.

[45] United States v. International Ore & Fertilizer Corp., No. 64-34 (M.D. Fla. 1964) (case dismissed); United States v. International Ore & Fertilizer Corp., 63 Cr. No. 927 (S.D.N.Y. 1964) (plea of nolo contendere); United States v. International Minerals & Chemical Corp., 63 Cr. No. 928 (S.D.N.Y. 1963) (plea of nolo contendere). For discussion of these cases, *see* W. FUGATE, FOREIGN COMMERCE AND THE ANTITRUST LAWS 244 (2d ed. 1973).

[46] *See, e.g.*, Treaty of Rome, art. 85(1), 298 U.N.T.S. 1, 49 (1958). *See* cases cited in J. VON KALINOWSKI, WORLD LAW OF COMPETITION § 5.02 n.1 (1979).

foreign competitor agree to fix prices at which products will be sold in foreign markets. Again, if the requisite effect on U.S. commerce exists, this conduct will be *per se* illegal under the U.S. antitrust laws. In the *Timken*[47] case and the *Alkali*[48] case, the requisite adverse effect was found in the exclusion of exports by the American participant in the agreement, and the exclusion of other American competitors' products from foreign markets.

2. Vertical Agreements. Vertical price agreements between suppliers and customers in foreign commerce are best analyzed by distinguishing between import sales and export sales. In those situations where the foreign manufacturer or exporter is setting the resale price for the U.S. distributor (import transactions), such activity will be illegal *per se*.[49] It will be a violation of both the Sherman Act and probably the Wilson Tariff Act.[50]

On export transactions, where the U.S. manufacturer or exporter is setting the resale price of the foreign distributor, the illegality of such conduct depends upon the effect on U.S. commerce.[51] Such an agreement may restrict the selling opportunities of the U.S. manufacturer's or exporter's competitors in that market. Even if it does not, the American manufacturer or exporter must beware of liability under foreign law.[52]

III. Allocation of Markets, Including Exclusive Distributorships

The illegality of the allocation of markets depends upon the plane in domestic transactions and upon the effect on U.S. commerce and the market allocated in international transactions.

A. Domestic Allocation of Markets

Domestically, the allocation of markets may be illegal, depending upon whether the agreement is horizontal between competitors or vertical between the supplier and customer.

1. Horizontal Agreements Are Illegal Per Se. Domestic horizontal agreements between competitors at the same level of trade to allocate markets have been held to be illegal *per se*.[53] This includes the situation where a supplier appoints a competitor as an exclusive distributor, or

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[47] *See* note 23 *supra*.

[48] *See* note 42 *supra*.

[49] Adams-Mitchell Co. v. Cambridge Distributing Co., Ltd., 189 F.2d 913 (2d Cir. 1951).

[50] 15 U.S.C. § 73 (1976).

[51] Alfred Bell & Co., Ltd. v. Catalda Fine Arts, Inc., 191 F.2d 99 (2d Cir. 1951) (de minimus effect).

[52] *See* Treaty of Rome, *supra* note 46, art. 85(1); Deutsch Phillips GmbH, Commission Decision of Oct. 5, 1973, O.J.L. 293/40; Gero fabriek, Commission Decision of Dec. 22, 1976 (1977), O.J.L. 16/8.

[53] Addyston Pipe & Steel Co. v. United States, 175 U.S. 211 (1899); United States v. Topco Associates, Inc., 405 U.S. 596 (1972).

competitors agree to use the same selling agent.[54]

2. Vertical Agreements May Be Lawful. An agreement on the part of the supplier not to compete with or appoint a competing distributor in the distributor's territory has been considered to be a reasonably ancillary restriction, and lawful if the manufacturer is not a monopolist and competing products are readily available.[55] Restrictions imposed by the manufacturer, not on itself, but upon the distributor not to sell in a competing distributor's territory, are judged by the rule of reason.[56] Under the holding of *Continental TV, Inc. v. GTE Sylvania, Inc.*, the court is required to balance the interbrand and intrabrand competitive effects.[57] Small companies breaking into the market will probably prevail under such analysis.

Since horizontal allocations of markets are considered illegal *per se*, and vertical allocations are either reasonably ancillary or judged under the rule of reason, it is important that the restraint be a true vertical one, not a combination of competitors at the same level of trade acting through a pliant manufacturer or distributor. The Court, in *GTE Sylvania* specifically excluded such combinations from the rule of reason analysis announced there.[58]

B. Foreign Commerce Allocation of Markets

In foreign commerce the allocation of markets may be illegal depending upon the market allocated and the effect on U.S. commerce.

1. Horizontal Allocations Depend Upon the Market Allocated and the Effect on U.S. Commerce. When a U.S. party agrees with a foreign party to allocate the U.S. market, the courts have unanimously held that such activity is illegal *per se*.[59] This also includes the situation where there is a unilateral or reciprocal appointment of a foreign competitor as the exclusive distributor of the United States party or the agreement to use joint

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[54] United States v. American Smelting & Refining Co., 182 F. Supp. 834 (S.D.N.Y. 1960); United States v. Masonite Corp., 316 U.S. 265 (1942).

[55] United States v. Bausch & Lomb Optical Co., 45 F. Supp. 387 (S.D.N.Y. 1942), *aff'd by an equally divided court*, 321 U.S. 707, 719 (1944); United States v. Arnold Schwinn & Co., 388 U.S. 365, 376 (1967).

[56] Continental TV, Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977).

[57] *Id.* at 57 n.27.

[58] *Id.* at 58 n.28; *accord*, 388 U.S. 350 (1967).

[59] United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945); United States v. Timken Roller Bearing Co., 341 U.S. 593 (1951); United States v. National Lead Co., 322 U.S. 319 (1947); United States v. American Tobacco Co., 221 U.S. 106 (1911); United States v. Bayer Co., 135 F. Supp. 65 (S.D.N.Y. 1955); United States v. Holophane Co., 119 F. Supp. 114 (S.D. Ohio 1954), *aff'd per curiam*, 352 U.S. 903 (1956); United States v. General Dyestuff Corp., 57 F. Supp. 642 (S.D.N.Y. 1944); United States v. Imperial Chem. Indus. Ltd., 100 F. Supp. 504 (S.D.N.Y. 1951); United States v. General Elec. Co., 82 F. Supp. 753 (D.N.J. 1949); *modified*, 115 F. Supp. 835 (D.N.J. 1953).

selling agents.[60]

The Department of Justice in its *Guide*[61] indicates that exclusive appointment of a competitor as a distributor would be prohibited where the competitor is a substantial potential competitor. However, they do indicate that if the appointment of the distributor is in an "infant industry," for a short term, and for non-competing products with no implied agreements not to compete in the competitive products, that such appointments will not be illegal.[62] This "infant industry" exception parallels the exception recognized by the Court in *United States v. Jerrold Electronics Corp.* in regard to domestic tying.[63]

Where U.S. and foreign competitors, or foreign competitors only, allocate foreign markets, as opposed to the U.S. market, the illegality depends upon the effect on United States commerce. The requisite adverse effect almost always exists due to the limitation of exports of the U.S. participants in the agreement, and the limitation of export opportunities of the non-participating U.S. competitors.[64]

2. Vertical Allocations. As in the case of domestic agreements, agreements by a U.S. manufacturer or exporter not to compete with, or appoint a competing distributor in the foreign distributor's foreign territory, are reasonably ancillary and lawful if the manufacturer is not a monopolist and competitive products are readily available.[65] This position is also recognized by the Department of Justice in its *Guide*.[66]

Vertically imposed restrictions by the U.S. manufacturer or exporter on the foreign distributor not to sell in a competing distributor's territory should be judged under the rule of reason. The Department of Justice in its *Guide*, Case J, takes the contrary position that such agreements are illegal *per se* under the *Schwinn* case.[67] However, the Department does note that the *Continental TV, Inc. v. GTE Sylvania, Inc.* case is pending.[68] Considering the result in the *GTE Sylvania* case, it is submitted that Case J in the Guide needs to be revised and that the Department of Justice would recognize that the rule of reason analysis mandated there is as equally applicable to foreign commerce transactions as domestic transac-

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60 United States v. Timken Roller Bearing Co., 341 U.S. 593 (1951); United States v. General Dyestuff Corp., 57 F. Supp. 642 (S.D.N.Y. 1944).

61 ANTITRUST GUIDE, *supra* note 6, Case J at 46.

62 *Id.* at 47-48.

63 187 F. Supp. 545 (E.D. Pa. 1960), *aff'd*, 365 U.S. 567 (1961).

64 United States v. Imperial Chem. Indus. Ltd., 100 F. Supp. 504 (S.D.N.Y. 1951); United States v. Concentrated Phosphate Export Ass'n, 393 U.S. 199 (1968); United States v. Timken Roller Bearing Co., 341 U.S. 593 (1951); United States v. General Elec. Co., 82 F. Supp. 753 (D.N.J. 1949); United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945).

65 United States v. General Dyestuff Corp., 57 F. Supp. 642 (S.D.N.Y. 1944); United States v. Imperial Chem. Indus. Ltd., 100 F. Supp. 504 (S.D.N.Y. 1951); United States v. Keystone Watch Case Co., 218 F. 502 (E.D. Pa. 1915).

66 ANTITRUST GUIDE, *supra* note 6, Case J at 46.

67 *Id.* at 48-49.

68 *Id.* at 46.

tions.[69]

Where the distributor agrees not to sell back into the United States market, as opposed to a third country, the effect on U.S. commerce is more direct. And, even if such activity does not rise to the level of a violation of the United States antitrust laws, any U.S. manufacturer or exporter imposing such restrictions on foreign distributors must beware of liability under foreign law.[70]

IV. Refusals to Deal

Provided that the requisite effect on U.S. commerce exists, the legality of domestic and foreign commerce refusals to deal under the U.S. antitrust laws appears to be the same.

A. Domestic Refusals to Deal

Under U.S. domestic precedents,[71] unilateral refusals to deal are lawful provided that the refusing party is not a monopolist and is not attempting to enforce some other anti-competitive practice, such as a tie-in,[72] reciprocal dealing,[73] market allocation[74] or price fixing.[75] The existence of valid business purposes for such refusals, such as the substitution of distributors,[76] has been recognized in these cases.

On the other hand, concerted refusals to deal are illegal *per se* under U.S. domestic law, whether horizontal or vertical.[77] In the vertical context, however, a certain relaxation of the standard is evidenced, particularly with regard to substitutions of distributors.[78]

B. Foreign Refusals to Deal

A unilateral refusal to deal with a U.S. buyer by a foreign seller has

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[69] *See* notes 55 and 56 *supra*.

[70] *See* Treaty of Rome, *supra* note 46; Consten and Grundig v. E.E.C. Commission, (1966) E. Comm. Ct. J. Rep. 429, [1961-1966 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8046.

[71] United States v. Colgate & Co., 250 U.S. 300 (1919); Great Atlantic & Pacific Tea Co. v. Cream of Wheat, 227 F. 46 (2d Cir. 1915).

[72] Osborne v. Sinclair Ref. Co., 286 F.2d 832 (4th Cir. 1960), *cert. denied*, 366 U.S. 963 (1961); Bragen v. Hudson County News Co., 278 F.2d 615 (3d Cir. 1960).

[73] United States v. General Dynamics Corp., 258 F. Supp. 36 (S.D.N.Y. 1966).

[74] United States v. Eaton Yale & Towne, Inc., [1972] Trade Cases (CCH) ¶ 73,889 (D. Conn. 1972).

[75] Simpson v. Union Oil Co. of Cal., 377 U.S. 13 (1964); Sahm v. V-1 Oil Co., 402 F.2d 69 (10th Cir. 1968); Guidry v. Continental Oil Co., 350 F.2d 342 (5th Cir. 1965).

[76] Bushie v. Stenocord Corp., 460 F.2d 116 (9th Cir. 1972); Cartrade, Inc. v. Ford Dealers Advertising Ass'n, 446 F.2d 289 (9th Cir. 1971), *cert. denied*, 405 U.S. 997; Joseph E. Seagram & Sons v. Hawaiian Oke & Liquors, Ltd., 416 F.2d 71 (9th Cir. 1969), *cert. denied*, 396 U.S. 1062 (1970).

[77] United States v. General Motors Corp., 384 U.S. 127 (1966); Klors, Inc. v. Broadway Hale Stores, Inc., 359 U.S. 207 (1959); Fashion Originators Guild of America, Inc. v. FTC, 312 U.S. 457 (1941); Eastern States Retail Lumber Dealers Ass'n v. United States, 234 U.S. 600 (1914).

[78] *See* note 76 *supra*.

been adjudged lawful in one case.[79] Presumably, the foreign seller was not a monopolist and, therefore, the result is consistent with domestic precedents.

Concerted refusals to deal in foreign commerce, whether horizontal or vertical, have been held to be illegal *per se*.[80] The Department of Justice supports this position in its *Guide*.[81]

A recent area of antitrust concern relating to this issue has been the Arab boycott. Consistent with domestic antitrust law, the Export Administration Amendments of 1977[82] have permitted refusals to deal connected with the Arab boycott, provided that such specification of suppliers is unilateral.[83] Although it is often very difficult to maintain that such selections were truly unilateral, both the antitrust law and the Export Administration Amendments recognize that such a distinction is necessary.

V. Reciprocal Dealing

The illegality of reciprocal dealing, or the use of monopsony purchasing power to promote sales, is distinguished in domestic and foreign commerce transactions only by the effect on U.S. commerce.

A. Domestic Reciprocal Dealing

Reciprocal dealing in domestic transactions had been held to be illegal *per se*.[84]

B. Foreign Commerce Reciprocal Dealing

In import transactions, where the foreign buyer attempts to use its purchasing power to promote sales to the American purchaser, there would appear to be the requisite adverse effect on U.S. commerce in that the American purchaser would lose its freedom to purchase from competitive sources.

In export transactions, where the American buyer attempts to use its purchasing power to promote sales to a foreign purchaser, such agreements would foreclose the foreign purchaser as a market to the U.S. competitors of the American seller. Although it is less likely that the

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[79] Fosburgh v. California & Hawaiian Sugar Refining Co., 291 F. 29 (9th Cir. 1923).

[80] Thomsen v. Cayser, 243 U.S. 66 (1917); United States v. Hamburg-Amerrhanriche P.F.A.G., 200 F. 806 (S.D.N.Y. 1911), *rev'd on other grounds*, 239 U.S. 466 (1916); United States v. Pacific & Arctic Ry. & Van Co., 228 U.S. 87 (1913); United States v. Diamond Dealers Club, Inc., [1955] Trade Cases (CCH) ¶ 67,987.

[81] ANTITRUST GUIDE, *supra* note 6, Case K at 50.

[82] 50 U.S.C.A. § 2403-1a (West Supp. 1978) (amending the Export Administration Act of 1969, 50 U.S.C.A. §§ 2401-13 (1976)).

[83] *Id.* § 2403-1a(a)(2)(c).

[84] United States v. General Dynamics Corp., 258 F. Supp. 36 (S.D.N.Y. 1966); FTC v. Mechanical Mfg. Co., 16 F.T.C. 67 (1932); FTC v. Waugh Equipment Co., 15 F.T.C. 232 (1931).

foreclosure of such a market would be substantial, if it were it would result in an illegal restraint.

VI. Tying

The distinction between the application of the antitrust laws to domestic tying and tying in foreign commerce depends upon the effect on U.S. commerce.

A. Domestic Tying

Tying may be attacked both under section 1 of the Sherman Act[85] and section 3 of the Clayton Act.[86] In either case, the conduct is illegal *per se* provided that the requisite effect on commerce is present.[87] The courts have created separate standards for tying under each act. Under section 3 of the Clayton Act, the defendant must have a monopolistic position in the market for the tying product, *or* a substantial volume of commerce in the tied product must be restrained.[88] Under section 1 of the Sherman Act, if the seller has sufficient economic power to control prices or impose other burdensome terms with respect to an appreciable number of buyers, *and* a not insubstantial dollar volume of commerce in the tied product is affected, then a violation results.[89]

Domestically, the courts have recognized a limited defense for a new entrant into an "infant industry." In *United States v. Jerrold Electronics Corp.*,[90] the defendant tied service contracts to the sale of cable television systems. The Court stated that for a limited period of time when there were not competent servicemen available in the new industry that the tying restraint was reasonable.

B. Tying in Foreign Commerce

In an import transaction, where a foreign seller conditions the sale of its products to the U.S. buyer on the purchase of a tied product, a restraint which is illegal *per se* would result. This tying restricts the U.S. purchaser's freedom of choice and denies the U.S. purchaser the right to select its seller.

In export transactions, where the U.S. seller is tying products in its sales to foreign countries, section 3 of the Clayton Act is not applicable.[91]

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[85] 15 U.S.C. § 1 (1976).

[86] *Id.* § 14.

[87] Northern Pac. Ry. v. United States, 356 U.S. 1 (1958); Times-Picayune Publishing Co. v. United States, 345 U.S. 594 (1953); International Salt Co. v. United States, 332 U.S. 392 (1947).

[88] 332 U.S. at 608-09.

[89] 356 U.S. at 6; 332 U.S. at 396.

[90] 187 F. Supp. 545 (E.D. Pa. 1960), *aff'd per curiam*, 365 U.S. 567 (1961).

[91] "It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies or other commodities, whether patented or unpatented, *for use, consumption, or resale*

Section 1 of the Sherman Act is applicable, but there must be the requisite adverse effect on U.S. commerce for a violation to result.

The Department of Justice in its *Guide* refers to export tying transactions.[92] It provides that "the Department would be unlikely to seek to invoke U.S. antitrust enforcement jurisdiction absent a belief in the case that it had some significant effect on overseas license opportunities for U.S. firms or some impact on sales in the United States."[93] It also states that U.S. source tying is preferred, *viz.*, if the American seller conditions the sale of its products on the purchase of U.S. products, as opposed to the seller's products alone, the Department of Justice would have no objection.[94] However, it is important to realize that such export tying may be a violation of foreign law if personal jurisdiction can be obtained in the foreign country over the U.S. seller.[95]

VII. Exclusive Dealing

Exclusive dealing, or an agreement by a buyer to purchase exclusively from the seller, such as in a requirements contract, may be a violation of section 3 of the Clayton Act[96] (which is limited to tangible goods), or section 1 of the Sherman Act[97] (which reaches services). A comparison of the domestic exclusive dealing cases and foreign commerce exclusive dealing cases demonstrates that the illegality depends upon differences in effect on U.S. commerce.

A. Domestic Exclusive Dealing

Exclusive dealing in the domestic cases has been judged under the rule of reason.[98] The basic test has been the amount of market foreclosure which has occurred, i.e., the amount of sales opportunity which is lost by the competitors of the seller.

B. Foreign Commerce Exclusive Dealing

As in the domestic cases, exclusive dealing in foreign commerce has been judged by the rule of reason.[99] In import transactions, where the buyer is in the United States, sufficient effect on U.S. foreign commerce

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within the United States or any territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States . . ." (emphasis added), 15 U.S.C. § 14 (1977).

92 ANTITRUST GUIDE, *supra* note 6, Case G at 37.

93 *Id.* at 39.

94 ANTITRUST GUIDE, *supra* note 6, Case F at 35.

95 Treaty of Rome, *supra* note 46, arts. 85(1), 86; Gema, Commission Decision of June 21, 1971, J.O.L. 134/6, COMM. MKT. REP. (CCH) ¶ 9438, *amended by* Commission Decision of July 6, 1972, J.O.L. 166/22, COMM. MKT. REP. (CCH) ¶ 9521.

96 15 U.S.C. § 14 (1976).

97 *Id.* § 1.

98 Standard Oil Co. v. United States, 337 U.S. 293 (1949); Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320 (1961); FTC v. Brown Shoe Co., 62 F.T.C. 679 (1963), *rev'd.*, 339 F.2d 45 (8th Cir. 1964), *rev'd.*, 384 U.S. 316 (1966).

99 United States v. Columbia Steel Co., 334 U.S. 495 (1948); United States v. Minnesota Mining & Mfg. Co., 92 F. Supp. 947 (D. Mass. 1950).

is more likely to be found due to the restriction on the U.S. buyer as to where it can buy its goods and services.

In export transactions the effect on U.S. commerce depends upon the amount of the market foreclosed to competitors of the U.S. seller. Section 3 of the Clayton Act is not applicable because that section is confined to sales in the United States,[100] but section 1 of the Sherman Act would continue to be applicable, both for tangible goods and services. The Department of Justice in its *Guide*[101] indicates that the legality of export exclusive dealing will depend upon whether it is illegal under foreign law, and whether there is another less restrictive alternative available.

VIII. Price Discrimination

Substantial differences exist between the application of the Robinson-Patman Act[102] regarding price discrimination in domestic and foreign commerce transactions due to the differences in jurisdictional language in the Robinson-Patman Act.

A. Domestic Price Discrimination

Under section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, it is unlawful to discriminate in price between different purchasers of commodities of like grade and quality.[103] Under section 2(c) it is unlawful to grant brokerage or commissions except for services rendered.[104] Sections 2(d) and 2(e) prohibit the granting of discriminatory promotional and/or advertising allowances or services.[105]

B. Foreign Commerce Price Discrimination

In regard to import transactions, in *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*,[106] the court ruled that in order for section 2(a) of the Act to apply, both sales must be within the United States. Therefore, discrimination in prices by a foreign seller between sales in its home market and sales to a U.S. purchaser are not covered by section 2(a) of the Robinson-Patman Act. Where a foreign seller makes two sales into the United States at discriminatory prices, however, the requirements of section 2(a) are met.

In further regard to import sales, a little-utilized provision, the Revenue Act of 1916,[107] does prohibit import sales at prices to the United

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[100] *See* note 91 *supra*.

[101] ANTITRUST GUIDE, *supra* note 6, Case J at 47 n.80.

[102] 15 U.S.C. §§ 13, 13a-c, 21a (1976).

[103] 15 U.S.C. § 13(a) (1976).

[104] *Id.* § 13(c).

[105] *Id.* §§ 13(d), (e).

[106] 402 F. Supp. 244, 248 (E.D. Pa. 1975).

[107] 15 U.S.C. § 72 (1976). This Act provides:

It shall be unlawful for any person importing or assisting in importing any articles

States market which are lower than the prices at which sales are made in the foreign market. The Antidumping Act of 1921,[108] also applies to such activity and will result in additional customs duties if such conduct occurs and injury results. Unlike the Robinson-Patman Act, there is no specific provision for meeting competition or cost justification defenses under the Antidumping Act of 1921. However, the Secretary of Treasury can make allowances for different circumstances of sale.[109]

In export sales, section 2(a) of the Robinson-Patman Act has been held not to apply,[110] since the sales of commodities must be "for use, consumption or resale within the United States" or "other place under the jurisdiction of the United States."[111] Similarly, a sale in the United States to a U.S. buyer for resale abroad is not covered by the Act.

However, this export exception to section 2(a) of the Act has been held not to apply to sections 2(c), 2(d), and 2(e) of the Act due to the differences in jurisdictional language.[112] Sales at a price to the foreign country which are lower than the price at which sales are made in the U.S. market may be "dumping" under foreign law. Obviously, sales to a foreign market at a price higher than that which is charged in the home market would not be a violation of the Robinson-Patman Act, but it may be a violation of foreign law.

IX. Monopolization

In addition to section 1 of the Sherman Act, section 2 of the Sherman Act[113] prohibits monopolization, attempts to monopolize, or conspiracies to monopolize. One of the activities which has been considered as conduct constituting an attempt to monopolize is predatory pricing.[114] Domestically, very recently a number of courts have adopted the Areeda-

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> from any foreign country into the United States, commonly and systematically to import, sell or cause to be imported or sold such articles within the United States at a price substantially less than the actual market value or wholesale price of such articles, at the time of exportation to the United States, in the principal markets of the country of their production, or of other foreign countries to which they are commonly exported, after adding to such market value or wholesale price, freight, duty, and other charges and expenses necessarily incident to the importation and sale thereof in the United States: *Provided*, that such act or acts be done with the intent of destroying or injuring an industry in the United States, or preventing the establishment of an industry in the United States, or restraining or monopolizing any part of trade and commerce in such articles in the United States.

Companion bills to amend this Act to make it much easier for actions to be brought are now pending in the Senate and House of Representatives, S.223, H.R.2597.

[108] 19 U.S.C. §§ 160-73 (1976).

[109] 19 C.F.R. § 153.9 (1978).

[110] Fimex Corp. v. Barmatic Products Co., 429 F. Supp. 978 (E.D.N.Y. 1977), *aff'd. mem.*, 573 F.2d 1289 (2d Cir. 1977).

[111] 15 U.S.C. § 13(a) (1976).

[112] Canadian Ingersoll-Rand Co. v. D. Loveman & Sons, 227 F. Supp. 829 (N.D. Ohio 1964); Baysoy v. Jessop Steel Co., 90 F. Supp. 303 (W.D. Pa. 1950).

[113] 15 U.S.C. § 2 (1976).

[114] [1962] TRADE REG. REP. (CCH) ¶ 70,401 (D.C.N.Y. 1962); United States v. Wallace & Tiernon Co., [1954] Trade Cases (CCH) ¶ 67,828, 67,901 (D.R.I. 1954).

Turner thesis,[115] that predatory pricing cannot exist without proof of sales below marginal or average variable cost.[116] This issue is now before Judge Becker in the Eastern District of Pennsylvania in a foreign commerce context in the case of *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*[117] The plaintiff has alleged that the foreign defendants combined and conspired through predatory pricing to attempt to monopolize the U.S. market. The defendants have argued that no such conduct occurred and that such conduct in the context of foreign commerce is irrational.

X. Section 337 of the Tariff Act of 1930

In addition to the antitrust laws already mentioned, the Tariff Act of 1930, section 337,[118] also prohibits "unfair methods of competition and unfair acts in the importation of articles into the United States." Thus, by its definition, the Act has no application to domestic commerce and is limited to import transactions in foreign commerce.

This section has been broadly utilized by the International Trade Commission to inquire into many traditional antitrust-types of offenses. For example, conspiracy, price fixing, refusals to deal, resale price maintenance, market allocations and price discrimination have all been investigated under this section.[119] Investigations under this Act are initiated by the International Trade Commission upon a petition filed by a U.S. business.[120]

XI. Conclusion

The antitrust laws and other related laws clearly apply to transactions in the marketing of goods in export and import foreign trade. Differences in application of the laws occur due to the differences in

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[115] Areeda & Turner, *Predatory Pricing and Related Practices under Section Two of the Sherman Act*, 88 HARV. L. REV. 697 (1975).

[116] Janich Bros., Inc. v. American Distilling Co., 570 F.2d 848 (9th Cir. 1978), *cert. denied*, — U.S. —, 99 S.Ct. 103 (1978); Pacific Eng'r & Prod. Co. of Nev. v. Kerr-McGee Corp., 551 F.2d 790 (10th Cir. 1977), *cert. denied*, 434 U.S. 879 (1977); Hanson v. Shell Oil Co., 541 F.2d 1352 (9th Cir. 1976), *cert. denied*, 429 U.S. 1074 (1977); International Air Indus., Inc. v. American Excelsior Co., 517 F.2d 714 (5th Cir. 1975), *cert. denied*, 424 U.S. 943 (1976); William Inglis & Sons Baking Co. v. ITT Continental Baking Co., Inc., 461 F. Supp. 410 (N.D. Cal. 1978); Transamerica Computer Co., Inc. v. International Business Machines, Corp., No. C-73-1832 RHS (N.D. Cal., filed Oct. 3, 1978); ILC Peripherals Leasing Corp. v. International Business Machines, Corp., 458 F. Supp. 847 (N.D. Cal. 1978); Murphy Tugboat Corp. v. Crowley, 454 F. Supp. 847 (N.D. Cal. 1978); Bowmar Instrument Corp. v. Texas Instruments Inc., Civil No. F 74-137 (N.D. Ind., filed Mar. 30, 1978); Weber v. Wynne, 431 F. Supp. 1048 (D.N.J. 1977).

[117] Japanese Elec. Prods. Antitrust Litigation, M.D.L. No. 189 [1979-2] TRADE REG. REP. (CCH) ¶¶ 62,753, 62,893 (E.D. Pa. 1979).

[118] 19 U.S.C. § 1337 (1976).

[119] Certain Electronic and Related Equipment, No. 337-TA-7 (1976); Certain Welded Stainless Steel Pipe and Tube, No. 337-TA-29 (1978); Certain Ceramic Tilesetters, No. 337-TA-41 (1978); Chicory Root-Crude and Prepared, No. 337-TA-27 (1976); Monolithic Catalytic Converters, No. 337-TA-18 (1976); Certain Angolan Robusta Coffee, Inc., No. 337-TA-16 (1976).

[120] 19 U.S.C. § 1337(b)(1) (1976); 19 C.F.R. § 210.10 (1979).

jurisdictional language of the various laws and the differing effects on U.S. commerce of specific transactions. Particularly, export transactions may have less adverse effect on U.S. commerce, and, therefore, less likelihood of violating U.S. law. However, such transactions may, under foreign law, be prohibited.

When engaging in any foreign trade transaction, the participant must consider the two guideposts of antitrust enforcement in foreign trade: first, whether the agreement or conduct will result in a limitation or restriction to the U.S. consuming public of foreign goods or services or a limitation on a U.S. business to obtain goods and services from its freely-chosen source; and second, whether the agreement or conduct will result in a limitation of a U.S. business competitor's ability to sell his products or services abroad.[121]

Fortunately, to the extent that one can be made a defendant under such laws, they are equally available to protect American business against anti-competitive conduct by their own U.S. competitors or by their foreign competitors.

Question and Answer Period

Question: Is the doctrine of full line forcing an important consideration or is it a simple tie in?

Mr. Johnson: Full line forcing is when a manufacturer or distributor tells the distributor or dealer that he wants him to take the entire line. Last month I was doing some work on this particular question, and I found four reported cases on this point. Two of them said that that kind of activity would be a *per se* violation of the antitrust laws similar to tying. Two cases said it would not be. The conclusion that I reached based on reading those facts is that if you can show some particular reason why it's important that the distributor or dealer take the full line of your product then it might be justifiable. It depends upon the circumstances. Otherwise, you cannot force them to take your full line. One case which permitted such forcing was *United States v. Jerrold Electronics*.[1] In that case cable TV was involved. It was a new industry, an infant industry, and Jerrold was able to argue that during this time when the industry was getting started it was important to them to use only equipment and components which they provided because other people did not know how to produce them, or manufacture them, and because use of other products resulted in an inefficient system. So they were able to argue that successfully. In *United States v. J. I. Case*[2] the judge concluded

[121] ANTITRUST GUIDE, *supra* note 6, at 4-5.

[1] United States v. Jerrold Electronics Corp., 187 F. Supp. 545 (E.D. Pa. 1960), *aff'd per curiam*, 365 U.S. 567 (1961). See notes 63 and 90 *supra* and accompanying text.

[2] United States v. J.I. Case Co., 101 F. Supp. 856 (D. Minn. 1951).

that the buyer was not really coerced, but agreed to take the full line, and therefore there was no full line forcing and no violation of the law.

Question: Can a manufacturer selling highly specialized equipment require as a condition that the purchaser buy maintenance services from the manufacturer for a period exceeding the warranty period?

Mr. Johnson: Definitely not in California. There's a law there called the Song-Beverly Act[3] which prohibits the sale of any good on which you require the purchaser to use your maintenance services. This also may be a violation of section 1 of the Sherman Act depending again upon whether they're really required or whether you can show the *Jerrold Electronics* exception that there's some special reason why your maintenance services are superior or important as opposed to an alternate supplier of services. Finally, I would say that if you require those maintenance services to extend beyond the warranty period, you will definitely have a violation of the law.

Question: Would you please expand on the elements and use of the Revenue Act of 1916?

Mr. Johnson: This is the Act that provides a private right of action for dumping in the United States. There are three cases in which it's being used presently. One is the *Zenith*[4] case in my article. There's also *Outboard Marine Corp. v. Pezetel*,[5] the Polish Golfcart case. The third case, which was filed out in District Court in Oregon, *Cascade Steel Rolling Mills v. C. Itoh & Co.*,[6] charges dumping of Japanese steel. One interesting thing about that particular case is that the defendants argued that the 1916 Act was not really an antitrust act and there should be a shorter statute of limitations applied of one year. The court ruled that this act was more like an antitrust act than like any other type of statute and therefore the four year statue of limitations applied. The elements of a cause of action under the Act are that you must commonly and systematically import or cause to be imported articles into the United States at a price substantially below their wholesale price or their actual market value in the home market with the intent of injuring the U.S. industry. Some of those elements are very difficult to meet. For example, proof that the importation was done with the intent of injuring someone is extremely difficult. Also, what is a substantially lower price? And third, what is commonly and systematically? All of those hurdles have to be

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[3] Song-Beverly Consumer Warranty Act, Cal. Civ. Code §§ 1790 *et seq.* (West 1979).

[4] Zenith Radio Corp. v. Matsushita Elec. Indus. Co., Japanese Elec. Prods. Antitrust Litigation, M.D.L. No. 189 [1979-2] TRADE REG. REP. (CCH) ¶¶ 62,753, 62,893 (E.D. Pa. 1979). See notes 106 and 117 *supra* and accompanying text.

[5] Outboard Marine Corp. v. Pezetel, [1979-2] TRADE REG. REP. (CCH) ¶ 62,792 (D. Del. 1979).

[6] Cascade Steel Rolling Mills, Inc. v. C. Itoh & Co., Civ. No. 78-875 (D.C. Ore., filed Sept. 28, 1978).

overcome for a plaintiff to be successful. As you can see by the cases which have begun to use this Act, there is more and more interest on the part of American firms in trying to utilize all of its features.