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SHERMAN ACT AND AMERICAN SUBSIDIARIES ABROAD

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In recent years an increasing number of American corporations have established subsidiary companies located in foreign countries. The reasons behind this trend have been numerous and differed probably in each case. In most cases, however, the main reasons for establishing subsidiaries abroad was the desire to jump over the local tariff wall, to secure cooperation of local capital, to take advantage of lower labor cost, or to acquire new markets. This policy of locating subsidiary companies abroad has been especially noticeable in Latin America and on the Continent of Europe within the area of the Common Market. Although from the economic and political point of view the extention of the operation of the United States corporations abroad will, in all probability, be advantageous and beneficial to all participants, nevertheless this extention may bring new complications as far as the application of our antitrust policy is concerned.

To a large extent unnoticed, during the postwar years a new development took place in the application of the Sherman Act to American foreign economic relations. For the first time since its enactment the Sherman Act was applied in cases involving the parent-subsidiary relation where the subsidiary was located abroad. This new development was welcomed with great satisfaction by some people while others greeted it with increasing apprehension and concern, fearing that this new step taken by the Department of Justice and the courts might lead towards undermining the whole concept of multi-corporate enterprises and that at the same time it was contrary to our policy of stimulating the export of capital. A closer analysis of the leading cases will indicate conclusively that most of those fears and apprehensions were unwarranted and without much foundation.

In a relatively short period of time a number of cases in which the issue of foreign subsidiaries was the focal point of the alleged violations appeared before the courts. There

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were three major cases, each of them dealing with a somewhat different type of subsidiary. Each will be presented and discussed in turn.

The case which became most widely quoted, and misquoted, and which had the widest possible repercussions was that of *Timken Roller Bearing Co.*[1] The novelty of the *Timken* case was partly due to the fact that it was based on a newly developed concept of intra-enterprise conspiracy, a concept which was introduced by the courts into several cases dealing with domestic markets. In order to appreciate fully the meaning of the *Timken* case a short discussion of the gradual development of the intra-enterprise conspiracy doctrine is essential.

I

The first case adjudicated by courts which involved the concept of the intra-enterprise conspiracy was the *General Motors Corporation* case in 1941.[2] The Department of Justice alleged that General Motors Co. and General Motors Sales Corp. created their own wholly owned subsidiary — General Motors Acceptance Corp. — which dealt with financing the sales of General Motors cars. According to the evidence General Motors Co. forced all of its car dealers to finance their sales only via General Motors Acceptance Corp. The court found General Motors Co. guilty of precluding competition in the business of financing the sales of cars and found General Motors guilty of illegal conspiracy to restrain trade. The court said:

> Nor can the appellants enjoy the benefits of separate corporate identity and escape the consequences of an illegal combination in restraint of trade by insisting that they are in effect a single trader. The test of illegality under the Sherman Act is not so much the particular form of business organization effected, as it is the presence or absence of restraints of trade.[3]

A few years later the courts decided the famous *A & P Co.* case in which the Department of Justice charged the A & P Co. with an illegal conspiracy with its wholly owned sub-

1. United States v. Timken Roller Bearing Co., 341 U.S. 593, 95 L.Ed. 1199 (1951).
2. United States v. General Motors Corp., 121 F.2d 376 (7th Cir. 1941).
3. *Ibid.* at 404.

sidiary ACCO, established by the A & P Co. for the sole purpose of centralizing the purchase of fresh vegetables and fruits.[4] The courts found the A & P guilty of violating the Sherman Act.

Before the Court of Appeals decided the *A & P Co.* case, however, the Supreme Court dealt in 1944 and 1948 with two cases involving the motion picture industry.[5] In both of these the Supreme Court found an illegal conspiracy between the parent company and its wholly owned subsidiaries and it ordered the dissolution of those multi-corporate enterprises. Commenting on the corporate relation between the conspirators in the *Schine* case the Supreme Court said that the concerted action of the parent company, its subsidiaries, and its directors was "a conspiracy which was not immuned by reason of the fact that the members were closely affiliated rather than independent."[6] In the above-mentioned case the Supreme Court repeated what it had said in 1947 in the *Yellow Cab* case:

> The test of illegality under the Act is the presence or absence of any unreasonable restraint on interstate commerce. Such a restraint may result as readily from among those who are affiliated or integrated under a common ownership as from a conspiracy among those who are otherwise independent. . . . The corporate interrelationship of the conspirators, in other words, are not determinative of the applicability of the Sherman Act.[7]

The above statement was probably the clearest and the most unequivocal expression of the Supreme Court's opinion that in determining the illegality of a case the form of an organization actually plays a less important role than do the actual policies, actions, and behavior of the enterprise.

Six months prior to the *Timken* decision, the Supreme Court dealt with another case involving intra-enterprise conspiracy and again, finding the defendant guilty of conspiring with its subsidiaries, it stated that "common ownership and control

4. United States v. Great Atl. & Pac. Tea Co., 173 F.2d 79 (7th Cir. 1949).
5. Schine Chain Theaters v. United States, 334 U.S. 110, 92 L.Ed. 1245 (1948); United States v. Crescent Amusement Co., 323 U.S. 173, 81 L.Ed. 160 (1944).
6. 334 U.S. 110, 116, 92 L.Ed. 1245, 1251 (1948).
7. United States v. Yellow Cab Co., 332 U.S. 218, 227, 91 L.Ed. 2010, 2018 (1947).

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does not liberate corporations from the impact of the antitrust laws."[8]

All decisions of intra-enterprise conspiracy so far mentioned had several things in common. In the first place they all dealt with restraints which affected only the relation between the defendant and its co-conspirators on the one hand and third parties on the other hand. None of the holdings implied any illegal restraints of trade *between* the defendant and its cospirators. The *Timken* case was the first and so far the only case where the restraints upon competition between the parent company and its own subsidiaries abroad were considered to be an illegal conspiracy. In the second place, in all these cases the defendant was a leader of the industry, its relative and absolute size being overwhelmingly greater than the size of its competitors. Finally, all cases except *Timken* involved wholly owned subsidiaries.

II

The cases of intra-enterprise conspiracy when looked upon from the economic point of view present at first sight a rather puzzling and strange picture. It appears that courts rigorously applied the concept of a corporation as a legal entity and considered each corporation as a separate and totally independent unit. Such an approach to a multicorporate enterprise apparently ignored the economic view of a multicorporate organization as a single profit maximizing unit, that is, one enterprise. To consider each corporation in such an organization as a completely independent unit was to ignore the economic facts of life, and to attach too great a role to legalistic labels.

It has been suggested, however, that on second thought the cases of intra-enterprise conspiracy which had been presented so far in the courts were not so simple as might have appeared.[9] Considering the fact that in each case the defendant was a firm of preponderant size, it appears that the Department of Justice, by utilizing the concept of conspiracy, was actually attacking the size — that is, the excessive economic power — of the defendant. Furthermore, when the behavior

8. Kiefer-Stewart Co. v. J. E. Seagram & Son, Inc., 340 U.S. 211, 215, 95 L.Ed. 219, 224 (1951).
9. Rahl, *Conspiracy and the Antitrust Laws*, 44 ILL. L. REV. 743-68 (1950); *Chain Stores under the Sherman Act*, 48 COL. L. REV. 786-99 (1947).

of the defendants in each case is analyzed, one may easily and quickly conclude that invariably the defendant employed policies and practices which could be labelled as predatory and unfair methods of competition. It appears, then, that in the concept of intra-enterprise conspiracy the Department of Justice found a handy weapon with which to attack size as such. At the same time the courts, although always employing a very strict legalistic approach, actually did consider, though implicitly, the facts of economic reality. Upon closer examination it appears that most economic experts would agree that in all cases the actual position and behavior of the defendant would indicate monopolization and a verdict of guilty, even without bringing in the charge of conspiracy.

The history of the enforcement of the Sherman Act shows conclusively that the attack upon size, as such, has probably been the most difficult way to achieve a victory in court. Having this in mind, the Department of Justice decided to embark upon an easier road; it chose to charge conspiracy. It used it on several occasions against domestic violations of the act, and in the *Timken* case it tried its use in the case involving foreign subsidiaries. It is well known to any student of antitrust that the charge of conspiracy has been used as being the most effective method in convincing the courts and the easiest way to attain the verdict of guilty. This attitude of courts towards the charge of conspiracy may be explained to a great extent in terms of tradition. Under the common law monopoly as such was never illegal — only combining and conspiring to monopolize was illegal. Even after the Sherman Act was on the statute books the conspiracy approach prevailed. The first section of the Sherman Act required conspiracy to declare an action illegal; it was only the second section which declared monopolizing, even without conspiracy, that is, by one person, as illegal. The second section, however, has been used in recent decades only on two occasions.[10] This traditional approach to the concept of illegal monopoly was reinforced in 1911 by the introduction of the rule of reason. Since then, and until very recent years, the courts consistently applied a dual standard to the antitrust cases. They used the hard weapon of illegality per se in cases of loose combinations where conspiracy was present, while

10. United States v. Aluminum Co. of Am., 148 F.2d 416 (2d Cir. 1945); United States v. Pullman Co., 50 F.Supp. 123 (E.D. Pa. 1943).

at the same time employing the soft and delicate approach via the rule of reason to the question of excessive economic power. When these considerations are kept in mind it is really not surprising that the Department of Justice in its attempts to get convictions of the defendants on several occasions employed the conspiracy approach to the alleged violations of the Sherman Act.

III

The attack on domestic monopolies via the charge of intra-enterprise conspiracy was soon extended to the parent-subsidiary arrangement in foreign trade. The case selected first was that of *Timken Roller Bearing Co.*, where the application of the doctrine of intra-enterprise conspiracy as developed gradually in the cases mentioned above was pushed probably to its extreme.

What made the *Timken* case different from all previous decisions involving this new concept of conspiracy was the fact that, in the first place, it involved foreign trade and subsidiaries located abroad; and, in the second place, the doctrine of intra-enterprise conspiracy was used for the first time with reference to a horizontal combination and to restraints of competiion *between* the parent company and its subsidiaries. The restraints of trade of third parties were not the crucial issue. The *Timken* case was also the first case where the parent had only a minority stock ownership, while all previous cases of intra-enterprise conspiracy involved wholly owned subsidiaries.

The *Timken* decision, in spite of all its complexity and misunderstandings, firmly established the conclusion that a parent-subsidiary relation in foreign trade does not offer an escape route to the violation of the Sherman Act and that a subsidiary which is established as a cover and a substitute for the restraints previously effected by a cartel-like agreement may constitute an antitrust violation. The evidence showed conclusively that Timken used the corporate device, and organized its subsidiary in Great Britain in order to perpetuate the elimination of competition between itself and its former British competitors. As far as the question of legality of subsidiaries was concerned, the decision of the Supreme Court indicated that the subsidiaries organized

jointly by an American corporation in cooperation with its competitors in their own country were not immune from prosecution under the Sherman Act. The form under which the restraints were effected was, in the opinion of the Supreme Court, less important than the nature and the magnitude of those restraints. The conclusion drawn by some observers that the decision of the Court declared *any* foreign subsidiary illegal was obviously erroneous, and the panic which apparently resulted among some members of the American business community abroad was totally uncalled for.[11]

The *Timken* case involved one type of subsidiary, namely that established by an American corporation together with foreigners, who were the nationals of the country where the subsidiary was located. A completely different type of subsidiary was involved in the *Minnesota Mining and Manufacturing Co.* case, which appeared in court at approximately the same time as the *Timken* case.[12] The *Minnesota Mining* case dealt with subsidiaries abroad established jointly by several American corporations without any participation of foreign capital.

This case dealt with two issues; one involving jointly owned factories abroad and the other involving an export association created under the Webb-Pomerene Act. Here the attention will be centered only on the legality of subsidiaries owned jointly by a group of major American producers.

The Department of Justice alleged that in 1929 the following major producers of coated abrasives — Minnesota Mining and Manufacturing Co., Behr-Manning Corp., The Carborundum Co., and Armour and Co. — combined and organized (1) Durex Abrasives Corp., and Export Association set up under the Webb Act, and (2) Durex Corp., a holding company which became the center of control of all foreign assets belonging to the defendants. Both Durex corporations had the same persons serving as officers and directors. It is important to note that all these companies taken together produced a very large proportion of coated abrasives in the United States, that each of them was engaged extensively in export trade,

11. *Hearings Before the Senate Subcommittee on Antitrust and Monopoly of the Committee on the Judiciary,* 84th Cong. 1st Sess. 1729, 1856 (1955).

12. United States v. Minnesota Mining & Mfg. Co., 92 F.Supp. 947 (D. Mass. 1950).

and that prior to this 1929 agreement they competed with each other on domestic and foreign markets.

Immediately following the 1929 agreement, which set up the Export Association and the Durex Corp., this corporation acquired plants producing coated abrasives in Great Britain, Canada, and Germany. At the same time a patent pool was established by the Durex Corp. which obtained all foreign patents of all defendants. Those patents were to be sub-licensed to the foreign subsidiaries owned by Durex Corp. A situation thus developed that a number of plants producing coated abrasives in Great Britain, Canada, and Germany were owned by the Durex Corp., which in turn was owned by four major producers of those abrasives in the United States. It may be said then that, for all practical purposes, those four major producers jointly owned a number of subsidiaries abroad.

The government alleged that in the 1930's a series of agreements were made between the Durex Corp. and the Export Association which stipulated that the Export Association, which centralized all export trade of its members, would cease to export coated abrasives to the territories belonging to the British Empire, and that these areas would be supplied by Durex's subsidiaries in Great Britain and in Canada. After 1946 the whole continent of Europe was added to Durex's subsidiaries in Great Britain as their territory to which, subsequently, no export from the United States took place. It was shown that after those agreements had been made the business of Durex's subsidiaries abroad increased substantially while the exports of the Export Association were greatly reduced. The Department of Justice then started action against the Durex Corp., the Export Association, and the four major producers in the United States who owned these subsidiaries and charged them with conspiracy to restrain United States foreign trade.

The defendants admitted all the facts but claimed that they were forced to establish subsidiaries abroad in order to overcome the political and financial difficulties connected with export and import trade. They maintained also that as economic restrictions abroad prevented imports of coated abrasives from the United States, their subsidiaries abroad could not be accused of restraining American export trade of coated

abrasives. The opinion of the court, as presented by Judge Wyzanski, stated that if the claims of impossibility of exporting from the United States were true, then "any private action taken to secure . . . business . . . does not restrain foreign commerce in that area in violation of the Sherman Act."[13] The evidence proved however, that

> nothing in the case can justify a finding of fact that if defendants had not themselves established joint foreign factories it would have been legally or economically impossible to sell at some profit a substantial volume of defendants' American-made coated abrasives.
>
> In short this Court finds . . . that defendants' decline in exports to the United Kingdom is attributable less to import restrictions of that nation . . . than to defendants' desire to sell their British-made goods at a large profit rather than their American-made goods at a smaller profit.[14]

The above statement plus some further elaborations on it made by the court, if taken in isolation, could and probably would mean that the court favored the export of final goods in preference to export of capital. It would also mean that the establishment of producing facilities abroad was illegal because by its very nature it restricted some exports of final goods from the United States. Furthermore, it could mean that any agreement between the parent company and its subsidiaries was illegal. The conclusions which could have been drawn from the court's opinion so far sound very like some of the conclusions drawn from the *Timken* case.

Fortunately, however, the court did not stop here. On page 962 of the opinion it unequivocally stated that it was not attacking the restraints of competition between the parent companies and their subsidiaries but that it attacked the fact that the subsidiaries abroad were established jointly by leading United States producers. The court explicitly stated that if each defendant established its own subsidiaries abroad no charge of restricting United States exports would be made. "Indeed the decree to be entered in this case will expressly contemplate allowing just such individual operation of foreign factories," said the Judge.[15] Commenting on the fact that

13. *Ibid.* at 958.
14. *Ibid.* at 960.
15. *Ibid.* at 962.

production abroad may be more remunerative than exports from the United States, the court stated that financial advantage is a legitimate consideration for an individual nonmonopolistic enterprise; however, "it is irrelevant where the action is taken by a combination and the effect . . . restricts American commerce."[16] An aggravating factor in this case was the fact that all the defendants were major firms in the industry and that, considered jointly, they completely dominated the whole abrasives industry in the United States.

The essence of the issue in the *Minnesota Mining* case was the fact that the subsidiaries were owned jointly by the dominant firms. This resulted, then, in two kinds of restraints. In the first place it restrained the export trade of the defendants. In the second place the court believed that "the intimate association of the principal American producers in day-to-day manufacturing operations . . . may inevitably reduce their zeal for competition *inter sese* in the American market."[17] In conclusion, the court seemed to attach great weight to this last type of possible restraint, and stated that joint foreign factories owned by leading producers "like joint domestic price fixing would be invalid per se because they . . . restrain competition in the American market."[18] The court, therefore, ordered the dissolution of the Durex Corp. and enjoined the defendants from jointly owning subsidiaries abroad.

According to some sources, the implication of the *Minnesota Mining* decision seemed to be that any association of dominant American producers to establish jointly subsidiaries abroad was illegal per se mainly because it tended to reduce competition among them in the domestic market, even if there were no detrimental effects upon United States foreign trade.[19] In view of what the court stressed in its opinion, such a conclusion sounds quite plausible.

Although the court was certainly correct about the possible restraints upon the domestic market, its reasoning about the restraints exercised on the export trade of the defendants seems to have somewhat doubtful validity on purely economic

16. *Ibid.*
17. *Ibid.* at 963.
18. *Ibid.*
19. Dean, *Extraterritorial Effects of the United States Antitrust Laws*, A.B.A. REP. 93 (1957).

grounds. What the court said in several places amounts in effect to concluding that export of final goods is to be preferred over the export of capital.[20] Such a statement certainly has no economic validity and is contrary to our long-established policy of stimulating the export of capital and by doing so to promote economic development of foreign countries. The court should have realized that in order to get a complete picture of the situation one has to place against the unquestionable reduction of American exports of final goods which may result in the short run from the fact that subsidiaries were set up abroad, the undeniable advantages which accrue to the United States economy from those foreign investments. It is obvious that to consider only the reduction in exports of final goods while neglecting the private and social benefits resulting from the export of capital actually amounts to an undermining of the whole philosophy of foreign investments. It is rather regrettable that the court showed a tendency to overlook this side of the problem and concentrated instead on analyzing only one aspect of the issue.

IV

The *Timken* and *Minnesota Mining* cases represented two different types of subsidiaries; but there is still another type. This is a situation in which an American company joins with a foreign company to create a jointly owned subsidiary in a country which is foreign to both partners. Subsidiaries of this kind were involved in the *Imperial Chemical Industries* case which was adjudicated in 1951 with a supplementary decision presented in 1952.[21] Parenthetically it may be mentioned that this case became internationally famous and that its epilogue took place in courts in London.[22]

The ICI case was probably one of the most formidable cases in the entire history of antitrust enforcement. The case was under investigation for several years before it came to court; it took several months before Judge Ryan could make findings of facts and formulate his opinion. The evidence presented by the Department of Justice consisted of over 3,500 exhibits printed in thirty large-sized volumes. The magnitude of the case should really not be surprising; it covered more

20. 92 F.Supp. 947, 961-962 (D. Mass. 1950).
21. United States v. Imperial Chem. Indus., Ltd., 105 F.Supp. 215 (S.D.N.Y. 1952).
22. [1952] 2 All E.R. 780 (C.A.); [1954] 3 All E.R. 88 (Ch.).

than fifty years of the activities of the chemical industry in almost all parts of the world.

The charges were brought against the Imperial Chemical Industries, Ltd., Imperial Chemical Industries (New York), Ltd., and E. I. duPont de Nemours and Co., alleging a conspiracy to divide world markets into exclusive areas and to eliminate competition in the manufacturing and marketing of chemical products. The conspiracy was achieved by agreements, contracts, patent assignments, and the establishment of jointly owned foreign subsidiaries. The conspiracy started in 1897, initially covering only the production of explosives but gradually extending to all chemical products. At first the cooperation between ICI and duPont was based on straightforward cartel agreements allocating exclusive territories to each party. In subsequent years when it appeared to duPont that an agreement of this type might be illegal under the Sherman Act, the cartel arrangements took the form of patent exchange or patent pool contracts. The purpose of those contracts was to eliminate competition between the ICI and duPont companies, and to perpetuate the division of markets. In the inter-war period also the IG Farbenindustrie A. G. joined the agreement and received its share of the world markets.

Simultaneously with extending their cooperation on the basis of patent and process exchanges, ICI and duPont embarked on a new venture which would facilitate the continuation of their conspiracy. This new idea consisted in creating a jointly owned (usually 50-50) subsidiary in a territory where ICI and duPont previously competed with each other. The first subsidiary so created was the Canadian Explosives, Ltd., in 1911. As the same pattern was to be repeated in subsequent years in several other countries, it is important to examine some details of this first new venture in Canada.

Prior to 1911, duPont and the predecessors of ICI competed with each other on the Canadian market. After Canadian Explosives, Ltd., was established, both duPont and ICI assigned to it all their Canadian patents, signed an agreement not to sell directly on the Canadian market, sold their Canadian plants to this new jointly owned subsidiary, and agreed that it should buy its raw materials in equal shares from ICI and duPont. A new agreement signed in 1936 ex-

plicitly stated that the "exploitation in Canada of the products of ICI and duPont should be conducted through Canadian Industries, Ltd.," exclusively. At the same time the Canadian subsidiary was limited in its operations to the Canadian market and was not allowed to export from Canada.

A similar pattern of cooperation between duPont and ICI was repeated in 1921 in Chile, in 1927 in Australia, in 1934 in Argentina, Uruguay, and Paraguay, and in 1938 in Brazil. It is essential to remember that the creation of subsidiaries in these countries did not open any new markets. Prior to establishing their subsidiaries there both ICI and duPont were already producing and selling their products in those markets and they competed keenly against each other. Commenting on this method of cooperation which was repeatedly used by the defendants, the district court said:

> We have found that the jointly owned companies were means designed and used by duPont and ICI to avoid and prevent competition between themselves and with others in the non-exclusive territories .... We have found that not only were they intended to affect the export and import trade of the United States but that the limitations placed on duPont and other American companies on the export to those jointly owned companies and the restrictions placed on those companies with respect to sales and exports by them to the United States did achieve the purpose and the end for which they were organized. ... The operations of those jointly owned companies were in violation of law.[23]

In its final statement the court stated that, based on the previous decisions of the Supreme Court, the law is crystal-clear: "A conspiracy to divide territories which affects American commerce, violates the Sherman Act" in the same way as price-fixing agreements do.[24]

The opinion on facts in the ICI case was presented by the court in 1951, but the opinion on remedies was presented by Judge Ryan several months later, in May, 1952.[25] The purpose of this supplementary opinion was to terminate, to prevent revival, and to destroy effects of illegal agreements in such a

23. 100 F.Supp. 504, 592 (S.D.N.Y. 1951).
24. *Ibid.*
25. 105 F. Supp. 215 (S.D.N.Y. 1952).

way that competition could be re-established with a minimum of judicial supervision. Among many other things, Judge Ryan ruled on foreign subsidiaries of ICI and duPont. After repeating that the foreign subsidiaries were used by ICI and duPont to accomplish the ends of an illegal agreement to divide territories and restrain competition, Judge Ryan stated that, considering all the circumstances, he saw no other alternative but to order divestiture of all jointly owned subsidiaries abroad:

> Our purpose is to provide that duPont will be without restraints to export in competition with ICI, that ICI will be without restraints to import into the United States in competition with duPont and that those foreign companies will be without restraints to export into the United States and import from it.[26]

In order to avoid any possible misunderstanding in the future Judge Ryan, stating explicitly that the formation of subsidiaries in foreign countries is not in and of itself illegal, said that "the wrong arises only from the formation of a number of those jointly owned companies, all in conjunction with the same potential competitor, with the purpose of dividing trade and commerce."[27] Probably anticipating some future allegations that by directing divestiture of those subsidiaries "we are extending this court's jurisdiction beyond places over which United States has sovereignty," Judge Ryan concluded that the decree of the court was not directed to those foreign companies which were not defendants in court, but was directed only to duPont and ICI, and it enjoined them from continuing actions and practices which substantially affected United States foreign trade and which violated United States law.[28] Judge Ryan was then far from asserting a "judicial aggression," as some of his critics maintained.[29]

There is no doubt that the practices involved in the case of cooperation abroad between two competitors struck at the very roots of competition. Instead of promoting competition a joint venture of two companies breathed the spirit of accord

26. *Ibid.* at 238.
27. *Ibid.* at 241.
28. *Ibid.* at 237.
29. Whitney, *Antitrust Law and Foreign Commerce,* 11 RECORD OF N.Y.C.B.A. 135 (1956); *Sources of Conflict Between International Law and the Antitrust Laws,* 63 YALE L. J. 661 (1954).

between them, it divided markets and fixed profit shares. If cooperation between competitors is allowed, then the nature of the antitrust policy will have undergone a basic change. If such a change is contemplated, however, the courts are not the proper institution to make it. A specific mandate from Congress would be required.

It has to be recognized, however, that there are certain exceptional circumstances where cooperation between competitors is necessary in order to have any trade at all. The most noted examples are the Arabian-American Oil Co. and the Kuwait Petroleum Co., where several leading oil companies were forced by the native rules to operate as a single unit. It is easy to see, however, that similar circumstances where cooperation is thrust upon potential competitors very seldom arise.

V

In addition to the *Timken, Minnesota Mining,* and *ICI* cases the issue of subsidiaries appeared in two other cases in the postwar years. The first of these cases, dealing primarily with a world-wide cartel in titanium pigments, was adjudicated in 1945.[30] This cartel was built by the National Lead Co. in cooperation with duPont, ICI, IG Farbenindustrie, and a French corporation called Societe Industrielle du Titane, known also as S.I.T. One of the measures used in accomplishing this world-wide control of the production of titanium was a network of subsidiaries located in several foreign countries and owned either jointly by National Lead and duPont, or by National Lead and its foreign partners.

The opinion of the court dwelt largely on the question of its jurisdiction over the case. Once the bases for jurisdiction were established, the main issues considered by the court were those of patent exchange and other cartel agreements. The problem of subsidiaries was considered only incidentally to the main issue of cartel arrangements. The court found, however, that the device of subsidiaries was used as a tool for dividing world markets into noncompeting areas, and it ordered National Lead and duPont to divest themselves of their interests in all of their foreign subsidiaries. When, on appeal, the case came to the Supreme Court, this Court accepted and

30. United States v. National Lead Co., 332 U.S. 319, 91 L.Ed. 2078 (1947).

affirmed all findings of facts by the district court and affirmed the order directing the defendants to divest themselves of some of their foreign investments, because it believed that those "acquisitions were part and parcel of the territorial allocation agreements and probably were a necessary element in the establishment of the territorial arrangements."[31]

The other case in which the question of foreign subsidiaries was indirectly raised was the widely known case of the electric lamp Phoebus cartel, which was organized by General Electric Co., with Westinghouse Electric Co., N. V. Philips Fabricken of Holland, and others.[32] In this case, decided by the district court in 1949, the government alleged that G. E. and other defendants conspired to monopolize and combined to restrain United States domestic and foreign trade in the electric lamp industry. One of the methods employed by this conspiracy was the formation of a large number of foreign subsidiaries, most of them wholly owned by G. E. The subsidiaries were not, however, defendants in the case; they were not served process. The court adopted here the attitude that the subsidiaries were legal entities and, as they were located abroad, they were outside the jurisdiction of the United States. The fact that they were owned, directed, and controlled by the General Electric Co., over which the court obviously did have jurisdiction, was overlooked. Although probably correct on legal grounds from the economic point of view such an attitude of the court was without any foundation, to say the least.

After the court found G. E. guilty of violating the Sherman Act four years passed before the final judgment was entered.[33] The request of the Department of Justice that G. E. be ordered to divest itself of all of its interests in foreign subsidiaries was denied by the court. The court believed that such an order of divestiture would be contrary to the United States foreign economic policy, and that it would not contribute in any appreciable way to the desired objective of promoting competition on the American domestic market. The court believed that its orders regulating the exchange of patents and future relations between G. E. and its foreign competitors would provide sufficient safeguards guaranteeing the removal

31. 332 U.S. 319, 363, 91 L.Ed. 2078, 2107 (1947).
32. United States v. General Elec. Co., 82 F.Supp. 753 (D.N.J. 1949).
33. United States v. General Elec. Co., 115 F.Supp. 835 (D.N.J. 1953).

of any restraints on competition. The court stressed the point that the nature and purpose of foreign subsidiaries in this case differed basically from the role the subsidiaries played in the *ICI* case. There, the subsidiaries were specifically organized to restrain trade; here, they were primarily employed as a means of penetrating a market and any restraints which resulted were due more to the cartel arrangements than to the existence of subsidiaries. Whether or not this was always so remains an open question and a highly debatable one. The clear-cut dividing line which the court drew between the *G. E.* case and the *ICI* case in reality was not always so clear and well defined as the court would like us to believe. In spite of the fact that the parent-subsidiary arrangements were declared illegal, G. E. was permitted to keep its foreign subsidiaries.

VI

An analytical review of the major cases involving foreign subsidiaries leads to the following classification of foreign subsidiaries:

1. A subsidiary organized by one American company in cooperation with foreigners in their own country (e.g., Timken).
2. A subsidiary organized by one American company in cooperation with foreigners in a third country (e.g., ICI and G. E.).
3. A subsidiary set up abroad jointly by a group of American producers (e.g., Minnesota Mining).

So far there had not been a clear-cut case involving a wholly owned foreign subsidiary organized by a single American firm. In the *G. E.* case, where some of the subsidiaries were wholly owned, the issues of cartelization and patents were more important than that of subsidiaries. The ruling therein cannot be applied to a simple case involving only a subsidiary device and no other restraints. The *Timken* decision obviously would not apply to a case of a wholly owned subsidiary, in spite of some of Justice Jackson's dicta.

It is difficult to say *a priori* how a case of a wholly owned subsidiary would be adjudicated by the courts. There is the possibility, although a rather remote one, that the courts might apply the decision of the *Yellow Cab* case and consider the

division of territory between parent and subsidiary as an illegal restraint of trade. Against this not very likely chance there stands a statement by the court in the *Minnesota Mining* case that foreign subsidiaries wholly owned by one corporation are legal. Ordering the dissolution of the jointly owned subsidiaries the court said that the decree to be entered in this case would expressly permit operation of foreign factories by each individual defendant. As the chance of applying the *Yellow Cab* decision is purely conjectural, and as it stands against the explicit dictum of the *Minnesota Mining* case, it may safely be assumed that a foreign subsidiary owned wholly by one American corporation is perfectly legal. Such a conclusion is based not only on judicial precedent but also on economic common sense. To conclude otherwise would surely mean to ignore the reality of conditions prevailing in our modern business life in general, and in foreign trade in particular.

The examination of the cases involving the issue of foreign subsidiaries reveals a number of definite conclusions. Although in all the cases discussed in this study the use of the corporate device to establish a subsidiary was declared by the courts as illegal, it appears unequivocal from the analysis of the facts and from the evidence presented that the formation and use of a foreign subsidiary as such should not be considered illegal. In all cases its use was made illegal by the environment in which it was utilized, by the purpose, and by the effects which it generated upon United States domestic and foreign trade. In all cases so far adjudicated by the courts it was found that the subsidiaries were used as a mechanism to perpetuate the restraints of trade and as a tool to effect the elimination of competition. The evidence also indicated that in all cases the illegal restraints and conspiracy antedated the creation of subsidiaries. It was, then, not the existence of a subsidiary as such which was illegal, but the use to which the subsidiary was put. In the *ICI* case the court plainly stated that "it is clear . . . that absent this wrongful purpose or harmful effect there is nothing per se unlawful in association or combination of a single American enterprise with a single local concern in a foreign county in a jointly owned manufacturing or commercial company to develop a local foreign market."[34]

34. See note 23 *supra*, at 557.

An additional and a very significant point at issue is that in all cases the restraints were effected by a company which had a dominant size in the domestic and foreign markets of the United States. By attacking those big corporations the Department of Justice really made an attack on size as much as it did on conspiracy.

In the widely discussed *Timken* decision the problem of intra-enterprise conspiracy was obviously misplaced. The remedy suggested by the Court requiring competition between the parent company and its subsidiaries was destined to be unworkable. The simple solution could have been to dissolve the whole multi-corporate organization. If some of the dicta of the *Timken* case were taken literally it would mean a complete elimination of the use of subsidiaries in foreign trade.[35] Fortunately, however, most authorities agree today that the *Timken* decision was a unique one and will not be used as a precedent.[36] To request competition among affiliates amounted really to seeking violation of rationality of business behavior.

The second conclusion which may be drawn from an analysis of the courts' decisions indicates that the courts so far have shown very little understanding of the process of foreign investment. They seemed to imply on several occasions in the *Timken* and *Minnesota Mining* cases that the export of goods is to be favored over the export of capital, and that when foreign investments are made they should not restrict the export of final goods. This implication, if correct, would obviously be contrary to economic rationality and against the policy of developing foreign countries by exporting capital. Professor Carlston believed that the courts tried "to set up artificial legal forces which will protect foreign commerce in goods as against the process of foreign investment."[37]

The third conclusion emerging here is that a concerted action of competitors abroad is subject to the same sanctions of law as is their concerted action at home. That was plainly demonstrated in the *Minnesota Mining* case. The Sherman Act, as interpreted, does not permit domestic subsidiaries to

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35. Oppenheim, *Federal Antitrust Legislation: Guideposts to a Revised National Antitrust Policy*, 50 MICH. L. REV. 69 (1952).

36. Whitney, *Planning Foreign Trade*, HOW TO COMPLY WITH THE ANTITRUST LAWS 377 (1954); Linowitz, *The International Businessman Meets the Antitrust Laws*, 41 CORNELL L. Q. 219 (1956).

37. Carlston, *Antitrust Policy Abroad*, 49 N. W. L. REV. 718 (1955).

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be owned jointly by competitors; such an arrangement is believed to restrain competition among them, amounts to a division of markets, and is illegal. The same rule of illegality applies to joint ventures abroad. Undoubtedly such a view has great justification and is based on sound economic grounds. No reasonable person can expect corporations X and Y to cooperate closely abroad, and request at the same time that they compete at home. Cooperation abroad will eventually lead to cooperation and division of markets at home.

When all facts are considered it may be concluded that the courts have failed in a few instances to show a reasonably correct and economically sound approach to the question of foreign subsidiaries. It is true that the per se doctrine was seldom, if ever, used and that within their limited resources the courts did consider, on a few occasions, the relevant economic and political factors which have had bearings on American foreign economic relations. Nevertheless, this does not mean that the courts made no mistakes and have left themselves no room for improvement. On the contrary, it is believed that there is an area where improvement in the judicial approach may take place. In the first place the concept of intra-enterprise conspiracy should be dropped, especially when it applies to foreign trade. This concept probably confuses more than it solves, and it is really unnecessary in prosecuting antitrust violations. Other equally effective but more rational weapons could be used here. Instead of using the conspiracy charge, the Department of Justice could use the excessive size approach as it did so successfully in the *Alcoa* case.

There is room for improvement also in the treatment of an even more significant issue, that concerning the case of a parent company and its wholly owned subsidiaries. In the *General Electric* case, the courts adopted the very rigid legal fiction of each corporation as an independent entity and refused to see that, from the point of view of economic behavior, all the subsidiaries plus the parent company actually constituted one enterprise. The courts refused to serve process on those foreign subsidiaries on the grounds that they were outside their jurisdiction. By doing so they completely overlooked the fact that the decision-making center of all those

subsidiaries was located not in Europe or in Asia but in the United States, in the Head Office of the General Electric Company. Such an oversight is surely unjustified. It would be advisable if the courts in addition to looking at the legalistic labels would also consider the economic facts of life. It is to be hoped that the approach displayed in the *G. E.* case will not be repeated. Probably it will not, because it has already been modified once in 1951 in the *ICI* case. In this case the process was served on the ICI via its wholly owned subsidiary ICI (New York) which was found to be within the jurisdiction of the United States. If it is permissible to serve process upon the parent company via its subsidiaries, it is even more logical to serve process upon the foreign subsidiaries via the parent company which is located in the United States. It certainly would be a significant help in the successful prosecution of antitrust violations if the courts would bridge the wide gap which today separates the concept of a wholly owned subsidiary from the concept of a branch or a department of a corporation. As there is really not much economic difference between a wholly owned subsidiary corporation and a department, there seems to be no justification to treat a subsidiary as a completely independent enterprise.

The third problem arising from the cases dealing with subsidiaries poses the complex question: Is divestiture an appropriate remedy? Here is an area of possible conflict between the need for divestiture of foreign assets in order to eliminate a chance of recurrence of illegal restraints, and the desirable policy of encouraging investments abroad. This question posed a dilemma to the courts on several occasions. Should the courts forego the opportunity of vigorously enforcing the antitrust laws so as not to harm American foreign investments, or should they give preference to the Sherman Act over the general principles of foreign economic policy? The solutions to this dilemma offered so far are very inconclusive. In two cases (*ICI* and *Minnesota Mining*) the courts ordered divestiture; in two other cases (*Timken* and *G. E.*) they refused to do so; while in the fifth case (*National Lead*) they ordered only a partial divestiture.

Considering the fact that any antitrust action in the area of foreign trade touches upon political, economic, military, and diplomatic relations involving the United States and several

foreign countries, it should be stressed that an antitrust action in foreign trade should never be considered in isolation but should always be related to wider aspects of our foreign relations. Specifically, all antitrust actions in foreign trade should be coordinated with, and related to, the general objectives of our economic policies. No situation should ever arise in which an antitrust action is contrary to the attainment of wider economic and political objectives of the United States. The antitrust policy should always be applied only within a wider framework of other foreign economic policies.

It is believed that the creation of a special Foreign Commerce Section within the Antitrust Division of the Department of Justice will contribute toward a more effective antitrust policy in cases dealing with subsidiaries abroad.[38] It is hoped that this section will coordinate the examination of all aspects of each case, and will also harmonize our antitrust policy with the general objectives of our overall foreign economic policy.

38. Press release of the Department of Justice, published in Wall Street Journal, Oct. 30, 1962, p. 17, col. 3.