Vanderbilt Journal of Transnational Law

Volume 15
Issue 4 *Winter 1982*

Article 2

1982

The Export Trade Exception to the Antitrust Laws: The Old Webb-Pomerene Act and the New Export Trading Company Act

Wilbur L. Fugate

THE EXPORT TRADE EXCEPTION TO THE ANTITRUST LAWS: THE OLD WEBB-POMERENE ACT AND THE NEW EXPORT TRADING COMPANY ACT

*Wilbur L. Fugate**

TABLE OF CONTENTS

I. INTRODUCTION

In October 1982 Congress passed new legislation, the Export

* Of Counsel, Baker & Hostetler, Washington, D.C.; former Chief, Foreign Commerce Section, Antitrust Division, United States Department of Justice; author of FOREIGN COMMERCE AND THE ANTITRUST LAWS (3d ed. 1982).

Trading Company Act of 1982 (Export Act),[1] providing for an exemption from the antitrust laws for export trade. This new legislation incorporates the standards of the existing Webb-Pomerene Export Trade Act (Webb Act) with that of section 5 of the Federal Trade Commission Act (FTC Act),[2] and adds a certification procedure for export companies and associations to provide more protection from antitrust liability to such companies and associations. The Senate Export Trading Company bill would have amended the Webb Act to embrace the new certification procedure and transfer the administration of the Webb Act from the Federal Trade Commission to the Secretary of Commerce. Paradoxically, the legislation, as enacted, does not amend the Webb Act, but leaves it intact. Title IV of the new Act restates the standards for application of the Sherman Act to export trade to clarify such criteria.

This Article discusses the history of the Webb Act as a prelude to a discussion of the new legislation. Because the standards in the new Export Act are similar to those in the Webb Act, the precedents under the Webb Act will remain important for interpreting the new legislation. Furthermore, a review of the Webb Act and of the alternatives proposed over the years gives an insight into the reasoning behind having an export exception to the antitrust laws.

There is always a move to spur United States exports during periods of a deficit in the United States balance of payments. This is as it should be. At such times analysts search for impediments to United States export, and the antitrust laws usually are singled out as one of the impediments. That is the case now. It is paradoxical that an *exemption* to the antitrust laws for export should have been considered a barrier to export trade, but some argued that the Webb Act has not provided an adequate exemption. Thus, some say that exporters hesitated to join together to use the Act because of a fear that the Justice Department would sue them for price fixing or cartel behavior despite the Act's exemption.

On the other hand—usually in more favorable economic climates—some officials of the Antitrust Division of the United States Department of Justice have urged the repeal of the exemp-

---

1. Pub. L. No. 97-290, [4 Federal Laws] TRADE REG. REP. (CCH) § 27,000.

2. Webb-Pomerene Export Trade Act, 15 U.S.C. §§ 61-66 (1976 & Supp. IV 1981); Federal Trade Commission Act, 15 U.S.C. §§ 41-58 (1976).

tion.[3] Supporters of this view have suggested that the Webb Act has never significantly helped to increase United States export trade because the trade of Webb associations has averaged only about five percent of United States exports and now represents less than two percent. They also have contended that United States exporters no longer face foreign buying cartels, one of the original reasons for passage of the Webb Act. Furthermore, small companies, for which the Webb Act primarily was designed, have not taken advantage of it. Finally and most importantly, they have suggested that the exemption is inconsistent with United States antitrust policy generally. The goal of the newly enacted legislation is to bolster the antitrust exemption for exports rather than limit the exemption. Both the Senate and the House of Representatives had this objective in mind, but the House bill sought to circumscribe the exemption more extensively.

When considered in perspective, the balance of payments deficit is not a brand new problem. United States exports for 1981 were $233.7 billion, and imports were $261.3 billion, leaving a trade deficit of $27.6 billion. In 1978 the deficit was greater—$31.1 billion (exports totaled $143.7 billion while imports were $174.8 billion).[4] The last year the United States had a balance of payments surplus was 1975, when exports were $107.7 billion and imports were $98.5 billion, leaving a surplus of $9.1 billion.[5] The preceding figures indicate some very favorable factors: exports as well as imports have increased greatly (even taking account of inflation), and the trade deficit in 1981 was not proportionately as large as it was in 1978. Accordingly, our export performance has not been particularly poor. Furthermore, even if antitrust law impedes export, there surely are many more important factors which affect export performance.

The Webb Act has been reconsidered repeatedly during the years since its passage in 1918. The most recent reconsideration, aside from congressional consideration of the Export Trading

---

3. *See Interview with Assistant Attorney General John Shenefield,* ANTITRUST & TRADE REG. REP. (BNA) No. 875, at AA-3 (Aug. 8, 1978); Turner, *United States Antitrust Policy and American Foreign Commerce,* 1967 SW. LEGAL FOUND. 206; *see also Hearings Before the Subcomm. on Antitrust and Monopoly of the Senate Judiciary Comm. pursuant to S. Res. 65,* 88th Cong., 1st Sess. 62 (1963) (statement of L. Loevinger).

4. Figures furnished by United States Department of Commerce, Bureau of International Trade. The deficit is worsening in 1982.

5. *Id.*

Company Act, was by the National Committee for the Review of the Antitrust Laws and Procedures.[6] A special business-oriented panel appointed to aid the committee favored strengthening the Act,[7] but the Commission itself took a rather negative view of it. In addition, the Business Practices Committee of the Organization for Economic Cooperation and Development has made a study[8] of the operation of export associations or "export cartels" which will be described in a subsequent section.

This Article will examine the Webb Act and its operation; the courts' treatment of the Webb Act; the manifold suggestions and recommendations for amending, changing, repealing, or replacing it; and finally, the new Export Trading Company Act of 1982 and the changes it made.

II. ANOMALOUS NATURE OF THE WEBB ACT—SEPARATION OF RESTRAINTS ON DOMESTIC TRADE AND FOREIGN TRADE

In general, the Webb-Pomerene Export Trade Act[9] permits United States companies to combine for the purpose of engaging in export trade, and, provided they stay within the limits of the Webb Act, such activity is exempt from the Sherman Act.[10] Section 1 of the Webb Act defines the terms used, including "export trade," which means "solely trade or commerce in goods, wares,

---

6. REPORT TO THE PRESIDENT AND THE ATTORNEY GENERAL OF THE NATIONAL COMMISSION FOR THE REVIEW OF THE ANTITRUST LAWS AND PROCEDURES (1979).

7. *Export Trade Companies and Trade Associations: Hearings Before the Subcomm. on International Finance of the Senate Comm. on Banking, Housing, and Urban Affairs*, 96th Cong., 1st Sess. 171 (1979) (report of Business Advisory Panel on Antitrust Export Issues).

8. ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT, REPORT OF THE COMMITTEE OF EXPORTS ON RESTRICTIVE BUSINESS PRACTICES (1974).

9. 15 U.S.C. §§ 61-66 (1976 & Supp. IV 1981). For background on the Webb-Pomerene Act, see W. FUGATE, FOREIGN COMMERCE AND THE ANTITRUST LAWS § 7 (3d ed. 1982); REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 109-14 (1955); McDermid, *The Antitrust Commission and the Webb-Pomerene Act: A Critical Assessment*, 37 WASH. & LEE L. REV. 105 (1980); Allison, *Antitrust and Foreign Trade: Exemption for Export Associations*, 11 HOUS. L. REV. 11, 24 (1974); Chapman, *Exports and Antitrust: Must Competition Stop at the Water's Edge?*, 6 VAND. J. TRANSNAT'L L. 319 (1973); Note, *The Webb-Pomerene Act: A Reexamination of Export Cartels in World Trade*, 19 VA. J. INT'L L. 151 (1978).

Some of the descriptive material herein has been adapted from W. FUGATE, *supra*.

10. 15 U.S.C. §§ 1-7 (1976).

or merchandise exported or in the course of being exported from the United States or a territory thereof to any foreign nation. . . ."[11] Section 2 provides that nothing in the Sherman Act shall be construed as declaring illegal an association entered into "for the sole purpose of engaging in export trade and actually engaged solely in export trade," or acts done or agreements made in the course of such export trade. Section 2, however, has two provisos limiting Sherman Act exemption. First, such association, or acts or agreements in pursuance thereof, may not be in restraint of trade within the United States or in restraint of the export trade of any domestic competitor of the association. Second, the association may not, in the United States or elsewhere, enter into any agreement, understanding, or conspiracy, or do any act which "artificially or intentionally enhances or depresses prices within the United States of commodities of the class exported by the association, or which substantially lessens competition within the United States or otherwise restrains trade therein."[12] Section 3 provides an exemption from the merger provisions of section 7 of the Clayton Act for a member company buying stock in an export association.[13] Section 4 broadens the jurisdiction of the Federal Trade Commission Act to include acts committed outside of the United States.[14] Section 5 of the Webb Act[15] requires all export associations subject to the Act to register with the Federal Trade Commission (FTC). An association that fails to file faces a penalty of one hundred dollars per day, and loses the benefits of the Act.[16] If the Commission has reason to believe that any act or agreement of the association is in restraint of the export trade of any domestic competitor or has done anything to artificially raise or depress domestic prices, the Commission may investigate and make recommendations to the Attorney General for whatever action he may deem proper.[17] This is much less stringent than an antitrust suit, but, as later noted, the Supreme Court[18] held that an antitrust suit may be brought against

11. *Id.* § 61.
12. *Id.* § 62.
13. *Id.* § 63.
14. *Id.* § 64.
15. *Id.* § 65.
16. *Id.*
17. *Id.*
18. United States v. United States Alkali Export Ass'n, 58 F. Supp. 785 (S.D.N.Y. 1944), *aff'd*, 325 U.S. 196 (1945) (jurisdictional issue), *aff'd*, 86 F.

an association in addition to, or as a substitute for, an FTC investigation.

The above provisions may indicate why there is considerable apprehension in the business community regarding the use of the exemption. The Webb Act exempts export associations from the Sherman Act upon such strict conditions that the Sherman Act appears to be reinforced with additional prohibitions against acts in foreign trade that substantially lessen competition in the United States or otherwise restrain trade therein. Furthermore, the Webb Act specifically declares that the Federal Trade Commission Act applies to unfair methods of competition "without the territorial jurisdiction of the United States."[19] Under section 5 the Commission is enjoined to watch such associations closely for violations of the strict conditions imposed by the Act.[20]

The passage of the Webb Act was preceded by a Federal Trade Commission Report in 1916.[21] The 1916 FTC Report stressed the importance of our foreign commerce and stated that one fact which stood out sharply was the demand for cooperation among manufacturers and producers in the export business. It also pointed out that small businessmen were at a disadvantage in single-handedly attempting to enter foreign markets in the face of powerful united competitors of other nations.[22] The FTC Report, however, mentioned two chief dangers of cooperative export organizations: (1) they might be used to exploit consumers in the home market; and (2) they might be used unfairly against individual United States concerns involved in the export trade that are not members of the organization.[23]

The 1916 FTC Report recommended passage of permissive legislation establishing the legality of cooperation in foreign trade among United States producers but with safeguards against the dangers mentioned above.[24] President Wilson, in his address to Congress on December 5, 1916, urged enactment of the pending

---

Supp. 59 (S.D.N.Y. 1949) (on the merits).

19. 15 U.S.C. § 64.

20. *Id.* § 65.

21. FEDERAL TRADE COMMISSION, REPORT OF THE FTC ON THE OPERATION OF THE EXPORT TRADE ACT (1916); *see* GILBERT, EXPORT PRICES AND EXPORT CARTELS 113 (TNEC Monograph No. 6, 1940).

22. FEDERAL TRADE COMMISSION, REPORT ON COOPERATION IN AMERICAN EXPORT TRADE 200 (1917).

23. *Id.* at 379.

24. *Id.* at 379-81.

legislation "to extend greater freedom of combination to those engaged in promoting the foreign commerce of the country than is now thought by some to be legal under the terms of the laws against monopoly. . . ."[25] He asked for a law that would "give freedom without permitting unregulated license."[26]

As the 1916 FTC Report pointed out, the sponsors of the bill stated that the purpose of the legislation was to enable United States businessmen to compete with foreign competitors on an equal footing and, particularly, to aid small businesses.[27] The advantage to small businesses set forth in the FTC Report was that small businessmen could compete with large foreign cartels by pooling sales and finances as well as by eliminating price conflicts among themselves.[28] The validity of these arguments from an economic standpoint has been questioned.[29]

III. Judicial Interpretation of the Webb Act

The precedents under the Webb Act consist of FTC Reports and Recommendations on Investigations of practices of particular associations under the Act and of judicial decisions in three cases: the *Alkali*,[30] *Minnesota Mining*,[31] and *Concentrated Phosphate* cases,[32] decided respectively in 1948-49, 1950, and 1968. In *Concentrated Phosphate* the Supreme Court for the first time decided a case involving a Webb association on the merits. The Court's consideration in the prior *Alkali* case was limited to a jurisdictional issue.

---

25. *Study of Monopoly Power: Hearings Before the Subcomm. on the Study of Monopoly Power of the House Judiciary Comm.*, 81st Cong., 2d Sess. 112 (1950) (excerpt from President Woodrow Wilson's address to Congress on Dec. 5, 1916) [hereinafter cited as *Monopoly Power Hearings*].

26. *Id.*

27. 55 Cong. Rec. 3569 (1916).

28. Federal Trade Commission, Report on Cooperation in American Export Trade 8 (1916).

29. *See, e.g.*, Fournier, *The Purposes and Results of the Webb-Pomerene Law*, 22 Am. Econ. Rev. 18 (1932).

30. United States v. United States Alkali Export Ass'n, 58 F. Supp. 785 (S.D.N.Y. 1944), *aff'd*, 325 U.S. 196 (1945) (jurisdictional issue), *aff'd*, 86 F. Supp. 59 (S.D.N.Y. 1949) (on the merits).

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

32. United States v. Concentrated Phosphate Export Ass'n, 393 U.S. 199 (1968).

A. The *Alkali* Case—Jurisdiction; Joining Foreign Cartels

The *Alkali* case initially raised the question whether the Attorney General could bring an independent suit against Webb-Pomerene associations for antitrust violations in foreign trade.[33] The defendants contended that the Commission first had to make an investigation and issue recommendations, then refer the matter to the Attorney General.[34] The Supreme Court rejected this argument, holding that the powers of the Commission under the Webb Act were only investigatory and that there was no intention to repeal either the jurisdiction given to the district courts or the power given to the Attorney General to bring actions under section 4 of the Sherman Act.[35] The Supreme Court went on to say that "there is no basis for interpreting the statute as though it had been contrived to prevent hostile action rather than to encourage efficient cooperation between the Commission and the Department of Justice."[36]

After the disposition of the jurisdictional question, the *Alkali* case was decided on the merits in the district court.[37] The defendants, including two export associations, the United States corporations which were members of one or the other of the export associations, and a British corporation, Imperial Chemical Industries, Ltd., (ICI) admitted agreements among themselves and with other foreign producers, including I.G. Farben, the giant German chemical company, to allocate world markets in alkalis. Alkasso, the primary export association, had as members eleven of the most important alkali-producing companies in the United States. The purpose of the association was to handle all sales of its members in foreign markets. In 1929 and 1933 Alkasso made agreements with Imperial Chemical Industries, Ltd. in which, *inter alia,* Alkasso was given a one-quarter share of total exports from the United Kingdom and the United States. Alkasso and ICI promised to sell at agreed prices in markets not specifically enumerated, and Alkasso agreed not to ship to the continent of Europe or to the British Empire, including Australia and New Zea-

33. United States v. United States Alkali Export Ass'n, 325 U.S. at 198.
34. *Id.* at 200-01.
35. 15 U.S.C. § 4.
36. United States v. United States Alkali Export Ass'n, 325 U.S. at 209.
37. United States v. United States Alkali Export Ass'n, 86 F. Supp. 59 (S.D.N.Y. 1949).

land.[38] In 1936 Belgian Solvay, a Belgian corporation, became a party to a tripartite arrangement with Alkasso and ICI. That arrangement prescribed some exclusive territories and some joint territories and established percentage quotas for the latter.[39] There was also evidence of collateral market arrangements which included I.G. Farben.[40] The defendants relied entirely upon the exemption given by the Webb Act and contended that by virtue of that statute the antitrust laws had no applicability to a division of territories outside of the United States, to the establishment of exclusive foreign markets, or to the fixing of prices with foreign competitors in foreign markets.[41]

After stating that such activities would be a violation of the Sherman Act apart from any immunity afforded by the Webb Act, the court held that the defendants' actions were in restraint of the export trade of domestic competitors of the association. The court stated: "[F]or as long as one rival of an export association sought to vend his wares in foreign territory, international agreements of the kind here involved could do naught but restrain his trade."[42] The court also mentioned that such agreements would stifle potential competition.[43] The court concluded that the practices of allocating exclusive markets, fixing prices on an international scale, and selling through joint agents with foreign competitors were not "agreements in the course of export trade."[44] The decision was predicated upon an interpretation of the Webb Act as forbidding these activities in foreign markets whether or not the United States was a territory embraced by cartel agreement. Here, however, the court did find that the parties intended to include the United States in the market partitioning despite the deletion in proposed agreements of any provisions expressly including it.[45] The court did not doubt that limiting imports to the United States substantially lessened competition and restrained trade within the United States.[46]

---

38. *Id.* at 65.
39. *Id.*
40. *Id.*
41. *Id.*
42. *Id.* at 67.
43. *Id.* at 65.
44. *Id.* at 70.
45. *Id.* at 71-73.
46. *Id.* at 73-74.

B. The *Minnesota Mining* Case—Joint Foreign Manufacture

The *Minnesota Mining*[47] court stated that a major issue in the case turned on the defendants' joint establishment of manufacturing companies in England, Canada, and Germany, and a minor issue turned on their use of a Webb-Pomerene export association.[48] Here, nine United States domestic corporations (later reduced to four), manufacturers of coated abrasives, had formed an export company, Durex Abrasives Corporation. The manufacturing companies also formed jointly owned foreign subsidiary companies in Great Britain, Canada, and Germany to manufacture coated abrasives in foreign countries, and a United States holding company, the Durex Corporation (Durex), to hold the stock of the foreign companies and to hold foreign patents.[49] The export company used three methods of distribution: (1) through distributors in foreign countries (some distributors were exclusive in a particular area); (2) through sales to domestic exporters (at a higher price, however, than to the company's foreign distributors); and (3) through the foreign subsidiaries which were jointly owned by the member companies.[50] The member companies entered into agreements with Durex, the holding company, to license all of their foreign patents relating to coated abrasives, but reserved the right to fix prices and standards of manufacture for the products manufactured.[51] These licenses were passed on to the joint foreign subsidiaries. With the exception of sales to the export company and certain other immaterial exceptions, these licenses were exclusive, not only for foreign manufacture, but also for export sales from the United States.[52] Durex agreed not to import to the United States any products in which the patented inventions were used.[53] No agreements were made between the export company and Durex or between the export company and any of the foreign subsidiaries. In situations in which economic and political conditions made it unprofitable for the export company to export, it arranged for a Durex subsidiary to supply the particular article and, gradually, through express agreement or practice or through

47. 92 F. Supp. 947 (D. Mass. 1950).
48. *Id.* at 958.
49. *Id.* at 951.
50. *Id.*
51. *Id.* at 954.
52. *Id.* at 954-55.
53. *Id.* at 954.

the appointment by the export company of the foreign subsidiaries as its agents, the foreign subsidiaries supplied much of the market formerly supplied by the export company.[54]

The court held[55] that agreement by the dominant United States manufacturers of coated abrasives (controlling four-fifths of the export trade) not to ship to particular areas but to do business there through jointly owned foreign factories was a violation of section 1 of the Sherman Act. The court also held that the effect of the arrangement was to deprive United States competitors of access to the foreign markets.[56] The court decided that the Webb Act provided no immunity for the defendants' conduct because it was limited to "that sort of 'export trade' . . . which consists of 'commerce in goods . . . exported . . . from the United States . . . to any foreign nation.' "[57] The court even speculated in passing that the export arrangement might be an unreasonable per se violation of section 1 of the Sherman Act as a restraint of "commerce among the several States."[58] Because joint manufacturing activity abroad (in contrast to joint exporting) is not covered by the Webb Act, the court suggested that the Government might have alleged that the joint foreign factories, like joint domestic price fixing, were unreasonable per se as a restraint on the domestic United States market.[59]

C. The *Concentrated Phosphate* Case—Government Sponsored Programs Are Not Export Trade

The Supreme Court reviewed the Webb-Pomerene Act in its *Concentrated Phosphate*[60] decision in 1968. The Court, reversing the lower court, held that the Webb Act did not cover joint overseas sales by an export association of commodities financed by the United States Government under the foreign aid program.[61] The district court had held that the activities in question, the sale and the shipment of fertilizer to Korea, were "act[s] done in the

54. *Id.* at 955.
55. *Id.* at 961.
56. *Id.* at 961-62.
57. *Id.* at 963.
58. *Id.* at 961-62.
59. *Id.*
60. 393 U.S. 199 (1968).
61. *Id.* at 209-10.

course of export trade" under section 2 of the Webb Act.[62] Though the district court found that the foreign aid transactions were "initiated, directed, controlled and financed" by the Agency for International Development (AID), it concluded that the form of the transactions, a direct sale abroad, was controlling.[63] The Supreme Court, however, concluded that because AID retained effective control over the shipments at every stage through final payment, the "economic reality" was that the United States was furnishing the fertilizer to Korea.[64] The Court also noted that the burden of the noncompetitive prices fell on the United States taxpayer.[65] Looking to the legislative history of the Webb Act, the Court found that its primary purpose was to protect United States businesses from foreign cartels and that great pains were taken to ensure that application of the Act would not injure domestic interests.[66] On remand, Judge Ryan entered a final judgment agreed to by the parties which enjoined each of the defendants from agreeing on prices or allocating business through a Webb association when the transaction was known to involve government financing under a foreign aid program.[67]

The Supreme Court, in the course of its opinion, took note of the legislative history of the Webb-Pomerene Act and made some observations concerning it. According to the Court, the Webb Act was passed "[t]o aid and encourage our manufacturers and producers to extend our foreign trade," and "Congress felt that American firms needed the power to form joint export associations in order to compete with foreign cartels."[68] The Court observed, however, that the Act was carefully "hedged" to prevent injury to domestic business.[69] Further, in the Court's view, Congress had concluded that the Webb Act would increase United States foreign trade "without depriving American consumers of the main advantages of competition."[70]

Producers of phosphate fertilizer earlier had faced antitrust

---

62. *See id.* at 201 (1968).

63. United States v. Concentrated Phosphate Export Ass'n, 273 F. Supp. 263, 270 (S.D.N.Y. 1967), *rev'd,* 393 U.S. 199 (1968).

64. *Concentrated Phosphate Export Ass'n,* 393 U.S. at 204-09.

65. *Id.* at 209.

66. *Id.* at 207-08.

67. That judgment was entered on Mar. 25, 1969.

68. *Concentrated Phosphate Export Ass'n,* 393 U.S. at 206.

69. *Id.*

70. *Id.*

trouble with their export sales. The Federal Trade Commission investigated the Phosphate Export Association and made recommendations to it for the readjustment of its business in 1946.[71] In 1963, the Department of Justice brought two indictments and a civil suit[72] relating to phosphate rock and triple superphosphate. The cases did not involve Webb associations, but the complaints alleged that the defendants (without benefit of the Webb Act) fixed prices, allocated sales, and sold through common export agents. The defendants in the criminal cases pleaded nolo contendere, and the civil case was dismissed.[73]

A case similar to the *Concentrated Phosphate* case, *United States v. Anthracite Export Association*,[74] concerned the joint sales by members of an export association of anthracite coal to the United States Army in Europe. The complaint charged that the defendant members of the Anthracite Export Association bid jointly for the supply of coal to army installations in Europe, allocated the supply, and sold exclusively through a common sales agent, Foreston Coal Company, and its affiliated export company.[75] Participation was limited to the association members and certain other selected producers. A consent judgment, entered in 1970[76] following the Supreme Court's *Concentrated Phosphate* decision, enjoined the defendants from jointly controlling the prices or allocating amounts of anthracite coal to be supplied to the army. The defendants were enjoined from agreeing not to compete and from selling through a common agent or to a com-

---

71. *In re* Phosphate Export Ass'n, 42 F.T.C. 555, 848 (1946).

72. United States v. International Ore & Fertilizer Corp., [1961-1970 Transfer Binder] TRADE REG. REP. (CCH) ¶ 45,064 (M.D. Fla. 1964); United States v. International Mining & Chem. Corp., [1961-1970 Transfer Binder] TRADE REG. REP. (CCH) ¶ 45,063 (S.D.N.Y. 1963) (indictment filed, phosphate rock); United States v. International Ore & Fertilizer Corp., [1961-1970 Transfer Binder] TRADE REG. REP. (CCH) ¶ 45,063 (S.D.N.Y. 1963) (indictment filed, triple superphosphate).

73. The claim of the defendant, International Ore & Fertilizer Corporation, was dismissed after its acquisition by Occidental Petroleum Corporation. Thereafter, the remaining defendants were dismissed without prejudice because conditions in the industry had changed. *See International Ore & Fertilizer Corp.*, [1961-1970 Transfer Binder] TRADE REG. REP. (CCH) ¶ 45,064.

74. [1961-1970 Transfer Binder] TRADE REG. REP. (CCH) ¶ 45,065 (M.D. Pa. 1965) (complaint filed).

75. *Id.*

76. United States v. Anthracite Export Ass'n, 1970 Trade Cas. (CCH) ¶ 73,348 (M.D. Pa. 1970).

mon purchaser for resale when supplying the United States Army's European bases.

Besides proceeding with the three named cases, the Department of Justice brought a suit against the Electrical Apparatus Export Association[77] and a suit against the California Rice Exporters, a Webb association, which concerned only interstate trade and exports to Hawaii and Puerto Rico.[78]

The complaint in another case, *United States v. American Lead Pencil*,[79] did not join a Webb association as defendant but charged the association's four member lead pencil companies with agreeing to refrain from establishing sales or manufacturing outlets in foreign companies without one another's prior consent. The complaint also charged them with agreeing to refrain from exporting to foreign countries in which any of the defendants controlled lead pencil manufacturing facilities except at prices agreed upon by all defendants. A consent decree enjoining defendants from such agreements was entered on February 5, 1954.[80]

The Federal Trade Commission also has instituted a number of investigations under the Webb Act and has made findings and orders directed to such associations. These findings and orders define the scope of the Webb Act and what activities may be legally conducted under it. These are noted by the Commission in its rules for export associations as set forth in section V of this Article.

IV. Current Operations of Export Associations Under the Webb Act

The FTC brochure, which summarizes how the Webb Act operates and which is distributed to applicant associations, states that there are three types of associations: (1) those which act as a central selling agent for all of the members, take orders, negotiate sales, and handle the shipment of the goods; (2) those which direct the exports of their members and retain certain functions in export trade but allow orders to be placed by agents already es-

77. United States v. Electrical Apparatus Export Ass'n, 1946-1947 Trade Cas. (CCH) ¶ 57,546 (S.D.N.Y. 1947)(consent decree entered).

78. United States v. California Rice Exporters, [1890-1951] Fed. Antitrust Laws (CCH) 409 (N.D. Cal. 1951) (indictment returned; three defendants dismissed, others acquitted by jury, Jan. 15, 1952).

79. 1954 Trade Cas. (CCH) ¶ 67,676 (D.N.J. 1954).

80. *See id.*

tablished by the members abroad (in this case the export department of one member may handle foreign orders for several members); and (3) those which buy the members' products and resell them abroad at terms agreed upon by the members.[81] The FTC further states that operations (1) and (2) may be combined; that is, members can use their own agents in some markets and the associations' agents or offices in other markets, particularly for new markets or for those in which the trade is not well developed.[82]

The Commission sets out the following as current Webb association functions:[83]

(1) serving as export agent for the members in all or some of their markets and for all or some of their products;

(2) purchasing products for resale from the members;

(3) employing agents, directing members' agents, and promoting conferences and agreements in export trade;

(4) exploiting members' products abroad, especially in new markets, and promoting members' brands and patented goods; and

(5) agreeing with members upon prices for export and adopting uniform contract forms.

The Commission stresses that the most important role of the association articles is to describe the acts to be done or the powers to be exercised.[84] A sample form for Webb Association Articles is enclosed as part of the brochure.

On January 5, 1982, there were thirty-nine registered Webb-Pomerene Export Trade Associations, up from twenty-nine four years ago when the FTC made its last broad study of the associations.[85] As in 1978, association membership presently varies from a few members to sixty-six firms in one association. The present roster has some very large companies and some groups of many small companies. Among the former, the Motion Picture Export Association of America, Inc. and two other film associations have the primary film companies as members; the American Frozen

---

81. FEDERAL TRADE COMMISSION, BROCHURE FOR EXPORTERS ASSOCIATION FUNCTIONS (1982) [hereinafter cited as FTC ASSOCIATION FUNCTIONS BROCHURE].

82. *Id.*

83. *Id.*

84. *Id.*

85. FEDERAL TRADE COMMISISON STAFF REPORT, WEBB-POMERENE ASSOCIATIONS: TEN YEARS LATER (1978) [hereinafter cited as FTC REPORT].

Food Export Association, Inc. includes such companies as General Foods Corporation, Pillsbury Consumer Food Export Group, and Stokely-Van Camp, Inc.; the Phosphate Chemical Export Association, Inc. includes American Cyanamid Company, W.R. Grace, and Freeport Chemical Company; and the Pulp, Paperboard Export Association of the United States includes such companies as Georgia-Pacific Corporation, ITT-Rayonier, Inc., St. Regis Paper Company, and Scott Paper Company. The Sulphur Export Association now has only two members: Freeport Minerals Company and Texasgulf, Inc. The United States Cigarette Export Association has three cigarette companies: Brown and Williamson Tobacco Corporation, Philip Morris, Inc., and R.J. Reynolds Tobacco Company.

The other associations cover a wide range of products, but the following agricultural products predominate: cotton (this association has the largest membership), peanuts, poultry, avocados, dried fruit, rice, citrus fruits, general produce, and tobacco. Other products are wood chips and wood fibre, coal, furniture, soda ash, and grease products.[86]

The latest figures on the proportion of trade handled by Webb associations are contained in the 1978 FTC Report.[87] This report revised the 1962 percentages and indicated that these associations accounted for $499 million or 2.3 percent of the total United States exports of $21.4 billion. In 1978 the FTC staff concluded that Webb associations in 1976 handled United States exports of $1.725 billion or 1.5 percent of total United States exports of $114 billion.[88] These figures show the dramatic increase of United States exports from 1963 to 1976. With much greater United States exports in 1981, Webb associations now probably represent two or three percent. In contrast, Webb associations in their heyday accounted for or "assisted" over twelve percent of United States exports.[89] Quantatively, however, Webb exports are a very large figure, and for companies in such associations this cooperative form of export has been very important.

---

86. Roster of companies provided by the FTC.

87. FTC REPORT, *supra* note 85.

88. *Id.* at 15.

89. FEDERAL TRADE COMMISSION, ECONOMIC REPORT: WEBB-POMERENE ASSOCIATIONS: A FIFTY YEAR REVIEW 23 (1967) [hereinafter cited as FTC FIFTY YEAR REVIEW].

V. FTC View of Activities Permitted and Prohibited by the Webb Act

The Federal Trade Commission brochure of instructions sent to Webb association applicants defines "export" as follows:

> "Export" is, insofar as consistent with law, defined as any act relating to offer, promise or performance of export by the association or its members from the United States, of goods, wares and merchandise, and not consisting of producing or manufacturing within the United States, nor of selling within the United States for consumption within the United States nor of selling within the United States for resale within the United States.[90]

The form "articles" for an association empowers an association, "[i]n any foreign country or area, to do any act that is lawful or customary there, subject only to the policy and antitrust laws of the United States, with such additional leeway as the Webb law authorizes."[91]

The FTC includes a brochure listing practices permitted and practices prohibited in the materials it sends to applicant associations. In brief, under the FTC rules an association may engage in the following activities:

1. An association may provide that all export sales of members are to be made through the association even though this covers a large percentage of industry sales.[92]

2. An association may reasonably restrict a member's right to withdraw and may for a limited time reasonably restrict a withdrawing member's competition with the association.[93]

3. An association may fix the prices and terms of export sale whether it functions by account or by placing orders on behalf of the members.[94]

---

90. FTC Association Functions Brochure, *supra* note 81, subtitle 9 (Association Functions).

91. *Id.* (Articles of (Incorporation) (Association)).

92. Federal Trade Commission, Brochure for Exporters, Activities and Practices 1 (1982) [hereinafter cited as FTC Activities Brochure]. In support, the FTC cites United States v. Minnesota Mining & Mfg. Co., 92 F. Supp. 947, 965 (D. Mass. 1950), as well as a number of FTC cases. The FTC also cites United States v. United States Alkali Export Ass'n, 86 F. Supp. 59 (S.D.N.Y. 1949) (because evidence existed of actions intended to stifle exports, such an association was prohibited).

93. FTC Activities Brochure, *supra* note 92, at 2.

94. *Id.* at 3.

4. An association may allocate exclusive trade areas by itself, or with cartels if the United States is excluded from the agreement.[95] The Commission cites several FTC cases on this point. If by this the Commission means that an association may agree with a foreign cartel to sell only in Canada or South America and not in Europe in return for an agreement by the cartel to sell only in Europe and not in Canada or South America, the author would disagree. Such an agreement would affect United States exports. The *Alkali* case[96] discussed above would appear to forbid these arrangements, as would the classic cartel cases.[97]

5. An association may assign quotas on exports by its members. This would appear to be permitted so long as there is no discrimination, especially against a smaller member.

6. An association may select its own exclusive distributors or brokers.[98]

The Commission lists first among its prohibited practices any agreements which may restrain the export of domestic producers. These include agreements not to compete with nonmembers or arrangements whereby the exports of nonmembers are to be deducted from the export quota of the association. The purpose of such agreements is to curtail nonmembers' exports. Also, an association cannot prohibit members from selling to nonmember domestic exporters or deduct such sales from a member's quota.

A second class of prohibited practices restricts the right of domestic producers to compete *within* the United States as, for example, when these producers control or attempt to control the terms or conditions of sales within the United States.[99] Associations cannot restrict imports into the United States or fix prices within the United States.

A third class of prohibitions concerns practices said to unlawfully restrict actual or potential imports into the United States.[100] It is not clear why the Commission uses the "said to" phrase because its recommendations in past investigations are cited. These

---

95. *Id.* at 3-4.

96. 86 F. Supp. 59 (S.D.N.Y. 1949).

97. *See, e.g.*, United States v. Aluminum Co. of Am., 148 F.2d 416 (2d Cir. 1946) (imports into the United States were in terms excluded per agreement among foreign producers with a United States manufacturer).

98. FTC ACTIVITIES BROCHURE, *supra* note 92, at 1-4.

99. *Id.* at 5.

100. *Id.* at 5-7.

practices include price fixing in the United States[101] and agreements with foreign producers in which the United States is included as an exclusive trade area.[102] Both of these practices are certainly illegal. Another prohibition concerns stock ownership by foreign producers when the markets supplied by these foreign producers might in the absence of said companies be supplied from the United States.[103] Still another prohibition[104] tracks the opinion in *Concentrated Phosphate*[105] discussed earlier.

Other prohibited practices listed are gleaned from recommendations of the Commission in particular cases. Thus, an association has been prohibited from, *inter alia,* the following acts or agreements: guaranteeing foreign producers the right to sell in a given area above sales there by the association;[106] discriminating between its members as to the right of withdrawal or restricting competition of a member after withdrawal;[107] conducting its office operations jointly with a domestic trade association;[108] agreeing to "maintain the status quo" in the world market;[109] and having foreign purchasers or customers as members.[110] A general prohibition or order has required associations to file the information required by statute (*e.g.,* information relating to agreements with

---

101. *Id.* at 6. The FTC cites Pipe Fitters and Valve Export Ass'n, 45 F.T.C. 917 (1948) and Export Screw Ass'n of the United States, 43 F.T.C. 980 (1947).

102. FTC ACTIVITIES BROCHURE, *supra* note 92, at 6. The FTC cites the following decisions in support: United States v. United States Alkali Export Ass'n, 86 F. Supp. 59 (S.D.N.Y. 1949); Export Screw Ass'n of the United States, 43 F.T.C. 980 (1947); Phosphate Export Ass'n, 42 F.T.C. 555 (1946).

103. FTC ACTIVITIES BROCHURE, *supra* note 92, at 7. The FTC cites the following decisions in support: United States v. Minnesota Mining & Mfg. Co., 92 F. Supp. 947 (D. Mass. 1950); General Milk Co., 44 F.T.C. 1355 (1947); Export Screw Ass'n of the United States, 43 F.T.C. 980 (1947).

104. FTC ACTIVITIES BROCHURE, *supra* note 92, at 9.

105. 42 F.T.C. 555 (1946).

106. FTC ACTIVITIES BROCHURE, *supra* note 92, at 7; *see* Sulphur Export Corp., 43 F.T.C. 820 (1947).

107. FTC ACTIVITIES BROCHURE, *supra* note 92, at 7; *see* Phosphate Export Ass'n, 42 F.T.C. 555 (1946); *see also* United States v. Minnesota Mining & Mfg. Co., 92 F. Supp. 947 (D. Mass. 1950).

108. FTC ACTIVITIES BROCHURE, *supra* note 92, at 8; *see* Carbon Black Export, Inc., 46 F.T.C. 1245 (1949).

109. FTC ACTIVITIES BROCHURE, *supra* note 92, at 8; *see* Sulphur Export Corp., 43 F.T.C. 820 (1947).

110. FTC ACTIVITIES BROCHURE, *supra* note 92, at 8; *see* Phosphate Export Ass'n, 42 F.T.C. 555 (1946).

members and agreements with foreign companies or cartels).[111] The Commission's rules generally appear to be consistent with the provisions of the Webb Act and its court interpretations.

VI. CURRENT EXPORT POLICIES OF UNITED STATES AND FOREIGN ANTITRUST AGENCIES

On several occasions, Department of Justice policy makers have advocated repeal of the export exemption, claiming that it is antithetical to the antitrust philosophy of the United States.[112] They also argued that the Webb Act is unnecessary because the Sherman Act does not cover export practices not injurious to United States domestic trade. The Department's *Antitrust Guide for International Operations* (Guide) has stated the view that, given the limitations imposed by the Webb-Pomerene Act, activities of collective export associations of United States producers covered by that Act are subject to constraints "broadly consistent" with the general policies of the Sherman Act.[113] The Guide's position is that "transactions outside the coverage of the Webb-Pomerene Act will [not] be subject to substantially different rules under the Sherman Act."[114] If the Guide's position were carried to its logical conclusion, there would be no need for the Webb-Pomerene Act. Nevertheless, the Department has not always adhered to the Guide's statements. In the past the Department has brought several price fixing cases against exporters not protected by the Webb-Pomerene Act.[115] Actually, one reason for the Webb exemption was the doubt in 1918 about the legality of export associations under the Sherman Act.[116] It thus may be impossible to

---

111. FTC ACTIVITIES BROCHURE, *supra* note 92, at 8; *see supra* the orders in cases cited in notes 53-55.

112. *See, e.g., International Aspects of Antitrust, Review of the Webb-Pomerene Act of 1918, Hearings on S. Res. 26 Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary,* 90th Cong., 1st Sess. 122, 122-24 (1967) [hereinafter cited as *Hearings on S. Res. 26*]; *Interview with Assistant Attorney General John Shenefield,* ANTITRUST & TRADE REG. REP. (BNA) No. 875, at AA1, AA3 (Aug. 8, 1975).

113. DEPARTMENT OF JUSTICE, ANTITRUST DIVISION, ANTITRUST GUIDE FOR INTERNATIONAL OPERATIONS 4 (1977). For an update and analysis of the GUIDE, see FOX, *Updating the Antiturst Guide on International Operations—A Greener Light for Export and Investment Abroad,* in this issue at 709.

114. *Id.*

115. See generally note 72 for examples of such cases.

116. *Monopoly Power Hearings, supra* note 25, at 112 (excerpt from Presi-

have the best of all worlds; perhaps we cannot drop the exemption and thereby make our domestic and foreign antitrust philosophy completely consistent while at the same time carving out exports from Sherman Act coverage.

There is another way to achieve greater consistency in domestic and export antitrust policy— even with an export exemption. The Department of Justice recently reverted to its customary position after a period of observing a contrary policy. This policy change was stated by Assistant Attorney General William F. Baxter as follows:

> This statute [Webb-Pomerene] expressly exempts from the prohibition of the Sherman Act associations entered into for the sole purpose of engaging in export trade. . . . Assuming that other nations had similar laws, we would consider it appropriate to prosecute similarly formed private cartels aimed at our marketplace. Both the United States and the Common Market have attacked export cartel activity abroad which has restrained competition in their market place.[117]

Under the prior, contrary policy, the Department did not bring actions against foreign export associations similar to Webb associations.[118]

Though the Department of Justice espouses Mr. Baxter's view, it has continued to indicate some concern for foreign prosecution of export associations. In a recent speech, Mr. Charles Stark, Chief of the Antitrust Division's Foreign Commerce Section, referred to a European Commission investigation of a Webb-Pomerene association on which there had been consultations between the United States Department of Justice and the European Commission (EC).[119] The EC stated in these consultations that it did not intend to proceed automatically against Webb associations active in the Common Market, but that the activities of such associations could violate Common Market law regardless of

---

dent Woodrow Wilson's address to Congress on Dec. 5, 1916).

117. Address by William F. Baxter before the ABA International Law Section, in Washington D.C. (Sept. 29, 1981) *(Antitrust in an Independent World).*

118. *See* Discussion of Letter from Assistant Attorney General Donald I. Baker to Senator Edward W. Kennedy, ANTITRUST & TRADE REG. REP. (BNA) No. 807, at A-24 (Mar. 29, 1977).

119. *See* Remarks of Charles G. Stark before the World Trade Institute Seminar on Advanced International Antitrust Practices and Related Trade Issues, in San Francisco (May 20, 1982) [hereinafter cited as Stark, Remarks].

their United States antitrust immunity.[120]

A district court recently has held that there is no implied exemption under United States law for foreign buyers who cooperate in order to meet the joint action of members of a Webb association.[121] A British court, however, upheld such a defense for a cooperative buying cartel under British law.[122]

VII. Various Views on the Need and Utility of the Export Trade Exception

During hearings on the Webb Act in 1967[123] the Commerce Department favored strengthening the Act, and the Justice Department (through Assistant Attorney General Turner) advocated its repeal. In these hearings the Federal Trade Commission said that it could "conceive of a limited range of circumstances" in which United States firms might benefit from a Webb-Pomerene type of antitrust exemption.[124] Accordingly, in the Commission's view Webb exemptions should be limited to those firms which could demonstrate a need for them. In addition, both the Commission and the Justice Department felt that they need not prove that an association's activities produced actual anticompetitive effects, but only that the activities could probably result in future adverse effects on domestic trade.[125] These views also are reflected in the Policy Conclusions and Recommendations of a 1967 FTC

---

120. *See id.* (European Commission Communication).

121. In Daishowa Int'l v. North Coast Export Co., 1982-1 Trade Cas. (CCH) ¶ 64,774 (N.D. Cal. 1982), a Japanese company contended that it was entitled to an implied exemption from the United States antitrust laws for foreign joint cooperative action to counter a Webb-Pomerene association's joint action as sellers of wood chips to Japan.

122. In 1963 the British Restrictive Practices Court rendered an opinion upholding the legality of a buying cartel under British restrictive practices law on the basis of a monopoly of supply by United States sulphur companies through a Webb association. The agreement of the British National Sulphuric Acid Association established a nonprofit pool which arranged for the joint purchase of all of the acid-making sulphur required by the members. It was shown that Sulexco, the United States Webb-Pomerene association, was the preponderant sulphur supplier to Great Britian. The buying pool was sustained on the ground that it was necessary to bargain with to secure fair terms from Sulexco. *See* Re National Sulphuric Acid Ass'ns Agreement, 1963 L.R. 4 R.P. 169.

123. *See Hearings on S. Res. 26, supra* note 112.

124. *Id.* at 139-40.

125. *Id.*

staff report.[126]

The 1967 FTC staff report stated that "a half century of experience with the Webb-Pomerene Act reveals that Associations have not proven to be effective instruments either for the expansion of overall exports or for the expansion of exports by small firms."[127] While the report did not advocate outright repeal of the Webb Act, it suggested restrictions on association membership and limitations on the antitrust exemption.[128] A more recent FTC staff report entitled *Webb-Pomerene Associations: Ten Years Later*[129] stated: "Today, export trade associations are again attracting interest as a potential vehicle for boosting exports."[130] On the other hand, the report conceded that "there is continued skepticism about the need for and scope of antitrust exemptions."[131] In 1977, a Justice Department Task Force on Antitrust Immunities,[132] after completing a two-year study, brushed aside the Webb-Pomerene Act with the observation that its economic effects were not sufficient for a detailed study.[133] The State Department witness, Harold A. Levin, in his testimony at the 1967 hearings, cited with approval the views of Professor Kingman Brewster[134] as outlined in his book *Antitrust and American Business Abroad.*[135] Professor Brewster advocated repeal of the Webb Act, but he stated that "further inquiry might urge a power to grant exemption on an ad hoc basis in special situations" for industries that could show a particular need to bargain collectively in the face of foreign restrictions.[136]

In a 1971 report, the President's Commission on International Trade and Investment Policy (the Williams Commission) concluded that the Webb Act's "usefulness for United States export-

126. FTC FIFTY YEAR REVIEW, *supra* note 89, at 67-70.

127. *Id.* at 61.

128. *Id.* at 69-70.

129. FTC REPORT, *supra* note 85.

130. *Id.* at 2.

131. *Id.*

132. UNITED STATES DEPARTMENT OF JUSTICE, ANTITRUST DIVISION, REPORT OF THE TASK FORCE ON ANTITRUST IMMUNITIES (1977).

133. *Id.* at 21-22.

134. *Hearings on S. Res.* 26, *supra* note 112, at 61-67.

135. K. BREWSTER, ANTITRUST AND AMERICAN BUSINESS ABROAD 454-56 (1958); *see* K. BREWSTER & J. ATWOOD, ANTITRUST & AMERICAN BUSINESS ABROAD § 19.06 (2d ed. 1981).

136. K. BREWSTER, *supra* note 135, at 456.

ers ha[d] been narrowed by judicial and administrative interpretation."[137] The report criticized the Webb Act because it did not apply to services or to consortia to build large capital projects.[138] Peter Peterson, Assistant to the President, expressed a somewhat similar view in his 1972 report entitled *A Foreign Economic Perspective,* in which he stated that our antitrust laws "may contain certain inhibiting disadvantages to many patented exporters."[139] In his opinion the Webb Act had not proved effective in offsetting these disadvantages.[140]

In 1979 the National Committee for the Review of the Antitrust Laws devoted one chapter to Webb-Pomerene associations.[141] At the urging of the Commerce Department, the President appointed the Business Advisory Panel to report to the Commission on issues pertaining to the Webb-Pomerene Act.[142] After interviewing witnesses from the private sector and government officials, the panel recommended the following: (1) the export exemption should be retained because it is heavily utilized by certain industries; (2) the Webb Act should be extended to cover services as well as goods; (3) the antitrust enforcement agencies should begin investigations regarding the domestic anticompetitive effect of export associations and, when they find misuse, they should bring antitrust actions; and (4) the Webb Act should be modified to make it clear that upon adoption of an international treaty regarding export associations the United States will conform its internal law to the requirements of the treaty.[143]

The Commission disagreed with most of the Business Advisory Panel's recommendations but did note that "it is generally agreed today that the act has failed to promote United States exports

---

137. COMMISSION ON INTERNATIONAL TRADE AND INVESTMENT POLICY, REPORT TO THE PRESIDENT, UNITED STATES INTERNATIONAL ECONOMIC POLICY IN AN INTERDEPENDENT WORLD 120 (1971).

138. *Id.*

139. P. PETERSON, A FOREIGN ECONOMIC PERSPECTIVE 43 (1972).

140. *Id.*

141. *See* NATIONAL COMMISSION ON THE REVIEW OF ANTITRUST LAWS AND PROCEDURES, REPORT TO THE PRESIDENT AND ATTORNEY GENERAL (1979) [hereinafter cited as NATIONAL COMMISSION REPORT].

142. *Export Trade Companies and Trade Associations: Hearings Before the Subcomm. on International Finance of the Senate Comm. on Banking, Housing, and Urban Affairs,* 96th Cong. 1st Sess. 171 (1979) (report of Business Advisory Panel in Antitrust Export Issues).

143. *Id.* at 173-74.

materially during its sixty years in existence."[144] Furthermore, the Commission found that export associations have not generally been established for the purposes originally envisioned for them: "[T]he common feature of export associations today is not their performance or efficiency or cost reducing functions, *but rather the pursuit of traditional cartel activities.*"[145]

The Commission set out four arguments against retaining the special antitrust exemption for export associations: (1) the Act adversely affects domestic markets, especially among domestic producers in oligopolistic markets; (2) the exemption is too broad because there are other means—brokerage or agent arrangements—available for promoting exports without involving compromises on antitrust policy; (3) the original reason for establishing export associations—relief from foreign buying cartels—is no longer valid; and (4) the Act impedes the United States advocation of strong international antitrust rules.[146] The Commission also noted some arguments in favor of retaining the exemption: (1) there is nothing inherently anticompetitive about Webb associations and real benefits can accrue to small manufacturers who operate in highly concentrated markets if they join together for the purpose of export; (2) the Act removes the uncertainty concerning the legality of joint export arrangements; and (3) the Act can be useful in increasing the volume of export trade. The Commission also stated that adding services to its coverage would be useful, especially to small and medium sized companies interested in bidding on large foreign contracts.[147] As part of its recommendations, the Commission suggested that a "legislative reexamination of the necessity of such an exemption is warranted."[148] The Commission further suggested that, if any exemption for export associations were to be retained by Congress, such an exemption should be granted only upon the showing of a particular need and the need should be related to the original purpose of the Act.[149] The Commission also would require an association seeking an antitrust exemption to demonstrate that the proposed association would not adversely affect the domestic or

144. NATIONAL COMMISSION REPORT, *supra* note 141, at 298.
145. *Id.* at 297 (emphasis added).
146. *Id.* at 299-300.
147. *Id.* at 301-02.
148. *Id.* at 302.
149. *Id.*

international trade of the United States.[150] Finally, the Commission did accept the recommendation of the Business Advisory Panel that service industries be granted the same antitrust exemption as manufacturing industries.[151]

The Organization for Economic Cooperation and Development (OECD) considered the usefulness of export associations, including Webb associations, in its 1974 *Report on Export Cartels.* The report was prepared by its Restrictive Business Practices Committee.[152] The OECD report pointed out some adverse effects of export "cartels," as they are labelled; for example, they frequently restrain domestic competition, and there is a danger that they may become part of noncompetitive international arrangements. According to the report, export cartels may be beneficial if they are formed by small or medium sized firms which are permitted to participate in export trade and thereby increase international trade.[153] The OECD report found that export associations generally did not achieve the aims for which the exception is provided. This view reflects the OECD's concern over the adverse effect on international trade as a whole of export cartels and export arrangements in the various countries. The report suggested that countries institute a notification procedure on export associations which would cover details about membership, the field of action, the types of reconstructions involved, and the basic facts of the business done or planned.[154]

VIII. THE NEW EXPORT TRADING COMPANY ACT

The Export Trading Company Act of 1982, passed by the 97th Congress, was a compromise between differing Senate and House bills. Both bills,[155] however, were designed to add incentives for exports and to permit banks to invest in export trading companies. Both bills provided for a certification procedure by which a company may obtain an exemption from the antitrust laws for export activities. In the Senate bill this was to be administered by the Secretary of Commerce; in the House bill this duty

150. *Id.*
151. *Id.* at 303-04.
152. ORGANIZATION FOR ECONOMIC COOPERATION, *supra* note 8.
153. *Id.* at 50.
154. *Id.* at 52-53.
155. *See* H.R. Rep. No. 637, 97th Cong., 2d Sess. (1982) (parts 1&2); S. Rep. No. 27, 97th Cong., 1st Sess. (1981).

was assigned to the Attorney General. H.R. 1799,[156] passed by the House on July 27, 1982, would have allowed an export trading company to obtain what would amount to a binding advisory opinion with respect to antitrust liability.[157] The Attorney General, rather than the Secretary of Commerce, would have issued the certificate.

The Export Trading Company Act, as enacted,[158] provides, with respect to export exemption, for "export trade certificates of review" to be issued by the Secretary of Commerce with the concurrence of the Attorney General.[159] The application for such a certificate is to "specify the conduct limited to export trade" and include information on the overall market in which the applicant operates.[160] Any individual, partnership, or association, including a state or local government organization exporting goods or services, or facilitating such export, can apply. "Export trade" includes trade or commerce in goods, wares, merchandise, or services which are exported or are in the course of being exported from the United States to any other country.[161] "Services" has a broad meaning including, for example, communication and financial and professional services.[162] The applicable definitions for the exemption are set forth in title III. A special office is to be set up in the Department of Commerce for the formation of export trade associations and export trading companies.[163] A signifi-

156. *See* House Judiciary Comm., Report on H.R. 1799, H.R. Rep. No. 637, 97th Cong., 2d Sess. (1982) (part 2) The House of Representatives passed the House Judiciary Committee's amended H.R. 1799. In its Report, *supra*, part 1, however, the Foreign Affairs Committee of the House of Representatives adhered to the original version of H.R. 1799 which followed S. 734. The House of Representatives designated all three Committees that worked on H.R. 1799, the Judiciary, Foreign Affairs and Banking, Finance and Urban Affairs Committees, to participate in the House-Senate Conference Committee.

157. *See* 128 CONG. REC. H4634 (daily ed. July 27, 1982)(statement of Rep. Rodino).

158. Pub. L. No. 97-290. Relevant portions are reprinted at [4 Federal Laws] TRADE REG. REP. (CCH) ¶¶ 25,117, 25,245, 27,000-032; *see* H.R. Rep. No. 924 97th Cong., 2d Sess. (1982), *reprinted in* ANTITRUST & TRADE REG. REP. (BNA) No. 1084, at 719 (Oct. 7, 1982) [hereinafter cited as H.R. Rep. No. 924].

159. Pub. L. No. 97-290, § 303, [Federal Laws] TRADE REG. REP. (CCH) ¶ 27,023.

160. *Id.*

161. *Id.* § 311, *reprinted at* ¶ 27,030.

162. *Id.* § 311(2), *reprinted at* ¶ 27,031.

163. *Id.* § 104, *reprinted at* ¶ 27,004.

cant feature is that the Secretary shall publish in the Federal Register a notice of the application, a list of the persons submitting it, and a description of the conduct for which the application is submitted.[164]

The antitrust standards for issuance of a certificate of review (section 303(a) standards) incorporate three criteria which are presently in the Webb Act—(1), (2), and (4) below—and add one new standard—(3) below. Certification may be granted if export trade activities and methods of operation will:

> (1) result in neither a substantial lessening of competition or restraint of trade within the United States nor a substantial restraint of the export trade of any competitor of the applicant;
> (2) not unreasonably enhance, stabilize, or depress prices within the United States of the goods, wares, merchandise, or services of the class exported by the applicant;
> (3) not constitute unfair methods of competition against competitors engaged in the export of goods, wares, merchandise, or services of the class exported by the applicant; and
> (4) not include any act that may reasonably be expected to result in the sale for consumption or resale within the United States of the goods, wares, merchandise or services exported by the applicant.[165]

The applicant, in addition to an annual report, shall report any change as to the matters set out in the certificate, and may ask for an amendment to cover such changes.[166] If either the Secretary or Attorney General has reason to believe that the activities of the certificate holder no longer comply with the section 303(a) standards of the Act set forth above, the Secretary shall request information which either he or the Attorney General deems necessary. Failure to comply is grounds for revoking the certificate. If the Secretary or the Attorney General determines that the activities of the holder no longer comply with the section 303(a) standards, a notice shall be sent to the holder to that effect with reasons therefore. Within sixty days after a thirty day period from the date of the notice, the Secretary shall revoke the certificate, or modify the certificate as he or the Attorney General deems necessary, to apply only to such export trade activities as are in

164. *Id.* § 302(b)(1), *reprinted at* ¶ 27,022.
165. *Id.* § 303(a), *reprinted at* ¶ 27,023.
166. *Id.* § 304(a)(1), *reprinted at* ¶ 27,024.

compliance.[167] Civil Investigation Demands (CIDs) may be issued by the Antitrust Division except that no such CID may be issued to the holder of the certificate if such person is the target of the investigation.[168]

Any person aggrieved by such a determination may sue in any appropriate district court to set aside the determination.[169] If the Secretary denies a certificate or amends or revokes it, neither the negative determination nor the reasons therefore shall be admissable in evidence in any judicial or administrative proceeding in support of any claim under the antitrust laws.

Anyone injured by conduct engaged in under a certificate of review may bring a civil action against the certificate holder for injunctive relief and actual damages—including interest and a reasonable attorney's fee—but only for failure to comply with the section 303(a) standards of the Export Act.[170] Such an action must be brought within two years after the plaintiff has notice of the certificate holder's failure to comply or in any event within four years after the cause of action accrues. The action lies exclusively under the Act, not under the antitrust laws generally. In any such suit there is a presumption of compliance, and if the court finds that there is compliance, the court shall award the costs of defending the suit and reasonable attorney's fees to the certificate holder. The Attorney General also may sue to enjoin conduct threatening the national interest. Apart from these provisions, the certificate holder, including members of an association engaged in conduct which is specified in and complies with an effective certificate, is shielded from all civil and criminal actions under the "antitrust laws."[171] In this connection, "antitrust laws" are defined to include section 5 of the FTC Act as well as state antitrust and unfair competition laws.

Because he thought the Senate Export Trading Company bill too cumbersome, Congressman Rodino had earlier introduced a short bill[172] in the 97th Congress to exempt joint export activities from the antitrust laws. Substantially amended, this became the Foreign Trade Antitrust Improvement Act, title IV of the Export

---

167. *Id.* § 304(b)(2), *reprinted at* ¶ 27,024.
168. *Id.* § 304(b)(3), *reprinted at* ¶ 27,024.
169. *Id.* § 305, *reprinted at* ¶ 27,025.
170. *Id.* § 306, *reprinted at* ¶ 27,026.
171. *Id.* § 306(a) *reprinted at* ¶ 27,026.
172. That bill was introduced as H.R. 2324, 97th Cong., 1st Sess. (1981).

Trading Company Act. It amends the Sherman Act as follows:

> Sec. 7. This Act shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless—
>
> (1) such conduct has a direct, substantial, and reasonably foreseeable effect—
>
> (A) on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; or
>
> (B) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States; and
>
> (2) such effect gives rise to a claim under the provisions of this Act, other than this section.
>
> If this Act applies to such conduct only because of the operations of paragraph (1)(B), then this Act shall apply to such conduct only for injury to export business in the United States.[173]

Section 5 of the FTC Act is amended similarly.[174] Originally, a provision would have been added to section 7 of the Clayton Act to exempt joint ventures in foreign commerce from that Act. This was deleted from the final legislation. The Export Act provides that the Secretary of Commerce with the concurrence of the Attorney General shall promulgate regulations under the Act.[175]

The new Export Act is anomalous in many ways. Because it does not repeal or amend the Webb-Pomerene Act, there are now two exempting statutes. It covers services, whereas the Webb Act does not. The new Export Act adopts the standards in the Webb Act plus an FTC Act standard and specifically provides for an antitrust suit under these specific standards rather than those of the Sherman Act. It also amends the Sherman Act, however.

The administration of the new export exemption is placed in the hands of the Secretary of Commerce rather than the Federal Trade Commission, but the Secretary's actions must be with the concurrence of the Attorney General. The Act was passed just prior to the recess of Congress on October 1, 1982, and thus was the result of a compromise between those who wanted the entire exemption to be in the hands of the Commerce Department, and Congressman Rodino and the House Judiciary Committee, who

---

173. Pub. L. No. 97-290, § 402 [4 Federal Laws] TRADE REG. REP. ¶ 25,117.
174. *Id.* § 403, *reprinted at* ¶ 25,245.
175. *Id.* § 310, *reprinted at* ¶ 27,030.

wanted it in the Justice Department. Congressman Rodino's original bill, which merely excluded export activities from the Sherman Act in general terms without any administrative procedure, became part of the Export Act. The Act provides a special exemption for export trade which the proponents of the Senate bill desired; the activities, however, still must pass muster under antitrust criteria, and any exemption must be approved by the Attorney General. A limited private civil antitrust suit can be brought, but if the plaintiff loses, he must pay the bill.

In their Report, the Senate and House conferees state that the standards of the Export Act "encompass the full range of the antitrust laws."[176] The Act's exemption covers the antitrust laws generally, including section 5 of the FTC Act, and state antitrust laws. The Webb Act only provides an exemption from the Sherman Act and from the part of section 7 of the Clayton Act that refers to stock, and not asset, acquisition. Thus, for the first time there is an export exemption from FTC action under section 5 of the FTC Act. On the other hand, the Export Trading Company Act provides that a private antitrust suit can be brought against a certificate holder if its activities "constitute unfair methods of competition against competitors. . . ."[177] Accordingly, the conferees have exchanged an antitrust suit under the FTC Act by the Commission for a private antitrust suit under the Export Act. A certificate will not protect the holder if its activities constitute unfair methods of competition.

A provision in the House bill to protect joint ventures in foreign commerce from section 7 of the Clayton Act was deleted from the Export Act. Joint ventures among United States companies would be protected, however, if "limited to export trade," and assuming compliance with the section 303(a) standards. The Webb Act now exempts an association from section 7 stock acquisition restrictions unless trade is restrained or competition lessened "within the United States."[178] In view of the precedents under the Webb Act, a joint venture with a foreign company would not appear to be eligible for a review certificate.

In contrast to the Webb Act, a single company is eligible to apply for a review certificate, though a single company in export

176. H.R. Rep. No. 924, *supra* note 158, at 725.

177. Pub. L. No. 97-290, § 304, [4 Federal Laws] TRADE REG. REP. (CCH) ¶ 27,024.

178. 15 U.S.C. § 63 (1976).

trade usually would not have to worry about the antitrust laws except under circumstances in which a certificate would not be granted in any event.[179] Associations now registered with the FTC under the Webb Act can continue to be registered and will continue to obtain the Webb exemption. In addition, they can apply for a certificate of review under the new Act. Other associations can still avail themselves of both acts.

The main advantage of the certification procedure of the new Act for an export group is that such an export company or association can obtain a specific exemption certificate for its activities from the Secretary of Commerce and the Attorney General. The benefit of the new certification procedure will depend upon the scope of the actual certificate. Presumably, the Secretary of Commerce will want a broad scope for the certificate and the Attorney General will want a narrow scope. As long as the certificate holder stays within the scope of the activities specified in the certificate, it is immune from criminal and civil antitrust suits, including state antitrust lawsuits. There still may be a private antitrust suit for single damages.

The disadvantages of the new Export Act include the somewhat cumbersome administrative procedure and the publicity given to an applicant's export activities as opposed to mere registration with the FTC; the difficulty in specifying export activities in detail; and the specific provision against reimportation into the United States with its accompanying potential liability. Previously, this was only a condition of the immunity. Under the Act there will also be surveillance by the Department of Justice rather than the more general supervision of Webb associations by the FTC.

The Foreign Trade Antitrust Improvements Act, title IV of the Export Act, originally was envisaged as a House substitute for the Senate Export Trading Companies bill,[180] but the later rationale for its inclusion was to provide a clear rule for jurisdiction in foreign trade antitrust cases, particularly those involving export. The House Report quotes Chairman Rodino: "The bill will estab-

---

179. *See, e.g.*, Branch v. Federal Trade Comm'n, 141 F.2d 31 (7th Cir. 1944) (United States company's representations in conducting a correspondence school with students in Latin America).

180. *See* H.R. Rep. No. 686, 97th Cong., 2d Sess. 6-7 (1982), *reprinted in* ANTITRUST & TRADE REG. REP. (BNA) No. 1076, at 306 (Aug. 5, 1982) [hereinafter cited as H.R. Rep. No. 686].

lish that restraints on export trade only violate the Sherman Act if they have a direct and substantial effect on commerce within the United States or on a domestic firm competing for foreign trade."[181] This appears to be a salutary rule which is considerably clearer than the provisions in the title itself. This title, after amendments to take care of particular criticisms, contains rather ambiguous language, such as the reference to conduct "involving" foreign trade, not a word usually employed in the cases. The formulation in the cases refers to conduct in the "flow" of interstate or foreign commerce, or a direct and substantial effect on such commerce.[182] There is also ambiguity as to an effect "on trade or commerce which is not trade or commerce with foreign nations. . .[or on import trade]."[183] The latter appears to mean domestic trade or interstate commerce but it is not so stated. The House Report, however, indicates that the "direct and substantial" effects test with the Restatement "foreseeable" concept added, will continue to be the test for foreign trade activities.[184]

Accordingly, while title III in (1)(A) requires such effects on domestic trade or import trade, and (1)(B) demands a showing of an effect on the export trade of a person engaged in such trade in the United States, it does not appear that any major jurisdictional rule change is intended.[185] The Act would change the result of cases holding[186] that an injury to foreigners in a foreign country by reason of restrictions on United States export trade may be covered by the Sherman Act, an erroneous view under present law in the author's view. It makes clear that trade between third countries is not covered by the Sherman Act. According to the House Report, this title would allow for comity considerations, but it would appear to require courts which have formulated a different rule, emphasizing comity and other considerations,[187] to return to the "direct and substantial" rule with "foreseeable"

---

181. *Id.* at 7-8, *reprinted at* 308.

182. *See* W. FUGATE, *supra* note 9, §§ 2.9-.10, 2.12-.15.

183. Pub. L. No. 97-290, § 402, [4 Federal Laws] TRADE REG. REP. (CCH) ¶ 25,117.

184. H.R. Rep. No. 686, *supra* note 180, at 7-8, 13, *reprinted at* 309-10.

185. *Id.* at 13, *reprinted at* 309.

186. *See, e.g.*, Todhunter-Mitchell & Co. v. Anheuser-Busch, Inc., 383 F. Supp. 586 (E.D. Pa. 1974).

187. *E.g.*, Timberlane Lumber Co. v. Bank of Am., 549 F.2d 597 (9th Cir. 1976).

tacked on to it.[188] Despite its ambiguities, title III should give more assurance to exporters with respect to antitrust considerations.

IX. Comments and Conclusions

It is difficult to make comments or to draw conclusions when new legislation on export trade has just been enacted. Much will depend upon the regulations to be issued under the new Export Act. The Export Trading Company Act is an effort to spur exports. This is a salutary goal. There may be some added incentive in giving banks an opportunity to invest in export companies. Adding services to the exemption for export trade appears to be an excellent idea. The reports on the Export Trading Company bills[189] adverted to the general "perception in the business community that joint activities that can produce efficiencies in the export of goods and services may violate American antitrust law."[190] The Senate Report refers to testimony that "the vagueness of the Webb-Pomerene Act leaves uncertain what activities constitute a substantial restraint of domestic trade." This factor was a particularly strong consideration for small business.[191]

The Export Trading Company Act will give the advantage of specific clearance for export association activities, while keeping the safeguards provided in the Webb Act. Despite the questions now being raised about the new Act, it hopefully will be more successful than the Webb-Pomerene Act. The certification process may remove fears of unwarranted antitrust prosecution. Such fears linger even though the Department of Justice has indicated that few joint export activities are likely to raise antitrust problems.[192] The Foreign Trade Antitrust Improvements Act, title IV of the Act, also is intended to remove unwarranted fears of antitrust prosecution for export activities.

Philosophically, the antitrust exemption for export trade runs contrary to the thrust of our antitrust laws. If we could agree with other countries on a mutual elimination of export exemptions, it

---

188. *See* Restatement (Second) of the Foreign Relations Law of the United States § 18 (1965).

189. H.R. Rep. No. 637, 97th Cong., 2d Sess. (1982)(parts 1&2); S. Rep. No. 27, 97th Cong., 1st Sess. (1981).

190. H.R. Rep. No. 637, 97th Cong., 2d Sess. 9 (part 2).

191. S. Rep. No. 27, 97th Cong., 1st Sess. 18-19 (1981).

192. *See* Stark, Remarks, *supra* note 119.

would be beneficial to international trade generally. Although the export exemption has helped United States trade very little, other countries, such as Japan, make extensive use of export associations. Other countries realistically call these associations "export cartels," but we have been very strict when prescribing what our associations may do by forbidding international agreements. Our associations are "cartels" only in a limited sense. Accordingly, from our standpoint, some international agreement curtailing the use of cartels would appear to be to our advantage. In order to avoid the standoff situation of United States prosecution of foreign export cartels and foreign prosecution of Webb associations, the United States should try to find a basis for agreement with other nations on export exemptions from the antitrust laws.

At this time, however, the author believes that the Export Trading Company Act is a good thing and may aid in spurring our exports. United States companies should have more assurance of protection in the use of export companies and associations. At the same time, the Department of Justice can monitor the use of such companies to prevent anticompetitive practices. If the certification process reassures small and medium sized companies and makes exporting attractive to them, the result could be very beneficial to our foreign trade.[193]

193. *See* Gaitty, *Taking the Plunge in International Waters*, NATION'S BUS. Apr. 1982, at 31. This article details aid to exporters given by the Department of Commerce and the Small Business Administration.