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Bibliography: The Extraterritorial Application of United States Antitrust Laws: A Selective Bibliography

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BIBLIOGRAPHY

THE EXTRATERRITORIAL APPLICATION OF UNITED STATES ANTITRUST LAWS: A SELECTIVE BIBLIOGRAPHY

*Howard A. Hood**

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I. INTRODUCTION

The United States antitrust laws historically have rested on a solid foundation of support from the public, the politicians, the press, and the professors. Conservatives as well as liberals,

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Republicans as well as Democrats, consider these laws essential to United States society. This consensus, however, has not always included agreement on application of the antitrust laws to the foreign activities of United States corporations. As early as the passage of the Webb-Pomerene (Export Trade) Act,¹ some have believed that the antitrust laws which govern the domestic activities of United States companies should not apply to their export activities. The Webb-Pomerene Act granted a limited exemption from the antitrust laws to associations "entered into for the sole purpose of engaging in export trade and actually engaged solely in such export trade. . . ."²

Those who have commented on the Webb-Pomerene Act can be divided into two groups: (1) those who support the Act and would retain it or even expand its scope; and (2) those who oppose the Act and would repeal or weaken it. The first group believes that application of the antitrust laws to the foreign activities of United States companies impairs their ability to compete in the world market. The second group rejects this contention and considers the Webb-Pomerene Act to be unjustifiably inconsistent with the legal framework of free competition.

The debate between proponents and opponents of the Act intensified during the 1970s when the United States suffered from large and persistent trade deficits.³ "Export expansion" became one of the bywords of the decade and along with it came proposals for expanding the exemption for firms engaged in foreign trade. Legislation to stimulate exports was introduced and the debate flourished in congressional hearings, public and private reports, and scholarly articles and books.

This discussion, however, has been extremely superficial. First, the basic assumed validity and value of antitrust policy has not been challenged. Defenders of the Webb-Pomerene Act support the antitrust laws with the same fervor as its critics. Despite growing concern that the theoretical foundations of antitrust are unsound,⁴ the crusade against "monopoly" proceeds without reflection or doubt. Second, the nature of the debate seems to per-

1. 15 U.S.C. §§ 61-65 (1976).

2. *Id.* § 62.

3. THE PRESIDENT'S EXPORT COUNCIL, THE EXPORT IMPERATIVE: REPORT TO THE PRESIDENT 27-28 (1980).

4. See D. ARMENTANO, ANTITRUST AND MONOPOLY: ANATOMY OF A POLICY FAILURE 1-2 (1982).

mit opinion evidence only; objective proof and truly convincing arguments are scarce or nonexistent. As a law professor once replied to a question concerning whether an act was legal: "Some say 'yes' and some say 'no.'" Without genuine proof, the debate is reduced to a swearing contest which will be won by the side with the superior political support, skill, and determination.

The composition of the forces on each side of the issue is quite predictable. Lawyers, public officials, and academics who have supported vigorous antitrust enforcement tend to oppose the Webb-Pomerene Act. Those who sympathize with business or who wish to promote United States exports and United States competitiveness abroad support the Act.

Although the literature on extraterritorial application of United States antitrust law is voluminous, its ideas are few and its repetitiveness great. The same propositions are advanced year after year with little noticeable effect one way or the other. Most of the writing in law reviews and treatises is concerned only with what the legal rules are, not with their economic consequences. Much of the more popular literature treats the political impact of extraterritoriality by discussing how United States officials have annoyed foreign nations by trying to apply United States antitrust laws to foreign corporations and nationals. The economic aspect of this subject is addressed primarily in congressional and executive publications. This sort of discussion usually is structured to produce the result desired by the committee or agency issuing the publication. Witnesses whose views are already well-known are invited to testify. Representatives of business or government serve on special commissions and deliver the pronouncements expected of them. There is a rehearsed, artificial flavor to much of the testimony and many of the reports, all of which are part of a process that is more political than intellectual.

This bibliography presents selected citations to the literature of this controversy. The listing is not comprehensive but attempts to identify important documents and representative books and articles. Annotations have been supplied when the author believed they would be useful to the student or researcher. Works published in the past decade are emphasized.

II. BOOKS

1. American Bar Association, Section of Antitrust Law. U.S. ANTITRUST LAW IN INTERNATIONAL PATENT AND KNOW-HOW LICENSING, MONOGRAPH 6. Chicago: The American Bar Association 1981.

Pp. vii, 78.

2. Atwood, James R., and Brewster, Kingman. *ANTITRUST AND AMERICAN BUSINESS ABROAD*. 2d ed. New York: McGraw-Hill, 1981. Pp. 359 and 355. Two volumes.

An update of Brewster's frequently cited 1958 treatise of the same name.

3. Armentano, Dominick T. *ANTITRUST AND MONOPOLY: ANATOMY OF A POLICY FAILURE*. New York: John Wiley & Sons, 1982. Pp. xi, 292.

A lucid attack on antitrust law as irrational, anticompetitive, and destructive of efficiency. It represents a distinctly minority viewpoint.

4. Armentano, Dominick T. *THE MYTHS OF ANTITRUST*. New Rochelle, N.Y.: Arlington House, 1972. Pp. 287.

An earlier presentation of Armentano's ideas.

5. Brewster, Kingman. *ANTITRUST AND AMERICAN BUSINESS ABROAD*. New York: McGraw-Hill 1958. Pp. 509.

6. Burns, Joseph W. *ANTITRUST DILEMMA: WHY CONGRESS SHOULD MODERNIZE THE ANTITRUST LAWS*. New York: Central Book Co., 1969. Pp. xviii, 251.

See pp. 194-204.

7. Burns, Joseph W. *A STUDY OF THE ANTITRUST LAWS*. Westport, Conn.: Greenwood Press, 1958. Pp. xiv, 574.

8. Fugate, Wilbur L. *FOREIGN COMMERCE AND THE ANTITRUST LAWS*. 3d ed. Boston: Little, Brown & Co., 1982. Pp. xxiv, 427.

The author is the former Chief of the Foreign Commerce Section of the Antitrust Division, Department of Justice.

9. Fugate, Wilbur L. *FOREIGN COMMERCE AND THE ANTITRUST LAWS*. 2d ed. Boston: Little, Brown & Co., 1973. Pp. xxv, 602.

10. Griffin, Joseph P. ed. *PERSPECTIVES ON THE EXTRATERRITORIAL APPLICATION OF UNITED STATES ANTITRUST AND OTHER LAWS*. Chicago: American Bar Association, 1979. Pp. xii, 241.

11. Hawk, Barry E. *UNITED STATES, COMMON MARKET AND INTERNATIONAL ANTITRUST: A COMPARATIVE GUIDE*. New York: M. Bender, 1979. Pp. xi, 422. Looseleaf.

12. Kindleberger, Charles P. *AMERICAN BUSINESS ABROAD*. New

Haven: Yale University Press, 1969. Pp. vii, 225.

13. Kintner, Earl W., and Joelson, Mark R. **AN INTERNATIONAL ANTITRUST PRIMER**. New York: MacMillian, 1974. Pp. xiv, 391.

The Webb-Pomerene Act is discussed at pp. 177-83. "Recently, the movement for expanding the antitrust exemption accorded export trade associations has gained momentum because of the rising U.S. balance-of-trade deficit and the weakening position of the United States in the sphere of international trade." *Id.* at 183. Also, there is a bibliography at pp. 273-309.

14. Kronstein, Heinrich D. **THE LAW OF INTERNATIONAL CARTELS**. Ithaca, N.Y. and London: Cornell University Press, 1973. Pp. xiv, 489.

15. Neale, A.D., and Goyder, D.G. **THE ANTITRUST LAWS OF THE UNITED STATES OF AMERICA**. 3d ed. Cambridge: Cambridge University Press, 1980. Pp. xvi, 526.

See "International Aspects of Antitrust," pp. 326-71.

16. Practising Law Institute. **17TH ANNUAL ADVANCED ANTITRUST LAW SEMINAR: INTERNATIONAL TRADE AND THE ANTITRUST LAWS**. New York: The Practising Law Institute, 1977. Pp. 364.

Includes discussions of patent licensing, Webb-Pomerene associations, joint ventures, jurisdiction, discovery, and other topics. Reprints the **ANTITRUST GUIDE FOR INTERNATIONAL OPERATIONS** of the Antitrust Division, United States Department of Justice.

17. Townsend, James B. **EXTRATERRITORIAL ANTITRUST: THE SHERMAN ANTITRUST ACT AND U.S. BUSINESS ABROAD**. Boulder, Col.: Westview Press, 1980. Pp. xiii, 308.

See pp. 228-45. There is a bibliography at pp. 277-97.

18. Zwarenstejn, Hendrik. **SOME ASPECTS OF THE EXTRATERRITORIAL REACH OF THE AMERICAN ANTITRUST LAWS**. Netherlands: Kluwer-Deventer, 1970. Pp. 174.

III. ARTICLES

A. General

1. Baker, Donald I. *Antitrust and World Trade: Tempest in an International Teapot?* 8 **CORNELL INTERNATIONAL LAW JOURNAL** 16-44 (1974).

A defense of United States antitrust laws in general and their application to foreign trade in particular.

2. Bild, Brian. *Some Nontariff Barrier Aspects of the Extrater-*

ritorial Effects Doctrine Upon U.S. Imports, 32 JOURNAL OF THE MISSOURI BAR 21-30 (1976).

3. Davidow, Joel. *Antitrust Foreign Policy and International Buying Cooperation*, 84 YALE LAW JOURNAL 268-92 (1974).

4. Davidow, Joel. *Extraterritorial Application of U.S. Antitrust Law in a Changing World*, 8 LAW & POLICY IN INTERNATIONAL BUSINESS 895-911 (1976).

Davidow writes that the United States has been the major force behind the adoption of antitrust laws in foreign countries after World War II. He claims that experience has disproved charges that antitrust laws have hurt United States foreign trade. He believes that United States antitrust laws have proved capable of dealing with multinational enterprises. The article discusses some differences between United States and foreign antitrust laws as well as international codes of restrictive business practices.

5. Dean, Arthur H. *Extraterritorial Effects of the U.S. Antitrust Laws: "Advising the Client,"* 11 AMERICAN BAR ASSOCIATION SECTION OF ANTITRUST LAW 88-102 (1957).

Part of a symposium on the extraterritorial effects of the United States antitrust laws.

6. Donovan, Peter A. *Antitrust Considerations in the Organization and Operation of American Business Abroad*, 9 BOSTON COLLEGE INDUSTRIAL & COMMERCIAL LAW REVIEW 239-353 (1968).

7. Fortenberry, Joseph E. *Jurisdiction over Extraterritorial Antitrust Violations—Paths Through the Great Grimpen Mire*, 32 OHIO STATE LAW JOURNAL 519-52 (1971).

8. Fugate, Wilbur L. *Damper or Bellows? Antitrust Law and Foreign Trade*, 45 AMERICAN BAR ASSOCIATION JOURNAL 947-50 (1959).

Fugate defends the application of the antitrust laws to foreign trade.

9. Fugate, Wilbur L. *An Overview of Antitrust Enforcement and the Multinational Corporation*, 8 JOURNAL OF INTERNATIONAL LAW & ECONOMICS 1-9 (1973).

10. Gore, Albert, Jr. *The Cartel Restriction Act of 1979: Response to a Global Economic Problem*, 12 VANDERBILT JOURNAL OF TRANSNATIONAL LAW 273-314 (1979).

11. Hale, Rosemary D. and Hale, G.E. *Monopoly Abroad: The Antitrust Laws and Commerce in Foreign Areas*, 31 TEXAS LAW REVIEW 493-548 (1953).

Favors repeal of Webb-Pomerene at an appropriate time.

12. Holley, Donald L. *United States Antitrust Laws as They Affect Investments Abroad*, PRIVATE INVESTORS ABROAD—PROBLEMS AND SOLUTIONS IN INTERNATIONAL BUSINESS IN 1974 35-87 (1974).
13. Joelson, Mark R. *Challenges to United States Foreign Trade and Investment: Antitrust Law Perspectives*, 14 INTERNATIONAL LAWYER 103-14 (1980).
14. Joelson, Mark R. *Extraterritorial Effects of Antitrust Laws*, 12 INTERNATIONAL LAWYER 616-21 (1978).
15. Joelson, Mark R. *International Technology Transfers and the United States Antitrust Laws*, 8 JOURNAL OF INTERNATIONAL LAW & ECONOMICS 85-112 (1973).
16. Joelson, Mark R. *The Need for a Thoughtful Assessment of the Application of U.S. Antitrust Law to International Transactions*, 2 NORTHWESTERN JOURNAL OF INTERNATIONAL LAW AND BUSINESS 365-71 (1980).
17. Joelson, Mark R. and Griffin, Joseph P. *International Regulation of Restrictive Business Practices Engaged in by Transnational Enterprises: A Prognosis*, 11 INTERNATIONAL LAWYER 5-28 (1977).
18. Joelson, Mark R. and Griffin, Joseph P. *The Legal Status of Nation-State Cartels Under United States Antitrust and Public International Law*, 9 INTERNATIONAL LAWYER 617-45 (1975).
19. Kauper, Thomas E. *"The Antitrust Bogeyman": U.S. Foreign Trade*, 39 VITAL SPEECHES OF THE DAY 311-14 (1973).
Kauper believes that antitrust enforcement has not injured foreign trade.
20. Kintner, Earl W. and Hallgarten, Katherine Drew. *Application of United States Antitrust Laws to Foreign Trade and Commerce—Variations on American Banana Since 1909*, 15 BOSTON COLLEGE INDUSTRIAL & COMMERCIAL LAW REVIEW 343-67 (1973).
21. Kintner, Earl W., Joelson, Mark R., and Vaghi, Peter J. *Groping for a Truly International Antitrust Law*, 14 VIRGINIA JOURNAL OF INTERNATIONAL LAW 75-100 (1973).

"[I]nternational businessmen are finding it more difficult to frame agreements and shape the policies of their enterprises for fear of the possible inconsistency in the nature and application of the antitrust attitudes of the United States, the various European countries, Japan and the EEC." *Id.* at

77. Criticizes the present state of national regulation of international restrictive business practices. Favors "supranational" approach.

22. Linowitz, Sol M. *Antitrust Laws: A Damper on American Foreign Trade?*, 44 AMERICAN BAR ASSOCIATION JOURNAL 853-56 (1958).

Criticizes the extraterritorial application of antitrust laws.

23. Linowitz, Sol M. *The International Businessman Meets the Antitrust Laws*, 41 CORNELL LAW QUARTERLY 215-23 (1956).

"At the present time . . . the American businessman moving into the foreign field must continue to proceed with caution and crossed fingers." *Id.* at 223.

24. Lipson, Barry J. *Antitrust Problems in Foreign Commerce*, 18 PRACTICAL LAWYER, Dec. 1972, at 57-68.

25. Maier, Harold G. *Principles Governing the Extraterritorial Reach of the Antitrust Laws*, in CRIMINAL LAW AND THE CORPORATE COUNSEL, SIXTH ANNUAL FORDHAM CORPORATE LAW INSTITUTE 341-52 (1981).

26. Norton, Joseph J. *Extraterritorial Jurisdiction of U.S. Antitrust and Securities Laws*, 28 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 575-97 (1979).

27. Note. *The Extraterritorial Application of American Antitrust Law and the Export Expansion Act of 1971*, 5 NEW YORK UNIVERSITY JOURNAL OF INTERNATIONAL LAW AND POLITICS 531-54 (1972).

28. Note. *Extraterritorial Application of the Antitrust Laws*, 69 HARVARD LAW REVIEW 1452-62 (1956).

29. Ongman, John W. "Be No Longer A Chaos": *Constructing a Normative Theory of the Sherman Act's Extraterritorial Jurisdictional Scope*, 71 NORTHWESTERN UNIVERSITY LAW REVIEW 733-66 (1977).

30. Ongman, John W. *Is Somebody Crying "Wolf"?: An Assessment of Whether Antitrust Impedes Export Trade*, 1 NORTHWESTERN JOURNAL OF INTERNATIONAL LAW AND BUSINESS 163-218 (1979).

The author opposes an antitrust exemption for foreign trade. "On the basis of the available evidence, the Sherman Act does not substantially impede American export trade in goods and services." *Id.* at 218.

31. Rahl, James A. *American Antitrust and Foreign Operations:*

What is Covered?, 8 CORNELL INTERNATIONAL LAW JOURNAL 1-15 (1974).

32. Rahl, James A. *Foreign Commerce Jurisdiction of the American Antitrust Laws*, 43 ANTITRUST LAW JOURNAL 521-29 (1974).

33. Rahl, James A. *International Application of American Antitrust Laws: Issues and Proposals*, 2 NORTHWESTERN JOURNAL OF INTERNATIONAL LAW AND BUSINESS 336-64 (1980).

34. Recent Development. *Antitrust Laws: Extraterritoriality*, 21 HARVARD INTERNATIONAL LAW JOURNAL 515-22 (1980).

35. Shenefield, John H. *Private Investments Abroad, Competition, and the Antitrust Laws*, PRIVATE INVESTORS ABROAD—PROBLEMS AND SOLUTIONS IN INTERNATIONAL BUSINESS IN 1979, 81-90 (1979).

36. Thompson, Mayo J. *Antitrust and the Multinational Corporation: Competition or Cartels?*, 8 INTERNATIONAL LAWYER 618-25 (1974).

37. Van Cise, Jerrold G. *Antitrust Guides to Foreign Acquisitions*, HARVARD BUSINESS REVIEW, Nov.-Dec. 1972, at 82-88.

38. Victor, A. Paul. *Multinational Corporations: Antitrust Extraterritoriality and the Prospect of Immunity*, 8 JOURNAL OF INTERNATIONAL LAW AND ECONOMICS 11-29 (1973).

B. Department of Justice Antitrust Guide for Foreign Operations

1. Griffin, Joseph P. *A Critique of the Justice Department's Antitrust Guide for International Operations*, 11 CORNELL INTERNATIONAL LAW JOURNAL 215-54 (1978).

The author considers the Guide too vague.

2. Silverstein, David. *The Antitrust Guide for International Operations—Another Point of View*, 13 INTERNATIONAL LAWYER 693-701 (1979).

The author believes that the extraterritorial application of antitrust laws impairs the ability of United States corporations to compete abroad.

C. International Codes of Corporate Conduct

1. Atkeson, Timothy B. and Gill, David G. *The UNCTAD Re-*

restrictive Business Practices Code: A Step in the North-South Dialogue, 15 INTERNATIONAL LAWYER 1-23 (1981).

2. Coombe, George W., Jr. *Multinational Codes of Conduct—A New Dimension in Corporate Accountability*, PRIVATE INVESTORS ABROAD—PROBLEMS AND SOLUTIONS IN INTERNATIONAL BUSINESS IN 1980 1-54 (1980).

3. Davidow, Joel. *The UNCTAD Restrictive Business Practices Code*, 13 INTERNATIONAL LAWYER 587-605 (1979).

4. Davidow, Joel. *International Antitrust Codes: The Post Acceptance Phase*, 26 ANTITRUST BULLETIN 567-91 (1981).

5. Gill, David G. *The UNCTAD Restrictive Business Practices Code: A Code for Competition?*, 13 INTERNATIONAL LAWYER 607-17 (1979).

6. Plaine, Daniel J. *International Regulation of Restrictive Business Practices*, PRIVATE INVESTORS ABROAD—PROBLEMS AND SOLUTIONS IN INTERNATIONAL BUSINESS IN 1979 1-36 (1979).

7. Recent Development. *Antitrust Law: United Nations Guidelines—Restrictive Business Practices*, U.N. Doc. A/Res/35/60 (1980), 22 HARVARD INTERNATIONAL LAW JOURNAL 405-11 (1981).

D. Joint Ventures

1. Brodley, Joseph F. *Joint Ventures and the Justice Department's Antitrust Guide for International Operations*, 24 ANTITRUST BULLETIN 337-56 (1979).

2. Graham, Robert W. *Antitrust Problems of Corporate Parents, Subsidiaries, Affiliates and Joint Venturers in Foreign Commerce*, 9 AMERICAN BAR ASSOCIATION SECTION ON ANTITRUST LAW 32-48 (1956).

The author suggests that uncertainty about United States antitrust laws may hinder United States investment abroad.

3. Joelson, Mark R. and Griffin, Joseph P. *Multinational Joint Ventures and the U.S. Antitrust Laws*, 15 VIRGINIA JOURNAL OF INTERNATIONAL LAW 487-538 (1975).

4. Lifland, William T. *International Joint Ventures: Antitrust Implications*, PRIVATE INVESTORS ABROAD—PROBLEMS AND SOLUTIONS IN INTERNATIONAL BUSINESS IN 1978 27-46 (1978).

5. Comment. *Joint Ventures Abroad and Per Se Antitrust Vio-*

lations, 1 CALIFORNIA WESTERN INTERNATIONAL LAW JOURNAL 95-114 (1970).

E. Jurisdictional Conflicts with Other Nations

1. Baker, Donald I. *Antitrust Conflicts Between Friends: Canada and the United States in the Mid-1970's*, 11 CORNELL INTERNATIONAL LAW JOURNAL 165-94 (1978).

2. Flexner, Donald L. *Foreign Discovery and U.S. Antitrust Policy—The Conflict Resolving Mechanisms*, 12 VANDERBILT JOURNAL OF TRANSNATIONAL LAW 315-21 (1979).

About 1946 the Antitrust Division of the Justice Department began using compulsory process to obtain documents located in foreign countries. Beginning with Ontario, Canada in 1947, foreign states began passing laws to block United States process. The Division now emphasizes voluntary cooperation rather than "confrontation."

3. Gordon, Edward. *Extraterritorial Application of United States Economic Laws: Britain Draws the Line*, 14 INTERNATIONAL LAWYER 151-66 (1980).

4. Jacobs, D.M. *Extraterritorial Application of Competition Laws: An English View*, 13 INTERNATIONAL LAWYER 645-65 (1979).

The author questions whether the United States has jurisdiction to apply its laws to foreign activities, to obtain personal jurisdiction, and to compel production of evidence.

5. Jones, Robert T. *Extraterritoriality in U.S. Antitrust: An International "Hot Potato,"* 11 INTERNATIONAL LAWYER 415-35 (1977).

The author discusses a civil antitrust suit brought by the Department of Justice against the Bechtel Group for its participation in the Arab boycott of Israel. A consent judgment was agreed to before the case came to trial. The author shows how enforcement of United States law in this area might eliminate participation of United States companies in the Arab market.

6. Recent Development. *Antitrust: British Restrictions on Enforcement of Foreign Judgments—Protection of Trading Interests Act, 1980, c.11*, 21 HARVARD INTERNATIONAL LAW JOURNAL 727-35 (1980).

7. Seidl-Hohenveldern, Ignaz. *The Limits Imposed by International Law on the Application of Cartel Law*, 5 INTERNATIONAL LAWYER 279-99 (1971).

8. Stanford, J.S. *The Application of the Sherman Act to Con-*

duct Outside the United States: A View from Abroad, 11 CORNELL INTERNATIONAL LAW JOURNAL 195-214 (1978).

9. Toms, Bate T., III. *The French Response to the Extraterritorial Application of United States Antitrust Law*, 15 INTERNATIONAL LAWYER 585-614 (1981).

The author discusses a French law passed in 1980 in response to the extraterritorial application of United States antitrust laws. The article includes the text and a translation of the law.

F. Patent Licensing

1. Davidow, Joel. *Antitrust and International Patent Licensing*, 43 ANTITRUST LAW JOURNAL 530-39 (1974).

2. Van Cise, Jerrold G. *Our Antitrust Law and International Licensing*, PRIVATE INVESTORS ABROAD—PROBLEMS AND SOLUTIONS IN INTERNATIONAL BUSINESS IN 1974 383-403 (1974).

G. Webb-Pomerene Act

1. Allison, John R. *Antitrust and Foreign Trade: Exemptions for Export Associations*, 11 HOUSTON LAW REVIEW 1124-50 (1974).

2. Chapman, Dudley H. *Exports and Antitrust: Must Competition Stop at the Water's Edge?*, 6 VANDERBILT JOURNAL OF TRANSNATIONAL LAW 399-445 (1973).

The author opposes the Webb-Pomerene Act in its present form and favors some application of United States antitrust law to the foreign activities of United States companies.

3. Development. *Antitrust and Foreign Export Cartels: The National Commission's Review of the Webb-Pomerene Exemption*, 12 NEW YORK UNIVERSITY JOURNAL OF INTERNATIONAL LAW AND POLITICS 59-111 (1979).

4. Development. *Export Trading Companies and S. 734*, 11 DENVER JOURNAL OF INTERNATIONAL LAW AND POLICY 115-22 (1981).

5. Larson, David A. *An Economic Analysis of the Webb-Pomerene Act*, 13 JOURNAL OF LAW AND ECONOMICS 461-500 (1970).

The author believes that the Act is producing "anticompetitive domestic effects" and recommends its repeal.

6. McDermid, John F. *The Antitrust Commission and the Webb-Pomerene Act: A Critical Assessment*, 37 WASHINGTON AND

LEE LAW REVIEW 105-26 (1980).

McDermid, who believes that the Webb-Pomerene exemption should be retained and strengthened, accuses the Commission of a lack of objectivity.

7. Neill, Denis M. *Export Trade Associations*, 37 JOURNAL OF THE MISSOURI BAR 55-57 (1981).

8. Note. *The Webb-Pomerene Act: A Reexamination of Export Cartels in World Trade*, 19 VIRGINIA INTERNATIONAL LAW REVIEW 151-82 (1978).

Favors repeal of the act.

IV. UNITED STATES GOVERNMENT DOCUMENTS

A. Congressional Hearings and Prints

1. *A Study of the Antitrust Laws, Part 4, Foreign Trade: Hearings on Senate Resolution 61 Before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary*, 84th Congress, 1st Session (1955).

These Hearings concentrate on an international agreement on trade restraints proposed by the Ad Hoc Committee on Restrictive Business Practices of the United Nations Economic and Social Council. The proposal was opposed by the American Bar Association, the National Association of Manufacturers, and the International Chamber of Commerce.

2. *Foreign Trade and the Antitrust Laws, Part 1: Hearings on Senate Resolution 262 Before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary*, 88th Congress, 2d Session (1964).

One goal of the Hearings was to "examine criticism that our antitrust laws impede our foreign trade and commerce." *Id.* at 2. Areas of concern also include investment abroad, joint ventures, and licensing problems. Exhibits include several reports on exports and other international economic topics.

3. *International Aspects of Antitrust, Parts 1 and 2: Hearings on Senate Resolution 191 Before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary*, 89th Congress, 2d Session (1966).

4. *International Aspects of Antitrust, 1967: Hearings on Senate Resolution 26 Before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary*, 90th Congress, 1st Session (1967).

The Hearings include the Staff Report to the Federal Trade Commission,

WEBB-POMERENE ASSOCIATIONS: A 50 YEAR REVIEW (1967).

5. *Export Expansion Act of 1971: Hearings on Senate Resolution 2754 Before the Subcommittee on Foreign Commerce and Tourism of the Senate Committee on Commerce*, 92d Congress, 2d Session (1972).

6. *Export Expansion Legislation, Part 1: Hearings on S. 1007, S. 1483, S. 1484, S. 1485, S. 1486, S. 1487, and S. 1488 Before the Subcommittee on Foreign Commerce and Tourism of the Senate Committee on Commerce*, 93d Congress, 1st Session (1973).

The Hearings include a discussion of the amendments to the Webb-Pomerene Act.

7. *Export Expansion Legislation, Part 2: Hearings on S. 1483 and S. 1774 Before the Subcommittee on Foreign Commerce and Tourism of the Senate Commerce Committee*, 93d Congress, 1st Session (1973).

A discussion of the Webb-Pomerene Act. Contains the General Accounting Office Report, "Clarifying Webb-Pomerene Act Needed to Help Increase U.S. Exports." (Aug. 22, 1973).

8. *International Aspects of Antitrust Laws: Hearings Before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary*, 93d Congress, 1st & 2d Sessions (1973-1974).

Senator Hart stated: "Over the years, American businessmen have complained that the American antitrust laws were hampering their ability to compete in other countries." *Id.* at 1. Recently the complaints have grown stronger as the balance of payments deficits worsened. The Appendix includes reports by the National Association of Manufacturers and the Chamber of Commerce of the United States on the impact of the extraterritorial application of United States antitrust laws.

9. *Export Policy, Part 6: Hearings Before the Subcommittee on International Finance of the Senate Committee on Banking, Housing, and Urban Affairs*, 95th Congress, 2d Session (1978).

10. *Export Policy, Part 7: Hearings Before the Subcommittee on International Finance of the Senate Committee on Banking, Housing, and Urban Affairs jointly with the Subcommittee on Science, Technology, and Space of the Senate Committee on Commerce, Science, and Transportation*, 95th Congress, 2d Session (1978).

11. *Export Trading Companies and Trade Associations: Hearings Before the Subcommittee on International Finance of the*

Senate Committee on Banking, Housing, and Urban Affairs, 96th Congress, 1st Session (1979).

Addresses possible changes in the Webb-Pomerene Act.

12. *Small Business Participation in United States Exports: Hearings Before the Senate Select Committee on Small Business, 96th Congress, 1st Session (1979).*

13. *Cartel Restriction Act: Hearings on H.R. 4661 Before the Subcommittee on Consumer Protection and Finance of the House Committee on Interstate and Foreign Commerce, 96th Congress, 2d Session (1980).*

14. *Senate Committee on Banking, Housing, and Urban Affairs, EXPORT PROMOTION, EXPORT DISINCENTIVES, AND U.S. COMPETITIVENESS, 96th Congress, 2d Session (Committee Print 1980).*

Contains various reports and a bibliography.

15. *Export Trading Companies: Hearings and Markup Before the House Committee on Foreign Affairs and its Subcommittee on International Economic Policy and Trade, 96th Congress, 2d Session (1980).*

16. *Export Trading Companies Legislation: Hearings Before the Subcommittee on International Trade, Investment, and Monetary Policy of the House Committee on Banking, Finance, and Urban Affairs, 96th Congress, 2d Session (1980).*

17. *Export Trading Company Act of 1980: Hearings Before the Subcommittee on International Finance of the Senate Committee on Banking, Housing, and Urban Affairs, 96th Congress, 2d Session (1980).*

A discussion of proposed amendments to the Webb-Pomerene Act.

18. *Export Trading Company Legislation: Hearings Before the Subcommittee on Financial Institutions Supervision, Regulation, and Insurance of the House Committee on Banking, Finance, and Urban Affairs, 96th Congress, 2d Session (1980).*

Focuses on a proposal to allow banks to participate in export trading companies.

19. *Financial Institutions and Export Trading Companies: Hearings on S. 2718 Before the Senate Committee on Banking, Housing, and Urban Affairs, 96th Congress, 2d Session (1980).*

20. *Formation and Operation of Export Trading Companies:*

Hearings on H.R. 7230 Before the Subcommittee on Trade of the House Committee on Ways and Means, 96th Congress, 2d Session (1980).

21. *Oversight Hearings on the Export-Import Bank: Hearings Before the Subcommittee on International Trade, Investment, and Monetary Policy of the House Committee on Banking, Finance, and Urban Affairs, 96th Congress, 2d Session (1980).*

22. *To Establish a Commission on the International Application of Antitrust Laws: Hearings on S. 1010 Before the Senate Committee on Government Affairs, 96th Congress, 1st & 2d Sessions (1979-80).*

23. *United States Export Competitiveness: Hearings Before the Joint Economic Committee of Congress, 96th Congress, 2d Session (1980).*

24. *Export Trading Company Act of 1981: Hearings on S. 144 Before the Subcommittee on International Finance and Monetary Policy of the Senate Committee on Banking, Housing, and Urban Affairs, 97th Congress, 1st Session (1981).*

Another discussion of possible modifications of the Webb-Pomerene Act.

B. Congressional Reports

1. **Senate Committee on Commerce. OMNIBUS EXPORT EXPANSION ACT OF 1974, SENATE REPORT NUMBER 783, 93d Congress, 2d Session (1974).**

Calls for changes in the Webb-Pomerene Act.

2. **Senate Committee on Foreign Relations. OMNIBUS EXPORT EXPANSION ACT OF 1974, SENATE REPORT NUMBER 860, 93d Congress, 2d Session (1974).**

3. **Senate Committee on Governmental Affairs. COMMISSION ON THE INTERNATIONAL APPLICATION OF THE UNITED STATES ANTITRUST LAWS. SENATE REPORT NUMBER 770, 96th Congress, 2d Session (1980).**

A report on S. 1010, which passed the Senate on September 30, 1980. "In the Committee's view, increased competition from abroad and our deteriorating trade balance make absolutely imperative a reassessment of traditional ideas underlying the international application of our antitrust laws." *Id.* at 5. The Committee had heard "widespread complaints that the application of these laws may have straightjacketed U.S. firms in international trade." The committee unanimously endorsed the bill, which would estab-

lish a commission to study the impact of the antitrust laws "on the ability of U.S. enterprises to compete effectively in overseas markets. . . ." *Id.*

4. House Committee on Foreign Affairs. EXPORT TRADING COMPANY ACT OF 1980, HOUSE OF REPRESENTATIVES REPORT NUMBER 1151, Part 1, 96th Congress, 2d Session (1980).

A report by the House Foreign Affairs Committee on H.R. 7230. "The [purpose] of H.R. 7230 is to increase exports of U.S. goods and services by encouraging and facilitating the provision of export trade services to U.S. companies through greater use of export trading companies and export trade associations." *Id.* at 13. The Report discusses extending Webb-Pomerene Act exemptions to include services. It traces Committee action in the area.

5. Senate Committee on Banking, Housing, and Urban Affairs. EXPORT TRADING COMPANIES, TRADE ASSOCIATIONS, AND TRADE SERVICES, SENATE REPORT NUMBER 735, 96th Congress, 2d Session (1980).

Recommends passage of S. 2718, the Export Trading Company Act of 1980. The Report surveys the recent history of legislative proposals regarding export trading companies.

6. Senate Committee on Banking, Housing, and Urban Affairs. EXPORT TRADING COMPANIES, TRADE ASSOCIATIONS, AND TRADE SERVICES. SENATE REPORT NUMBER 27, 97th Congress, 1st Session (1981).

Recommends passage of S. 734 to amend the Webb-Pomerene Act. S. 734 was signed into law on October 8, 1982.

C. Other Government Reports, Studies, and Guides

1. Attorney General's National Committee to Study the Anti-trust Laws. FINAL REPORT (1955).

"We recognize that Webb-Pomerene has been criticized as an unwarranted spur to international cartel arrangements. Accordingly, some have urged its repeal." *Id.* at 114. A majority of the committee members favored its retention, however. Eugene V. Rostow and several other members dissented from this conclusion.

2. Federal Trade Commission. SUMMARY AND ANALYSIS OF SURVEY OF WEBB-POMERENE ASSOCIATIONS (November 9, 1978). (Staff memorandum).

3. National Commission for the Review of Antitrust Laws and Procedures. REPORT TO THE PRESIDENT AND THE ATTORNEY GENERAL (1979). 2 volumes.

The Commission recommended that Congress re-examine the Webb-Pomerene Act. If the Act is to be retained, the Commission said, it should be amended in two ways: (1) antitrust immunity should be made contingent on a showing of particularized need; and (2) services should be included within the Act's coverage. 1 *id.* at 296-98. The Commission states that after 1924 most new export associations concentrated on fixing prices and other "traditional cartel-related activities" rather than "performing selling and exporting functions which are now usually handled by the individual members." *Id.* The Commission was not convinced that the Act had helped to promote United States exports. Volume 2 of the Report includes the Report of the Economic Advisory Panel and the Report of the Business Advisory Panel on Antitrust Export Issues. The Business Panel recommended that the Webb-Pomerene Act be expanded to include services. 2 *id.* at 291. The Panel concluded that the Act has had a favorable impact on the foreign trade of the United States.

4. **STAFF REPORT TO THE FEDERAL TRADE COMMISSION, WEBB-POMERENE ASSOCIATIONS: A 50 YEAR REVIEW**, reprinted in *International Aspects of Antitrust, Part 2: Hearings Before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary*, 90th Congress, 2d Session (1967).

The Report concludes that the Act is used primarily by large firms and that Webb-Pomerene associations have not played a significant role in United States exports.

5. **Task Force on Productivity and Competition. REPORT OF THE TASK FORCE**, reprinted in 115 CONGRESSIONAL RECORD 15,933 (1969).

The Task Force called the Webb-Pomerene Act an "outmoded approach to international competition" and advocated its repeal. *Id.* at 15,937. The Report implies that the Act encourages cartels in foreign commerce and "illegal cooperation at home." *Id.*

6. **United States Department of Justice, Antitrust Division. ANTITRUST GUIDE FOR INTERNATIONAL OPERATIONS (1977)**, reprinted in *ANTITRUST & TRADE REGULATION REPORTER (BNA) No. 799 at E-1 (Feb. 1, 1977)*.

This Guide was produced in response to the President's Export Council, whose members "expressed concern that uncertainty about the application of U.S. antitrust laws had deterred useful international trade and investment." *Id.* at E-1. The Guide was intended to be a "general statement of enforcement policy." *Id.* The Antitrust Division states that although thousands of international transactions may raise antitrust questions, most of them do not create serious antitrust enforcement issues. "Yet uncertainty on this score may sometimes cause businesses to abandon or limit unobjectionable transactions, or to embark upon unnecessarily restrictive transactions which would not be undertaken if the antitrust risk were more clearly

perceived." *Id.*

7. United States Department of Justice. MEMORANDUM CONCERNING ANTITRUST AND FOREIGN COMMERCE, *reprinted in 5 TRADE REGULATION REPORTER (CCH) ¶ 50,129 (Jan. 31, 1972).*

This Memorandum analyzes twelve hypothetical cases which might involve antitrust problems.

V. NONGOVERNMENTAL REPORTS AND STUDIES

1. Committee on International Trade Regulation of the American Bar Association. *Impact of Antitrust Laws on Foreign Trade*, 1953 AMERICAN BAR ASSOCIATION SECTION OF INTERNATIONAL AND COMPARATIVE LAW 75-100.

A very mild report which generally supports existing law, although it favors a somewhat less restrictive application of antitrust to foreign trade.

2. *Report of the Committee on Antitrust Problems in International Trade*, August, 1954 AMERICAN BAR ASSOCIATION SECTION ON ANTITRUST LAW 188-89.

3. Committee on Antitrust Problems in International Trade. *Report of Subcommittee on Subsidiaries in Foreign Trade*, 1955 AMERICAN BAR ASSOCIATION ANTITRUST LAW REPORTS 242-65.

This Report "reviews the antitrust problems that arise when American companies form and operate foreign subsidiaries or affiliates." *Id.* at 242. The major area of uncertainty is that of joint ventures such as jointly-owned subsidiaries. The Report suggests that the President be empowered to exempt particular investments from the antitrust laws because of public interest considerations.

4. American Chamber of Commerce in London. *THE AMERICAN ANTITRUST LAWS AND AMERICAN BUSINESS ABROAD (1956).*

The American Chamber of Commerce in London has concluded that our present antitrust policies are misconceived and are highly damaging to our material interests. . . . No other nation prevents its nationals from operating abroad in accordance with the laws and customs of the place where the trade is carried on. No other nation punishes its traders for combining with foreign traders or with their own nationals to promote trade in the manner which as businessmen they consider most conducive to growth and profit.

Id. at 2. For examples of harm caused by extraterritoriality, see pp. 17-20. The Report states that many persons are beginning to recognize "the need to relax somewhat the severity of the present extraterritorial application of the Sherman Act. . . ." "The Chamber considers that *the only possible solution is the complete exemption of acts performed outside the territorial limits of the United States,*" *Id.* at 26. (emphasis in the original).

5. Special Committee on Antitrust Laws and Foreign Trade of the Association of the Bar of the City of New York. NATIONAL SECURITY AND FOREIGN POLICY IN THE APPLICATION OF AMERICAN ANTITRUST LAWS TO COMMERCE WITH FOREIGN NATIONS: A PRELIMINARY REPORT (1957).

The Committee recommended that Congress give the President power to exempt persons or firms from the application of the antitrust laws to their activities in international commerce. Under this proposal, the President must find that the exemption serves the national security or the foreign policy interests of the United States. Kingman Brewster directed this study.

6. Working Group on Antitrust Policy in International Trade of the Committee on International Trade and Investment, Section of International and Comparative Law of the American Bar Association. *Antitrust Problems in International Trade: A Report*, 1963 AMERICAN BAR ASSOCIATION SECTION OF INTERNATIONAL AND COMPARATIVE LAW 70-92.

"Most authorities agree that the uncertainty of our antitrust laws is a substantial handicap to Americans doing business abroad." *Id.* at 79. Uncertainty arises in the following areas: (1) joint ventures for conducting business abroad; (2) cooperation with foreign competitors; (3) territorial and other limitations in patent, trademark, and know-how licenses; (4) conflicts between United States and foreign antitrust laws; and (5) political repercussions caused by application of United States antitrust laws to foreign nationals. The Working Group makes many recommendations in its Report.

7. Committee on the Extraterritorial Application of Restrictive Trade Legislation. *Report*, 51 INTERNATIONAL LAW ASSOCIATION 304-592 (1965).

The Report includes extracts of criticism and comments by various interested parties on the extraterritorial application of antitrust law as well as a bibliography.

8. Antitrust Task Force on International Trade and Investment of the Chamber of Commerce of the United States. FINAL REPORT ON UNITED STATES ANTITRUST LAWS AND AMERICAN EXPORTS, (1974), printed in *International Aspects of Antitrust Laws: Hearings Before the Subcommittee on Antitrust and Monopoly of the Senate Judiciary Committee*, 93d Congress, 1st & 2d Sessions, 163 (1973-74).

The purpose of this study was to examine and make recommendations about the effect of United States antitrust laws on the ability of United States businesses to compete in world markets. It includes a comparison of United States and foreign antitrust laws as they apply to exporting. The Task Force favors legislation which would "[allow] American business to

compete on a fair and equitable basis with Japan and Europe, neither of which has any antitrust restraints hobbling their exporters of goods and services." *Id.* at 172.

9. International Economic Affairs Department, National Association of Manufacturers. **THE INTERNATIONAL IMPLICATIONS OF U.S. ANTITRUST LAWS: AN ISSUE ANALYSIS OF GLOBAL ECONOMIC REALITY (1974).**

This report is based on a ten-month study which included a search of the literature, an opinion survey of several hundred firms, discussions with corporate and government counsel, and collection of representative problems caused by extraterritoriality. About seventy percent of the firms responding believed that extraterritorial application of United States antitrust laws handicapped their international competitiveness. The study reports that the principal problem areas are formation of export associations, joint ventures, licensing arrangements, and foreign investments by larger firms.

