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EXPORTS AND ANTITRUST: MUST COMPETITION STOP AT THE WATER'S EDGE?

*Dudley H. Chapman**

The ground rules governing competition in international trade rank high among current issues of economic policy. The President's pending Trade Bill[1] and its companion bill on competitive practices[2] place a new emphasis on issues of unfair competition. These issues were prominent during the early 1900's and the interwar years but have rested in abeyance through the long post-war transition. The economic predominence of the United States characterized the post-war period. Now that Europe and Japan are once again formidable competitors in the world marketplace, the rules governing competition on the international level have regained their prior importance. As may be expected, the laws that were framed to deal with these problems a half century ago are the subject of renewed attention and proposals for legislative change.[3] One much discussed candidate for change is the Webb-Pomerene Export Trade Act of 1918.[4] That law, which exempts United States export trade from the antitrust laws, was framed at a time when the American antitrust philosophy was largely unique in the world. That circumstance has changed radically since World War II. The time may be at hand to reexamine the Webb Act's exemptive approach to the enforcement of competition in international trade. Either a return to the rule of reason or an administrative scheme for limited exceptions, comparable to that of the European Economic Community, would seem preferable to the legal vacuum created by the Webb Act.

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1. H.R. 6767, 93d Cong., 1st Sess. (1973).

2. The bill, which had not yet been introduced at this writing, is entitled: "A Bill [t]o amend the Federal Trade Commission Act and the Export Trade Act as amended to deal with unfair competition in imports, to provide for clarification of law, for prior Federal Trade Commission clearance of export trade associations, and for other purposes." 608 BNA ANTITRUST & TRADE REG. REP. F-1 (1973). *See* note 144 *infra.*

3. In addition to the Administration's bill (*supra* note 2), see S. 2754, 92d Cong., 2d Sess. (1972); S. 1483, 93d Cong., 1st Sess. (1973). *See* note 143 *infra.*

4. 15 U.S.C. §§ 61-65 (1970).

I. INTRODUCTION

A. *The Spreading Competitive Norm*

At the end of World War II, the United States and Canada were almost alone in having antitrust legislation in the modern sense of that term.[5] The ensuing worldwide explosion of antitrust legislation has been widely documented.[6] The laws imposed by fiat of the United States during the occupation regimes in Germany and Japan[7] were the first instances of the proliferation of antitrust legislation. Although the purpose in each case was primarily political, rather than economic,[8] and although both nations since have made some departures from the occupation legislation, each has retained a positive legislative antitrust policy.[9] The German law, through successive amendments, has been strengthened until it is generally recognized, with that of the United

5. Friedmann, *Antitrust Law and Joint International Business Ventures in Economically Underdeveloped Countries,* 60 COLUM. L. REV. 780, 781-82 (1960). Other countries, notably Scandinavia, had antitrust laws—or more accurately, laws against certain abusive practices—at that time. *See* C. EDWARDS, CONTROL OF CARTELS AND MONOPOLIES 3-4 (1967); OECD, MARKET POWER AND THE LAW 13 (1970).

6. C. EDWARDS, CONTROL OF CARTELS AND MONOPOLIES (1967); C. EDWARDS, TRADE REGULATIONS OVERSEAS (1966); 1-3 THE EUROPEAN COMMON MARKET ANTITRUST PROJECT OF THE SPECIAL COMMITTEE ON THE EUROPEAN COMMON MARKET ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, BUSINESS REGULATION IN THE COMMON MARKET NATIONS (H. Blake ed. 1969) [hereinafter cited as H. Blake]; 4 THE EUROPEAN COMMON MARKET ANTITRUST PROJECT OF THE SPECIAL COMMITTEE ON THE EUROPEAN COMMON MARKET ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, COMMON MARKET AND AMERICAN ANTITRUST (J. Rahl ed. 1970) [hereinafter cited as J. Rahl]; E. HADLEY, ANTITRUST IN JAPAN (1970); H. IYORI, ANTIMONOPOLY LEGLISATION IN JAPAN 9 (1969); *Hearings pursuant to S. Res. 40 Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary,* 89th Cong., 1st Sess., pt. 2 (1965); SENATE SUBCOMM. ON ANTITRUST AND MONOPOLY, 88TH CONG., 2D SESS., REPORT ON ANTITRUST DEVELOPMENTS IN THE EUROPEAN COMMON MARKET (Comm. Print Pursuant to S. Res. 262 1964).

7. E. HADLEY, *supra* note 6, at 439; Riesenfeld, *The Protection of Competition,* in AMERICAN ENTERPRISE IN THE EUROPEAN COMMON MARKET: A LEGAL PROFILE 215 (E. Stein & T. Nicholson eds. 1960).

8. *See* note 7 *supra.*

9. *See generally* 3 H. Blake, *supra* note 6; E. HADLEY, *supra* note 6.

Kingdom, as one of the two strongest laws outside of the Western Hemisphere.[10]

The British law itself is a major benchmark.[11] Starting from scratch after World War II, and following two decades characterized by a wholesale renunciation of competition in favor of industrial cooperation and cartelization,[12] the United Kingdom achieved a clear shift in its antitrust policy, principally in the Restrictive Trade Practices Act of 1956. A comparable change has occurred throughout the nonsocialist countries and, to some extent, even in the citadels of centrally planned socialist economies.[13]

The growth of foreign antitrust legislation reflected a watershed in political-economic attitudes. The interwar years in Europe had been characterized by a virtual abandonment of competition as a regulator of markets in favor of cartelization (both private and with government collaboration); cartels were deemed necessary to "rationalize" industry and avoid wasteful competition.[14] Germany was the forerunner in this movement, with literally hundreds of cartels permeating its economy.[15] The United Kingdom started from the opposite extreme of *laissez faire* liberalism in the 19th century, but rapidly crossed over to a policy of cartelization to which it adhered until the outbreak of World War II.[16]

Corwin Edwards attributes the postwar trend among nations away from cartelization policies to a number of factors, including revulsion against the association of powerful cartels with the fascist dictatorships in Germany and Japan, the impressive example of American productivity during World War II (which our government attributed to the role of competition in the American economy), and a belief that the extensive cartel practices of the interwar period were largely responsible for inefficiencies in their own economies.[17] The active

10. *See* Timberg, *European and American Antitrust Laws–A Comparison,* 7 ANTITRUST BULL. 131-32 (1962); Timberg, *Conflict and Growth in the International and Comparative Law of Antitrust,* 4 A.B.A. SECT. INT. & COMP. L. BULL., July, 1960, at 20, 23.

11. *See generally* Rhinelander, *British Antitrust Laws,* 40 ANTITRUST L. J. 827 (1971); Timberg, *Conflict and Growth in the International and Comparative Law of Antitrust,* 4 A.B.A. SECT. INT. & COMP. L. BULL., July, 1960, at 20, 23.

12. G. STOCKING & M. WATKINS, CARTELS OR COMPETITION 18-19 (1948).

13. *See* S. PISAR, COEXISTENCE AND COMMERCE 23-28 (1970).

14. *See* G. STOCKING & M. WATKINS, *supra* note 12, at 29, 32-34 & 54.

15. *Id.* at 19-29.

16. *Id.* at 18-19, 54 & 60-63.

17. C. EDWARDS, CONTROL OF CARTELS AND MONOPOLIES 8-13 (1967).

policy of the United States Government immediately after World War II in urging other countries to adopt procompetitive policies, both for political and trade purposes, had some effect, if only as a catalyst, in triggering the post-War surge of antitrust legislation.[18]

Another major factor was the desire for economic and political unity in Europe. The framers of the European Communities were aware that the removal of government barriers to trade as a stimulus to the integration of their economies could be frustrated by private agreements restricting trade along national lines,[19] and there was ample pre-War experience to justify these fears.[20] The competition rules and policies adopted for this purpose gave a regional and common framework to the development of antitrust rules. The growing vigor of the European Economic Community's competition policy is now a leading influence in the continuing growth of antitrust regulation abroad.[21]

Perhaps the most significant fact about this foreign trend is that it represents a shift in political and economic attitudes. As described by Professor Edwards:

> At the close of the war, it seemed possible that the trend in Western Europe and elsewhere would be toward nationalization of industry, central economic planning, and state trading. But this prospect soon changed. On the one hand, the communism of countries beyond the iron curtain was discredited as its inconsistency with democratic freedoms became manifest. On the other hand, the democratic socialism of Western Europe no longer seemed, even to socialists, a possible panacea.... It was evident that in democratic countries large parts of the economy would be privately administered through market mechanisms, whether or not governments were socialist. Private restrictions could no longer be regarded as transitional phenomena, conducive to socialism and shortly to be terminated thereby. Desiring to minimize restrictions in sectors of the economy that might be enduringly private, socialists showed new sympathy for competition.... Policies based upon competition tended to occupy a middleground between extremes of collectivization and cartelization. They became politically viable and sometimes even expedient.[22]

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18. *Id.* at 11; Timberg, *European and American Antitrust Laws—A Comparison,* 7 ANTITRUST BULL. 131, 133 (1962).

19. *See, e.g.,* Riesenfeld, *supra* note 7, at 204-05; 4 J. Rahl, *supra* note 6, at 23.

20. *See* note 16 *supra.*

21. *See* COMM'N OF THE EUROPEAN COMMUNITY, FIRST REPORT ON COMPETITION POLICY 24-39 (1972).

22. C. EDWARDS, *supra* note 17, at 12.

These foreign developments thus have acquired a momentum of their own, and continue to thrive long after the post-War missionary efforts of the United States diminished. Indeed they have not been pale reflections of American law but emerged as truly indigenous products reflecting varying national concerns. The framers of the foreign laws have drawn freely from the American experience, not copying it, but learning from it, occasionally profiting from our mistakes and oversights, and adapting American experiences to their local needs.[23] This process has been facilitated, beginning in 1960, through the mechanism of the Restrictive Business Practices Committee of the Organization for Economic Co-operation and Development (OECD), which provides a forum for the interchange of ideas between antitrust officials of the major trading countries of Europe, the United States, Canada and Japan.

In some respects, foreign laws are more rigorous than our own: in imposing an affirmative duty on dominant firms to sell to independent competitors;[24] in a more restrictive policy towards resale price maintenance;[25] in the establishment of more flexible standards defining competitive objectives;[26] and in enforcing more meaningful fines for violations.[27] In other respects, notably mergers,[28] and through greater tolerance for exceptions for practices governed by per se rules in the United States,[29] foreign laws are less strict than American counterparts.

The foreign laws do not reflect the political, populist reaction to an excessive concentration of economic power that inspired the Sherman Act.[30] They are based rather on a new-found economic belief that competition is conducive to efficiency.[31] This does not lead foreign

23. *See generally* note 6 *supra;* Timberg, note 18 *supra.*

24. *See* 4 J. Rahl, *supra* note 6, at 203; Timberg, *supra* note 18, at 139.

25. 4 J. Rahl, *supra* note 6, at 207; Timberg, *supra* note 18, at 133-34.

26. In Japan, for example, a cut-off of supplies to a price-cutting retailer has been found illegal under the broad test that it affected a "substantial restraint of competition," without the need to find any combination or agreement, as would be required under American law. *See* Ariga & Rieke, *The Antimonopoly Law of Japan and its Enforcement,* 39 WASH. L. REV. 437, 447 (1964).

27. In contrast to the Sherman Act's $50,000 limit (15 U.S.C. §§ 1, 2 (1970)), fines of up to $1,000,000 or 10% of a firm's annual turnover are authorized in the European Community. 1 CCH COMM. MKT. REP. ¶¶ 2541-42 (1973).

28. *See* J. Rahl, *supra* note 6, at 168-81.

29. *See* notes 33-35 *infra.*

30. *See* C. EDWARDS, *supra* note 17, at 197, 200; Timberg, *supra* note 18, at 135.

31. *See* C. EDWARDS, *supra* note 17, at 197.

nations to reject categorically all forms of restrictive practices; foreign enforcement systems typically rely on administrative agencies to make ad hoc judgments on the merits of individual cases.[32] The British law, for example, gives businessmen an opportunity to argue the validity of any agreement before the Restrictive Practices Court, but places on them the burden of establishing the existence of specified public interest criteria.[33] (This authority has been used—albeit rarely—to sanction price fixing.[34]) The German and Japanese laws provide for a number of exceptions, including certain types of cartel agreements, but the exceptions are always hedged by some criterion designed to safeguard the public interest.[35] The flexibility of the German and Japanese approaches would be impractical under the American method of judicial enforcement, a fact which accounts in large measure for the difference in approach.

The resulting contrast between the pristine rigor of the Sherman Act and the willingness of foreign laws to countenance exceptions can be mistaken for a greater difference in philosophy than actually exists. On the American side, the purity of the Sherman Act within the sphere of its application must be discounted by the ever-growing list of legislative exceptions to it.[36] The export exception of the Webb Act

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32. *Id.* at 200-01.

33. *See* Timberg, note 11 *supra.*

34. *See* Rhinelander, *supra* note 11, at 830.

35. The German law on Restraints of Competition qualifies exceptions to the general prohibition by such requirements as—"if the arrangement takes into consideration the economy in general and the public interest" (§ 4); "if the agreement is intended to bring about rationalization in conjunction with price agreements or by the establishment of joint purchasing or selling organizations Syndikate), authorization may only be granted if the rationalization purpose cannot be achieved by other means and if the rationalization is in the public interest" (§ 5(3)); a provision for veto of proposed rationalization plans within three months by the cartel authority (§ 5a(3)); and similar provisions in § 6(3) (export cartels) and § 8(2). For citations to the German law see 2 OECD, GUIDE TO LEGISLATION ON RESTRICTIVE BUSINESS PRACTICES (1966) [hereinafter cited as OECD GUIDE].

In Japan, the legal exceptions permitting cartels are similarly qualified; and contrary to popular belief, cartels do not have a long and extensive history in Japan. *See* E. HADLEY, *supra* note 6, at 358-65.

36. *See* note 32 *supra;* Ariga & Rieke, *supra* note 26, at 470-71; SENATE COMM. ON FINANCE AND ITS SUBCOMM. ON INT'L TRADE, 93D CONG., 1ST SESS., REPORT UNDER SECTION 332 OF THE TARIFF ACT OF 1930 ON INVESTIGATION NO. 332-69: IMPLICATIONS OF MULTINATIONAL FIRMS FOR WORLD TRADE AND INVESTMENT AND FOR U.S. TRADE AND LABOR 12, 864-67 (1973).

has kindred brethren, for example, permitting retail price fixing under the "fair trade" laws[37] (to an extent that would not be permissible under some foreign laws[38]), in agriculture and agricultural cooperatives,[39] in fisheries cooperatives,[40] by small business pools for defense supply activities,[41] in insurance,[42] in banking,[43] in transportation (by land,[44] sea[45] and air[46]), in communications,[47] in entertainment,[48] in electric power,[49] in atomic energy,[50] in securities and securities exchanges[51] and for measures to aid the balance of payments[52] and the national defense.[53] And these are only the federal exceptions. At the state and local level a vast tangle of restrictive licensing and regulatory schemes interferes with entry into business and the freedom of existing firms to compete.[54]

The exceptions have become so important, in fact, that the advocacy of competitive values before the various boards and agencies that administer them has become a major concern of the Antitrust

37. *See generally* REPORT OF THE ATTORNEY GENERAL'S COMMITTEE TO STUDY THE ANTITRUST LAWS 149-55 (1955).

38. *See* note 25 *supra.*

39. 15 U.S.C. § 17; Capper-Volstead Act, 7 U.S.C. §§ 291-92 (1970); Cooperative Marketing Act, 7 U.S.C. §§ 451-57 (1970); Agricultural Marketing Act of 1937, 7 U.S.C. § 608b (1970); Agricultural Adjustment Act, 7 U.S.C. §§ 851-55 (1970) (hog cholera).

40. 15 U.S.C. § 521 (1970).

41. 15 U.S.C. §§ 636, 638, 640 (1970).

42. 15 U.S.C. §§ 1011-15 (1970); 46 U.S.C. § 885 (1970).

43. Bank Merger Act of 1960, 12 U.S.C. § 1828(c); Federal Reserve Act of 1913, ch. 6, 38 Stat. 251 (codified in 31 U.S.C. § 409 and scattered sections of 12 U.S.C.).

44. Interstate Commerce Act, 49 U.S.C. § 5 (1970).

45. Shipping Act of 1916, 46 U.S.C. § 801 (1970).

46. 15 U.S.C. § 18 (1970); 49 U.S.C. §§ 1378, 1384 (1970).

47. Communications Act of 1943, 47 U.S.C. §§ 222(b)-(f) (1970).

48. 15 U.S.C. §§ 1291-95 (1970).

49. 16 U.S.C. §§ 791 *et seq.*

50. Atomic Energy Act of 1954 § 105, 68 Stat. 919, *as amended,* 42 U.S.C. § 2135 (1970).

51. 15 U.S.C. § 77(a) (1970).

52. 31 U.S.C. § 932 (1970).

53. 50 U.S.C. App. § 2158 (1970).

54. *See generally* Address by Roland W. Donnem, former Director of Policy Planning, Antitrust Division, *Federal Antitrust Law Versus Anticompetitive State Regulation,* before the Sherman Act Committee of the Antitrust Section of the American Bar Association, St. Louis, Missouri, Aug. 10, 1970.

Division of the Department of Justice.[55] In some areas such as banking and atomic energy, for example, the regulatory criteria are framed in terms of an explicit trade-off between competition and other public interest factors, with a caveat to preserve as much competition as possible.[56] In these areas of antitrust-regulatory practice, the American and foreign approaches begin to look very much alike. The superficial contrast between the "pure" American system and those abroad is therefore misleading. When *all* the laws regulating business in the United States are compared with those abroad, a general procompetitive norm to which exceptions are made emerges in each system.[57] In most cases, the exceptions reflect largely domestic matters, such as regulated utilities. But at the point where American and foreign law are most likely to collide—the regulation of export trade—both systems abandon the principle of competition that now governs so much of the world's domestic commerce. As long as the United States was virtually alone in its antitrust policy, and while foreign legislation was still in its infancy, an exception for export trade could be defended (if for no other reason) as an accommodation of the differing legal regimes at home and abroad. But with the growing acceptance of competition abroad, it may be time to ask whether continued exemption of export trade is consistent with our

55. *See generally* Baker, *The Antitrust Division, Department of Justice: The Role of Competition in Regulated Industries,* 11 B.C. IND. & COM. L. REV. 571 (1970); Address by Assistant Attorney General Thomas E. Kauper, *The Challenge of Competition,* before the Section of Corporate, Banking and Business Law of the American Bar Association, New York City, Oct. 27, 1972.

56. The Bank Merger Act of 1966 provides that a bank merger "whose effect... may be substantially to lessen competition" may be administratively approved if such effect is "clearly outweighed in the public interest by the probable effect of the transactions in meeting the convenience and needs of the community to be served." 12 U.S.C. § 1828(c)(5)(B). The Supreme Court has held that this defense would not apply unless the benefits to the community of the merger could not reasonably be achieved in any other way. United States v. Third National Bank, 390 U.S. 171 (1968). The Atomic Energy Act of 1954, 42 U.S.C. § 2135(b), (c) (1970), provides for participation and advice by the Attorney General in licensing proceedings and authorizes the Commission to deny a license or issue it on conditions designed to protect the public interest in competition.

57. *See* note 32 *supra;* Ariga and Rieke, *supra* note 26, at 471: "An American comparison with the genus, if not the species, can be found for almost every exemption from the Japanese Law."

58. "Every contract, combination in the form of trust or othervise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal...." 15 U.S.C. § 1 (1970).

own objectives and with those of our trading partners, or whether it is instead a contretemps that threatens to undo much of the progress made in the last quarter of a century.

B. *The Contretemps in Export Trade*

1. *The United States.*—When first enacted, the Sherman Act contained no exception for export trade, and in fact, clearly included it by express reference to the "foreign commerce" of the United States.[58] With the Webb-Pomerene Export Trade Act of 1918, Congress created an exception to the Sherman Act for associations "entered into for the sole purpose of engaging in export trade and actually engaged solely in such export trade," and for "an agreement made or act done in the course of export trade . . . ."[59] "Export trade" was defined to mean "solely trade or commerce in goods, wares, or merchandise exported, or in the course of being exported from the United States or any Territory thereof to any foreign nation . . . ."[60] The reference to goods, wares and merchandise left open the question of the extent to which transactions involving services might be covered. Specifically excluded from the definition of export trade were the "production, manufacture, or selling for consumption or for resale, within the United States or any Territory thereof, of such goods, wares or merchandise, or any act in the course of such production, manufacture, or selling for consumption or for resale."[61] The exclusion was designed to insulate the domestic market from any of the immunized activities of the export association.[62]

United States participation involved a Webb-Pomerene association that included both major and independent producers.[63] Although restrictive agreements between a Webb-Pomerene association and foreign cartels since have been held illegal, at that time the Federal Trade Commission still adhered to the interpretation announced in the "Silver letter" of July 31, 1924, that a Webb-Pomerene association could "adopt a trade arrangement with non-nationals" provided the

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59. 15 U.S.C. § 62 (1970).
60. 15 U.S.C. § 61 (1970).
61. 15 U.S.C. § 61 (1970).
62. S. REP. No. 1056, 64th Cong., 2d Sess. 2 (1917). "Export trade" has been held not to include sales to the United States Government or its agencies, regardless where purchased and consumed. United States v. Concentrated Phosphate Export Ass'n, Inc., 393 U.S. 199 (1968), *consent decree approved in final judgment,* 1969 Trade Cas. ¶ 72,719 (S.D.N.Y. 1969).
63. 393 U.S. at 199.

arrangement did not reach the American market or affect domestic conditions.[64] That interpretation was subsequently invalidated by the court decision in the *Alkali* case in 1949,[65] yet the Commission did not rescind the Silver letter until 1955.[66] The agreement between the Webb-Pomerene association and the steel cartel sought to meet the proviso in the Silver letter with a prophylactic clause declaring the arrangements inapplicable to trade within the United States.[67] But is such an insulation realistic?

The immunity was further conditioned on a proviso that such an association "does not, either 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[68] within the United States of commodities of the class exported by such association, or which substantially lessens competition within the United States or otherwise restrains trade therein."[69] Judicial decisions have held that the prohibition against restraining trade either within the United States or of an export competitor is breached by inclusion of foreign members in an association,[70] by an agreement to

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64. The letter is reproduced in FTC STAFF REPORT, WEBB-POMERENE ASSOCIATIONS: A 50 YEAR REVIEW 102-06 (1967).

65. United States v. United States Alkali Export Ass'n, 86 F. Supp. 59 (S.D.N.Y. 1949).

66. *See* FTC STAFF REPORT, *supra* note 64, at 106-07. *See also* Simmons, *Webb-Pomerene Act and Antitrust Policy*, 1963 WISC. L. REV. 426, 430.

67. The provisions, as quoted in G. STOCKING & M. WATKINS, *infra* note 146, at 200, provided: "Materials sold in the United States other than for export and sold for export to the United States shall not be covered by this agreement, and this agreement shall not be construed as in any way referring to trade in materials so sold and shall not be allowed directly or indirectly to restrain trade within the United States or the export trade of any domestic competitor of the American groups or to enhance or to depress prices of such material or to lessen competition therein within the United States."

68. The concern which led to the proviso on domestic prices was described as follows: "While the large packers . . . ought to be permitted to form associations for the purpose of buying meat products and selling them abroad, they ought not to be allowed to so conduct this branch of their business as to increase prices at home more than would naturally result from the export trade. They ought not to be permitted to buy ostensibly for this trade and then use their stock for the purpose of depressing prices to the point of ruining home competitors, and then raise the prices to all consumers, and thereby secure a monopoly. . . ." S. REP. No. 1056, 64th Cong., 2d Sess. 3 (1917).

69. 15 U.S.C. § 62 (1970).

70. United States v. United States Alkali Export Ass'n, 86 F. Supp. 59 (S.D.N.Y. 1949).

substitute sales from jointly owned foreign plants for United States exports,[71] and by division of world markets.[72] Permissible activities have been held (or said in dicta) to include the assignment of stock in an export association according to quotas, firm commitments by members to use the association as their exclusive foreign outlet, the refusal of the association to handle the exports of American competitors, the determination of quotas and the prices at which each member should supply products to the association, the fixing of resale prices at which the association's distributors should sell, and the limitation of distributors to handling products of the members.[73]

A significant feature of the Webb Act is that it is mandatory. Any joint export activity that qualifies must be registered under the Act (even if immunity is neither sought nor desired); and there is a penalty of 100 dollars per day for a delay in filing or a failure to do so. Section 5 of the Act[74] requires that "[e]very association which engages solely in export trade, within thirty days after its creation, shall file with the Federal Trade Commission . . . " the information required to be filed by the Act. This information consists (when corporations comprise the association) of the articles of incorporation, bylaws, corporate address, stockholder list and " . . . such information as the Commission may require as to its organization business, conduct, practices, management, and relation to other associations, corporations, partnerships, and individuals."[75]

The Federal Trade Commission is authorized to investigate violations of any of the Act's conditions, and if it concludes that the law has been violated, it may make recommendations for "readjustment" of the association's business; the Commission has no power, however,

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

72. United States v. Imperial Chemical Indus., Ltd., 100 F. Supp. 504 (S.D.N.Y. 1951).

73. United States v. Minnesota Mining & Mfg. Co., 92 F. Supp. 947, 965 (D. Mass. 1950). The conclusion that an association can refuse to accept members that it does not want is consistent with the legislative history. *Hearings on H.R. 17350 Before the Senate Comm. on Interstate Commerce,* 64th Cong., 2d Sess. 60-61 (1917) [hereinafter cited as *1917 Hearings*]. But this general privilege must be qualified in cases where the export association becomes an indispensable means of exporting. The Webb Act specifically provides that joint activity must not be "in restraint of the export trade of any domestic competitor." 15 U.S.C. § 62 (1970). And it is well established that access to joint facilities, which is essential to the competitiveness of firms, is obligatory. *See* note 234 *infra.*

74. 15 U.S.C. § 65 (1970).

75. 15 U.S.C. § 65 (1970).

to remove the statutory privilege. It is restricted to referring alleged violations to the Attorney General.[76]

The proposal that ultimately emerged as the Webb Act was first presented to Congress by the Federal Trade Commission, shortly after it was established, and pursuant to section 6(h) of its enabling statute.[77] The bill was enacted in substantially the same form as proposed by the Commission.[78] It was changed in one significant respect, however, which gave the law its special character as an exemption. The Commission believed that its bill was simply declaratory of existing law under the rule of reason, but argued that the legislation was needed because businessmen felt uncertain and because lawyers disagreed among themselves about the state of existing law.[79] The Commission's bill arguably would not have changed existing law, because it included a condition that the joint

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76. 15 U.S.C. § 65 (1970).

77. "That the commission shall also have power— . . . (h) To investigate, from time to time, trade conditions in and with foreign countries where associations, combinations, or practices of manufacturers, merchants, or traders, or other conditions, may affect the foreign trade of the United States, and to report to Congress thereon, with such recommendations as it deems advisable." 15 U.S.C. § 46(h) (1970) (originally enacted as Act of September 26, 1914, ch. 311, § 6(h), 38 Stat. 717, 722).

78. The original bill, H.R. 16707, was introduced on June 28, 1916 (53 CONG. REC. 10,186 (1916)), but was not reproduced in full text there or in the hearings. *See Hearings on H.R. 16707 Before the House Comm. on the Judiciary*, 64th Cong., 1st Sess. (1916) [hereinafter cited as *1916 Hearings*]. It is evident, however, from the FTC testimony at those hearings (*id.* at 14, 23 & 25, in which the FTC witnesses described reasons for drafting the bill as it was) and from the limited nature of the changes made thereafter, that the basic thrust of the bill remained substantially in its original form. *See* H. R. REP. No. 468, 65th Cong., 2d Sess. (1918); S. REP. No. 9, 65th Cong., 1st Sess. (1917); H. R. REP. No. 1118, 64th Cong., 2d Sess. 4 (1916).

79. H.R. REP. No. 1118, 64th Cong., 1st Sess. 1 (1916); *1916 Hearings, supra* note 78, at 7, 25. "The [Federal Trade] Commission does not believe that Congress intended by the antitrust laws to prevent Americans from cooperating in export trade for the purpose of competing effectively with foreigners, where such cooperation does not restrain trade within the United States and where no attempt is made to hinder American competitors from securing their due share of the trade. . . . By its investigation the Commission, however, has established the fact that doubt as to the application of the antitrust laws to export trade now prevents concerted action by American business men in export trade, even among producers of noncompeting goods. . . . [T]he Commission respectfully recommends the enactment of declaratory and permissive legislation to remove this doubt." S. DOC. No. 426, 64th Cong., 1st Sess. 6-7 (1916).

activity "does not restrain the *export trade* of the United States."[80] This was amended by the Senate to read "and is not in restraint of the export trade of any domestic competitor."[81] The Senate report commented that otherwise the exemption granted would be taken away,[82] which was true and which was why the FTC could argue that its bill was simply declaratory of existing law. The Commission's stated objective of providing certainty for businessmen was not satisfied by its proposed bill. The Senate change, however, clarified the bill and considerably altered the status of existing law by creating a complete exemption for conduct within export trade that might otherwise have violated the Sherman Act. Thus price fixing, division of markets, quotas, and the like were made permissible among the members of an association, *inter se.*[83] The United States, which had pioneered in antitrust legislation,[84] thus also led the way to a retreat from the competitive norm in international trade. Canada's law, which antedated the Sherman Act, carved out a similar exception, but not until 1960.[85]

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80. S. REP. No. 1056, 64th Cong., 2d Sess. 2 (1917) (emphasis added).

81. *Id.*

82. *Id.*

83. The FTC saw a danger that the Act might be used unfairly against individual American exporters in foreign trade, which it sought to remedy by (1) a specific extension of unfair competition law to export trade (§ 4 of the Act, 15 U.S.C. § 64 (1970)), (2) reports to the FTC, and (3) enforcement of the antitrust laws. *See* S. DOC. No. 426, 64th Cong., 1st Sess. 6 (1916). But within the exempted trade, the antitrust laws and FTC reports would have no effect. The extended remedy against unfair competition in export trade was designed to substitute for, and some apparently viewed it as embodying the substance of, the antitrust laws. *See 1917 Hearings, supra* note 73, at 128. Others recognized that "unfair competition" does not reach all that the antitrust laws do and bemoaned creating this void in antitrust coverage. *Id.* at 77, 122-23, 128. In practice, this unfair competition remedy has been a dead letter and does not appear to have impressed businessmen as incorporating the substance of the Sherman Act.

84. It may be significant that the Webb Act was enacted when American Banana Co. v. United Fruit Co., 213 U.S. 347 (1909), was still the leading case on the application of the antitrust laws to international commerce. Congress might have been more concerned about what it was giving away if it had had before it the very different implications of the holdings in United States v. Sisal Sales Corp., 274 U.S. 268 (1927), United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945), Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690 (1962), or the international cartel cases cited note 153 *infra.*

85. Canada carved out a similar exemption for exports in 1960. For the background of and rationale for the Canadian law see Note, *The Purpose, Operation and Effect of the Export Exemption Provision of the Combines Investigation Act (Section 32 (4) and (5)),* 3 OSGOODE HALL L.J. 106 (1964).

2. *Germany.*—Section 6 of the German Act Against Restraints of Competition, enacted in July 1957, exempts agreements between enterprises "which serve to promote exports insofar as they are limited to regulation of competition in markets outside the area to which this Act applies."[86] Such export agreements are permitted even if they have an effect on the domestic market.[87] On the other hand, the German law contains two safeguards that do not apply to Webb-Pomerene associations: first, the agreement must serve to "protect or promote exports" to be valid; and secondly, if the agreement affects domestic commerce, it is valid only insofar as it "is necessary to insure the desired regulation of competition" in exports. An export agreement may not be approved if it may lead to a substantial restraint of competition within Germany and if there is "a predominating interest in preserving competition."

3. *The European Economic Community.*—The antitrust provisions of the Treaty of Rome, which created the European Economic Community, contain no express exception for exports. As a general rule, however, it is recognized that agreements relating solely to exports are not prohibited insofar as they do not affect trade between the member states, and the Commission has ruled to this effect.[88] In

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86. Section 6(1) of the German Law as translated in 2 OECD GUIDE, *supra* note 35, ¶ 1.0, at 6.

87. *Id.* § 6(2). *See also* 3 H. Blake, *supra* note 6, at 104. On its face, this would appear contrary to the American law, but in light of the difficulty of insulating the domestic market from all effects of an export agreement and Judge Wyzanski's statement in *Minnesota Mining,* 92 F. Supp. at 965, that Congress intended to accept such inevitable effects, the practical effect of the United States and German laws may not be as different in this respect as they seem.

88. *See, e.g.,* Grosfillex Co., 1 CCH COMM. MKT. REP. ¶ 2412.37 (1973); S.A. Nicholas Freres, 1 CCH COMM. MKT. REP. ¶ 2412.46 (1973); Dutch Engineers and Contractors, 1 CCH COMM. MKT. REP. ¶ 2412.31 (1973). The German Federal Cartel Office has ruled that agreements relating only to exports do not violate EEC rules. *Wirtschaft und Wettbewerb,* No. 10, 1 CCH COMM. MKT. REP. ¶ 2011.383 (1973). The High Authority of the Coal and Steel Community, however, has ruled that the French and German steel industries would violate the competition rules of the ECSC "by entering into an agreement for allocation of export orders received from nonmember countries, if such allocation were shown indirectly to affect the common market for coal and steel so as to restrict the normal competition in that market." 1 CCH COMM. MKT. REP. ¶ 2011.382 (1973) (answer by the High Authority of Coal and Steel Community, dated May 5, 1961, to written question No. 16 submitted in Parliament by Mr. Nederhorst, *Official Journal of European Communities* No. 35, May 20, 1961). Export arrangements may in some cases have an effect on trade

addition, an export agreement might be exempted under article 85(3), which provides for ad hoc exemptions for agreements otherwise in violation of the general provisions in article 85(1) for:

> concerted practices . . . which contribute to the improvement of the production or distribution of goods or to the promotion of technical or economic progress while reserving to users an equitable share in the profit therefrom, and which:
> (a) neither impose on the enterprises concerned any restrictions not indispensable to the attainment of the above objectives;
> (b) nor enable such enterprises to eliminate competition in respect of a substantial proportion of the goods concerned.[89]

Moreover, the Community may take regulatory actions under its own authority to impose regulations governing exports (among other matters), as it has done in the past under the Coal and Steel Treaty.[90] Both the article 85(3) exemption and the Community-authorized regulatory action represent procedures by which decisions are made on an ad hoc basis, rather than through a categorical exception[91] such as the Webb-Pomerene Act.

4. *Japan.*—Japan also makes an exception to its antitrust laws for exports, but in yet another way. Both exports and imports are comprehensively governed by a special statute, the Export and Import Trading Act of 1952.[92] The stated purpose of the Act "is to prevent unfair export trading and to establish order in export and import trading, and thereby to promote the sound development of foreign trade."[93] Section 5 of the Act recalls Webb-Pomerene: "Exporters may enter into an agreement on price, quantity, quality design, or any

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between the member states and so come within article 85(1) of the EEC Treaty. *See* DERINGER, THE COMPETITION LAW OF THE EUROPEAN ECONOMIC COMMUNITY ¶¶ 128, 141, 142 (1968).

89. 1 CCH COMM. MKT. REP. ¶ 2051 (1973).

90. *Official Journal of European Communities* No. 76, April 21, 1967.

91. "Categorical" is used here to connote a legislative exception. The European Commission does grant certain "categorical" exemptions for certain types of agreements; but these are based on ad hoc judgments by administrative officials on the merits of certain types of agreement, and they are free to change their minds (prospectively). *See* Kobak, *Three Approaches to the Bureaucratic Dilemma: The Administration and Enforcement of the Antitrust Laws of the United States, France, and the Common Market*, 23 ALA. L. REV. 43, 89-90 (1970).

92. Extracted in 4 OECD GUIDE, *supra* note 35, at 12. Citations to the Japanese statute refer to this translation.

93. *Id.* § 1.

other matter in relation to commodities of a particular kind to be exported to a specific destination, by notifying the Minister of International Trade and Industry within ten days from the day of its conclusion."[94] The Minister of International Trade and Industry (MITI), however, is given much greater power and a more specific mandate than the Federal Trade Commission in the United States. The Minister, on receipt of a notice of agreement, is directed to order the agreement modified or prohibit its conclusion if it fails to fulfill any of the following criteria:

> [1] There is no fear of violating treaties and other arrangements concluded with foreign governments or the international agencies;
> [2] The interest of importers or enterprises concerned at the destination is not injured and there is no fear of gravely injuring international confidence in Japanese exporters;
> [3] In addition to the preceding two paragraphs, there is no fear of gravely injuring the sound development of export trade;
> [4] Its contents are not unjustly discriminatory;
> [5] The participation in or the withdrawal from the agreement is not unjustly restricted;
> [6] There is no fear of unjustly injuring the interests of domestic agriculture, forestry and fishery enterprises concerned and other enterprises concerned or consumers in general.[95]

The matter of production for export, which, in the United States, specifically was covered by amendment prior to the enactment of Webb-Pomerene,[96] is governed in Japan by a separate review procedure paralleling that for export agreements, again subject to authorization by MITI.[97] Both of these provisions apply to exporters.

94. *Id.* § 5.

95. *Id.* § 5-bis.

96. S. Rep. No. 1056, 64th Cong., 2d Sess. 2 (1917). The amendment added the following underscored words in § 1 (15 U.S.C. § 61 (1970)) to permit buying and selling within the United States as long as the goods are ultimately exported: "The words 'export trade' shall not be deemed to include the production, manufacture or selling *for consumption within the United States. . . .*" (emphasis added).

97. "Exporters may enter into an agreement on price, quantity, quality, design, or any other matter in domestic transactions relating to commodities of a particular kind to be exported to a specific destination, or may enter into an agreement on these matters with producers or sellers of the said commodities to be exported to the said destination by obtaining the authorization of the Minister of International Trade and Industry." Note 92 *supra,* § 5-2(1). The Minister is directed not to approve the agreement unless it satisfies condition [2] quoted *supra* in the text. *See* note 92 *supra,* § 5-2(2).

A distinct authorization is provided for producers or sellers of commodities to be exported to a specific destination, and they too are subject to the same conditions.[98] There is, in addition, an unusual provision for agreements coordinating imports and exports when import restrictions or foreign governmental arrangements make this necessary.[99]

Export associations are governed by a different section. Thus, unlike American law, Japanese law grants the privilege to agree on export prices, division of markets, quotas and similar practices restricting competition independently of the formation of an association. In addition to serving as a vehicle for such agreements, an association may serve the following purposes:

> [1] Prevention of unfair export trading by members . . . belonging to any export association;
> [2] The maintenance and cultivation of overseas export markets, for example, by survey, publicity, good offices, in regard to export;
> [3] Improvement of price, quality, design and any other matter relating to commodities to be exported;
> [4] Dealing with complaints and disputes relating to exports;
> [5] Activities incidential to activities within each of the preceding paragraphs;
> [6] . . . facilities for furtherance of the common interest of members of the export associations; and
> [7] Loan of funds (including discounting of notes) to its members and borrowing thereof in favour of its members.[100]

The Japanese export regime thus shares the common exemption policy toward restrictive practices in exports; but the Japanese system hedges its policy of exemption with elaborate safeguards to protect against harmful effects, both domestically and in export markets, and includes a substantial power of intervention by the supervising government agency.

5. *Universality of the Exception.*—The foregoing examples illustrate several different legislative approaches that have the common feature of excluding the application of normal antitrust rules to export trade. Comparable exceptions appear in the United Kingdom and many other countries.[101] The existence of an exception, whether

98. Note 92 *supra,* § 5-3.
99. Note 92 *supra,* § 7-3.
100. Note 92 *supra,* § 11.
101. Section 21(1)(f) of the British law (3 OECD GUIDE, *supra* note 35) lists as one ground for upholding an otherwise prohibited restriction a finding "that having regard to the conditions actually obtaining or reasonably foreseen at the

by express provision or because the rules do not apply, appears to be universal. Does this mean that export trade is somehow economically different than domestic commerce, that the economic forces which favor competition as a domestic policy do not operate similarly in foreign commerce and that international commerce will function best if freed of the differing competitive rules that apply to national or regional markets? Or is this common policy toward international trade an exception that threatens to swallow the rule?

C. *The Collision Course of National Policies: Extraterritoriality in Reverse*

One of the key arguments urged by supporters of the Webb Act in 1916-1918, and by those who would retain it, is that American industry should be allowed to compete abroad under the same ground rules as its foreign competition.[102] In 1916-1918, when those ground rules embraced cartelization with a bear hug,[103] it involved no conflict with foreign law for the United States to authorize its exporters to do what others were legally doing abroad. Indeed, that conclusion would appear to follow under conflict of laws doctrine, even without the Webb Act.[104]

But can this remain true when the foreign law changes to favor competition and to outlaw cartel practices? The conduct sanctioned

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time of the application, the removal of the restriction would be likely to cause a reduction in the volume or earnings of the export business which is substantial either in relation to the whole export business of the United Kingdom or in relation to the whole business (including export business) of the said trade or industry." In many cases there is no specific provision, but this is unnecessary where the national law would not otherwise permit concerted export activity.

102. "Few, if any, foreign countries compel their exporters to observe business standards prescribed by our antitrust laws, [sic] then why should we require our exporters to observe a higher and stricter standard of conduct than their foreign competitors are required to observe? In other words, by this bill we permit our American exporters to meet their foreign rivals on foreign soil on equal terms." H.R. REP. No. 1118, 64th Cong., 1st Sess. 3 (1916).

103. *See* notes 12, 14-16 *supra*.

104. *Cf.* J. Rahl, *supra* note 6, ch. 7. *See generally* W. FUGATE, FOREIGN COMMERCE AND THE ANTITRUST LAWS § 3.16, at 87-93 (1958); Fugate, *Damper or Bellows? Antitrust Laws and Foreign Trade*, 45 A.B.A.J. 947, 948-49 (1959); Timberg, *Antitrust and Foreign Trade*, 48 NW. U.L. REV. 411, 414-15 (1953); Note, *The Conflict of Laws and the Extraterritorial Application of the Sherman Act*, 4 CASE W. RES. J. INT'L L. 164 (1972); Note, *Extraterritorial Application of the Antitrust Laws: A Conflict of Laws Approach*, 70 YALE L.J. 259 (1960).

by United States laws then may violate the law of the importing country, and under the effects test of jurisdiction can result in legal liability. This prospect was noted when the first significant foreign antitrust legislation emerged,[105] and recently there have been signs of a legal clash between Scandinavian and Japanese export cartel practices and the German antitrust law.[106] In at least one instance the existence of an American Webb-Pomerene sanctioned association was relied on to justify an import buyers' cartel under the British Restrictive Business Practices Legislation.[107] The extraterritoriality problem is now reversed—with the export of restrictive practices to nations where they are no longer welcome.

The potential for conflict is well illustrated by one of the classic cases in the perennial debate over extraterritoriality: the Swiss watch cartel case.[108] That case involved a whole gamut of restrictive practices adopted in Switzerland, where they were entirely legal and favored by government policy, but which had a direct impact on the import commerce of the United States.[109] A recent commentary on that case undertook an extensive review of its background and facts to support the conclusion that the practices complained of were matters of local concern and great importance to the Swiss, a question of regulating their own domestic economy.[110] The question was raised whether a traditional adversary court proceeding is an appropriate forum for resolving issues raised by the acts of foreign nationals within their own territory.[111] An answer to this question is that a conflict of laws doctrine has been developed to deal with precisely that kind of problem and was applied in the Swiss watch case so that the final judgment reached only those practices that operated outside Swiss territory.[112] On the larger policy question of the legitimacy of the importing country's stake in prohibiting these practices, the com-

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105. *See, e.g.,* Timberg, *Conflict and Growth in the International and Comparative Law of Antitrust,* 4 ABA SECT. INT'L & COMP. L. BULL. 20, 24-25 (1960).

106. *See Antitrusters Nip a Steel Cartel Bid,* BUSINESS WEEK, March 6, 1971, at 42.

107. The case involved United States sulphur exports. *See* FTC STAFF REPORT, *supra* note 64, at 58.

108. United States v. Watchmakers of Switzerland Information Center, 1962 Trade Cas. ¶ 70,600 (S.D.N.Y. 1963).

109. 1962 Trade Cas. at 77,456-57.

110. J. Rahl, *supra* note 6, at 311-63.

111. *Id.* at 312.

112. *See* Note, *The Conflict of Laws and the Extraterritorial Application of the Sherman Act,* 4 CASE W. RES. J. INT'L L. 164, 169-70 (1972).

mentary recited but took no account of facts showing that the primary impact of Swiss policies affecting its watch industry was abroad. Counsel for the Swiss Government alleged that "95% of the production" of the Swiss watch industry was exported.[113] The Swiss watch industry was said to be the largest in the world with a share of total world production ranging from 53.4 per cent to 67.5 per cent[114] and the United States was described as "the largest single export market for Swiss watches."[115] Under circumstances of this kind, it would seem difficult to argue that the importing country has no legitimate interest in barring the export of restrictive practices.

"Extraterritorial" enforcement has accompanied the spread of antitrust legislation. The European Economic Community has recently fined foreign firms in the *Dyestuffs* case.[116] The Europeans have exhibited no sympathy for a policy by other nations to export restrictive practices they will not tolerate at home.[117]

A further anomaly is that because of the universality of the exemption for exports, international trade has been singularly excepted from the spreading antitrust norm. Those defending the exemption under our own law can point out that foreign export cartels are still legal. This argument has some merit, though it should be discounted in at least two respects. First, the justification of export cartels by the existence of *cartelized markets within individual foreign countries* is a factor of decreasing importance. Second, as to *competition with cartels* for international markets, the potential for conflict with the laws of importing countries may exert increasing pressure against cartel activity, as suggested by the recent protests of the European Economic Community and Germany.[118] But a more basic question is whether exempting exports from antitrust regulation is the appropriate way of accommodating the special problems of international trade.

113. *See* J. Rahl, *supra* note 6, at 340.
114. *Id.* at 339.
115. *Id.* at 340.
116. 1 CCH COMM. MKT. REP. ¶ 2542.39 (1973).
117. *See, e.g.*, Remarks of Jochen Thiesing, 25 RECORD OF N.Y.C.B.A. 207, 209 (1970).
118. *See* note 106 *supra*.

II. SHOULD EXPORTS BE EXEMPT FROM THE RULES OF COMPETITION?

A. *Rationale for the Exemption: The Continuing Controversy*

The Federal Trade Commission's rationale for proposing the Webb Act (expressed in the committee reports)[119] was that: (1) American firms were disadvantaged in export trade by both a combination of superior facilities available to foreigners (in transportation, finance and existing foreign investments) and the cooperation by foreign firms among themselves and with their governments; (2) American firms (particularly small ones) were disadvantaged by uncertainties concerning the legality of joint efforts among themselves; and (3) an urgent need to expand United States exports required removal of this uncertainty.[120] As noted earlier, the bill was drafted on the theory that it was only declaratory of existing law,[121] and much of the debate centered on whether the kinds of cooperation desired could be carried on without special legislation.[122]

The Commission presented a two-volume study in support of its proposal.[123] The bulk of it was a description of cartels and cartel practices abroad, which served as a premise for the argument that American firms should be permitted to do the same things when competing internationally.[124] While the advocates of the Act emphasized its supposed advantages to small business,[125] the FTC clearly stated from the beginning that the legislation would extend to large as well as to small firms.[126] The purported advantages to small firms were emphasized repeatedly throughout the debates, however, and were relied on heavily in explaining how American business would be helped by the legislation.[127] The special expenses of exporting that a large firm could handle easily might deter small firms, but if a number of small firms could cooperate and share the overhead expenses, exporting would be more attractive.[128]

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119. *See* note 78 *supra.*

120. FTC, COOPERATION IN AMERICAN EXPORT TRADE, DOC. NO. 426, 64th Cong., 1st Sess. 1 (1916).

121. *See* note 79 *supra.*

122. *See, e.g., 1916 Hearings, supra* note 78, at 25, 36 & 43.

123. FTC, COOPERATION IN FOREIGN TRADE (1916).

124. *Id.* at 375.

125. *1916 Hearings, supra* note 78, at 12.

126. *Id.* at 12-13.

127. *See, e,g.,* FTC STAFF REPORT, *supra* note 64, at 6.

128. *See* FTC, *supra* note 120, at 6; FTC STAFF REPORT, *supra* note 64, at 6. In a different context, however, much stress has been laid on how much more

The bill was controversial—its opponents arguing that no exemption was necessary,[129] that to grant an exemption would be contrary to the philosophy of the Sherman Act[130] and that monopolistic practices in export trade would inevitably spill over into domestic markets and increase domestic prices.[131] The Act's opponents also claimed that commercial export houses, brokers and agents could perform the same functions as an export association, and more effectively.[132] The evidence of extensive cartel practices abroad and the feeling that United States businessmen should be able to compete on the same terms without the uncertainty of antitrust liability constantly hanging over their heads appears to have been the decisive consideration spurring passage of the Act.[133]

Enactment did not still the controversy over the Webb Act. Businessmen soon complained that the exemption was not broad enough to overcome the uncertainty of violations,[134] and a series of successful prosecutions has not quieted these protests.[135]

Some critics of the Act have continued to urge its repeal. This was the minority view of the Attorney General's National Committee to Study the Antitrust Laws in 1955,[136] and the recommendations of Kingman Brewster, Jr., in his 1958 study of the antitrust laws in

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efficient—and less costly—selling is in export than in domestic markets. For a discussion of a number of such factors to explain how imports may tend to undercut domestic prices see VINER, DUMPING: A PROBLEM IN INTERNATIONAL TRADE 9-12 (1966). Foreign orders are generally in larger units, and through one or a few buyers with whom an exchange of cables may suffice to complete a transaction, in contrast to the vast selling and service establishments that must be kept on hand domestically.

129. H.R. REP. No. 50, 65th Cong., 1st Sess. 5-6 (1917).

130. *Id.* at 6.

131. *Id.*; FTC STAFF REPORT *supra* note 64, at 7.

132. *See supra* note 129, at 6; note 237 *infra.*

133. "The bill seeks to . . . [aid and encourage our manufacturers to extend our foreign trade] by permitting the organization of cooperative selling agencies or associations among American exporters in order that they may meet foreign competition on equal terms in international commerce." H.R. REP. No. 1118, 64th Cong., 1st Sess. 1 (1916).

134. As early as 1945, the National Foreign Trade Council was proposing a broadening of the Act to permit joining with foreign firms in furtherance of the interests of foreign policy and national security. G. STOCKING & M. WATKINS, *supra* note 12, at 257-58.

135. *See* notes 70 & 71 *supra.*

136. REPORT OF THE ATTORNEY GENERAL'S COMMITTEE TO STUDY THE ANTITRUST LAWS 114 (1955).

foreign commerce,[137] and of former Assistant Attorney General Donald F. Turner in testimony before the Hart Committee in 1967.[138] In addition to the arguments originally urged against the Act, current critics point to the relatively small portion of our export trade actually conducted by Webb associations,[139] and to the accrual of benefits provided by the Act mainly to large firms in concentrated industries fully capable of exporting on their own,[140] while the smaller firms for which the Act was intended have largely ignored it.[141] Another argument has been that Webb associations are useful largely for the export of undifferentiated, fungible commodities and not for the high technology exports in which the United States has its greatest relative advantage.[142]

The majority of the Attorney General's study committee in 1955 declined to recommend repeal, asserting that while some small firms may be helped, the relative disuse of the Act assures that any adverse consequences are minimal and noting that abuses may be controlled through continued enforcement action.[143] The committee did not rely on the argument, emphasized by others, that as long as state trading and cartel practices persist abroad, this privilege should remain available to American firms.[144] Former FTC Chairman Kirkpatrick defended retention of the Act, observing that while the Act was little-used, the dollar value of exports under it is substantial and concluding that it "performs an office."[145]

Others have urged changes in the criteria and administration of the Act. George Stocking and Myron Watkins, coauthors of several major

137. K. BREWSTER, ANTITRUST AND AMERICAN BUSINESS ABROAD 454-55 (1958).

138. *Hearings on S. Res. 26 Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary,* 90th Cong., 1st Sess. 125 (1967) [hereinafter cited as *1967 Hearings*].

139. FTC STAFF REPORT, *supra* note 64, at 35. In the survey period 1958-1962, Webb Association exports accounted for less than 5% of U.S. exports.

140. *Id.* at 44-45.

141. *Id.*

142. *Id.* at 37.

143. *See* REPORT OF THE ATTORNEY GENERAL'S COMMITTEE TO STUDY THE ANTITRUST LAWS 113-14 (1955).

144. *See, e.g., 1916 Hearings, supra* note 78, at 4; S. DOC. NO. 426, 64th Cong., 1st Sess. 2-4. This factor was stressed in connection with the Canadian legislation. *See supra* note 85, at 106.

145. *Hearings on S. 2754 Before the Subcomm. on Foreign Commerce and Tourism of the Senate Comm. on Commerce,* 92d Cong., 2d Sess. 242 (1972) [hereinafter cited as *1972 Hearings*].

cartel studies,[146] recommended that associations be limited to groups of small scale enterprises with strictly defined cooperative principles, and that associations not be permitted to include more than 25 per cent of the total exports of any commodity.[147] A staff report of the Federal Trade Commission in 1967 recommended amending the Act both to limit the size of eligible firms and to require a showing of need.[148] This resembles Brewster's alternative recommendation that if the Act is retained, exemptions should be limited to ad hoc determinations of need and suitability of the proposed joint action.[149]

Recent amendments offered in Congress would expand the immunity.[150] The President's trade package for 1973 proposes an amendment to the Webb Act that would extent its coverage moderately but would make registration and immunity optional, would require ad hoc approval by the Federal Trade Commission on such conditions as it may prescribe (after an opportunity for the Attorney General to comment) and would empower the Commission to withdraw immunity prospectively for cause.[151] The amendment

146. *E.g.*, G. STOCKING & M. WATKINS, CARTELS IN ACTION (1947).

147. G. STOCKING & M. WATKINS, *supra* note 12, at 436.

148. *See* FTC STAFF REPORT, *supra* note 64, at 69-70.

149. *See* K. BREWSTER, note 137 *supra; 1967 Hearings, supra* note 138, at 64.

150. S. 4120, 92d Cong., 2d Sess. (1972); S. 1483, 93d Cong., 1st Sess. (1973). S. 2754, for example, would confer immunity from suit by the FTC or the Justice Department for five years. The charter could not be revoked unless the Secretary of Commerce finds that the association has taken some action for the *principal* purpose of restraining export trade of a domestic competitor or of lessening competition within the United States. The bill would omit the existing prohibition against domestic price effects, would cover all types of technology licenses and might be construed to cover investments as well as exports. *1972 Hearings, supra* note 145, at 3-47.

151. *See* note 2 *supra.* Title II of the bill would amend the Webb Act. Title II, § 3 provides for the voluntary registration and enlarges the reporting requirement, including § 3(a)(ix): "... any other information which the Commission may require concerning the organization, operation, management or finances of the association, the relation of the association to other associations and to the export trade being conducted; and competition or potential competition, and effects of the association thereon." On receipt of the application, the FTC would be directed to furnish copies immediately to the Attorney General (§ 3(b)), who may also request further information, and must submit a report within 90 days. The FTC may register the application "for such period of time and subject to such conditions as it deems appropriate if... [it finds that the organization and operation] ... is not likely to result in substantially lessening competition, or restraining the domestic or import trade of the United States, or substantially

would also make the entire Act expire within five years unless renewed.[152]

The full range of choices of whether, how and to what extent there should be immunity from the antitrust laws in export trade thus has been presented. The arguments summarized above raise two basic issues: first, is there something different about export trade that warrants some departure from normal antitrust rules; secondly, if so, what form should that exemption take? Let us avoid entanglement in the first issue. It would be impossible to answer it definitively in the negative because the endless variety of international business conditions can always present new and unforeseen problems. The practical question is how these problems should be identified and accommodated. Reliance on the rule of reason was rejected in 1918 for fear of uncertainty. But was a categorical grant of immunity the only alternative?

The immunity approach of Webb-Pomerene, its counterparts abroad and the proposals to broaden the exemption all imply that business should be free of antitrust restraint in export trade. Is this *laissez faire* approach likely to further exports, cope with the competitive pressures of foreign cartels and state trading, avoid conflict between the antitrust laws and our foreign policy objectives and promote the national security? There is experience by which those propositions may be tested, and since the proposals for broadening Webb-Pomerene include elimination of its present limitations, it makes sense to test them in terms of a complete exemption to join and participate in foreign cartels.

B. *The Historical Experience with Cartels*

There is extensive experience with trade restraints in international commerce.[153] Some revealing insights into the behavior of business

restraining exports by domestic non-members." § 3(c). Section 4(a) authorizes the FTC, whenever "any material act, practice or course of conduct" is not in conformance with its registration statement, to "(i) require that the statement be amended, (ii) require that the organization or operation of the association be modified, (iii) revoke, in whole or in part, the registration of the association and/or (iv) recommend to the Justice Department prosecution of the appropriate persons . . . under the Antitrust Laws."

152. *Id.* § 5(b).

153. E. HEXNER, INTERNATIONAL CARTELS (1944); C. EDWARDS, CARTELIZATION IN WESTERN EUROPE (1964) (reprinted in *Hearings on S. 262 Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary,* 88th Cong., 2d Sess., pt. 1, at 475 (1964); *id.,* pt. 2, *Antitrust Development and Regulations of Foreign Countries (appendix);* C. EDWARDS,

when unbridled by the rules of competition (through private agreements or with the collaboration of governments) can be obtained by an examination of the trade restraint experience.

Let us postpone a definition of "cartel" to a survey of the various kinds of restrictions that might be included in that term. The examples that follow include purely private restrictions, some that are wholly governmental and some mixtures of the two. The common feature is the resort to some limitation on the freedom of buyers and sellers to act independently in international trade. While it is true that all cartel practices have the basic objective of limiting competition,[154] the purposes of cartelization as well as the means employed vary widely. Our focus is not so much on the desirability or the justification of these practices as on the implication of their existence abroad for American firms competing in foreign markets. For this purpose three different levels of cartel objectives can be distinguished.[155] One is defensive: the cartel is designed to alleviate some basic maladjustment in an industry, typically characterized by excess supply and too many producers. This category should include those Japanese cartels used to restrain exports which reach disruptive levels. The second level includes the overwhelming preponderance of historical cartels, which have as their central object a kind of industrial truce to limit or eliminate competition between the members, accompanied by

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78TH CONG., 2D SESS., ECONOMIC AND POLITICAL ASPECTS OF INTERNATIONAL CARTELS (Comm. Print 1944); FTC STAFF REPORT, 82D CONG., 2D SESS., THE INTERNATIONAL PETROLEUM, THE CARTEL (Comm. Print 1952); G. STOCKING & M. WATKINS, *supra* note 12; G. STOCKING & M. WATKINS, *supra* note 146. *See also* United States v. Watchmakers of Switzerland Information Center, Inc., 1963 Trade Cas. ¶ 70,600 (S.D.N.Y. 1962); United States v. Bayer Co., 135 F. Supp. 65 (S.D.N.Y. 1955); United States v. Imperial Chemical Indus., Ltd., 100 F. Supp. 504 (S.D.N.Y. 1951), *opinion on remedies,* 105 F. Supp. 215 (1952); United States v. Minnesota Mining and Mfg. Co., 92 F. Supp. 947 (D. Mass. 1950); United States v. United States Alkali Export Ass'n, 86 F. Supp. 59 (S.D.N.Y. 1949); United States v. General Electric Co., 82 F. Supp. 753 (D.N.J. 1949), *opinion on remedies,* 115 F. Supp. 835 (1953) (incandescent lamps); United States v. General Electric Co., 80 F. Supp. 989 (S.D.N.Y. 1948) (carbology); United States v. National Lead Co., 63 F. Supp. 513 (S.D.N.Y. 1945), *aff'd*, 332 U.S. 319 (1947).

154. *See* C. EDWARDS, ECONOMIC AND POLITICAL ASPECTS OF INTERNATIONAL CARTELS, *supra* note 153, at 9.

155. Professor Edwards classifies cartels into three basic types: (1) associations of firms using joint selling agencies, quota arrangements and the like, (2) patent licensing agreements which have the effect of dividing markets and territories, and (3) combines in which joint investments are made in a joint venture or subsidiary. *Id.* at 2-9.

varying degrees of exploitation of consumers. The third level is relatively rare: the monopolization or domination of international markets by an aggressive combine in a single country, aided by some degree of government collaboration. The following examples[156] are illustrative of the three categories.

1. *Defensive Cartels.*—The interwar cartels in the sugar and natural rubber industries were created to cope with severe problems of oversupply. Both of these agricultural commodities suffered periods of substantial overproduction that led to governmental action restricting production and protecting national sources. In the case of sugar, the problem arose following World War I when European governments took vigorous action through subsidies and tariffs to revive the sugar beet production that had been interrupted during the War.[157] Cane producers in Puerto Rico, Hawaii and the Philippines had increased production during the War and, failing to anticipate the rapid comeback of European beet production, had invested in expanded capacity. Protective tariffs in the United States and elsewhere continued to stimulate increased production, and the surplus had no sufficient outlet in the protected foreign markets.

The initial efforts to cope with this problem by agreement among the private producers under the "Chadbourne Plan" were unsuccessful.[158] Ultimately, 21 governments representing 85 to 90 per cent of the world production joined in the International Sugar Agreement of 1937, in which they agreed to limit production and exports and maintain their 1937 level of import purchases. The clear purpose of the agreement was not to expand exports but to limit excess production and to avoid major capital losses by the private interests involved.[159] It was a rescue operation, carried out by governments, and appears to have been reasonably successful for that purpose. Even the private agreement, however, was defensive, and it probably helped the

156. The record is so vast that these descriptions are necessarily based on secondary sources. All statements of fact are therefore only reports of conclusions reached by scholars, government officials, and in some instances by courts. None are presented as the first-hand observation of this author or the present position of any government agency.

157. The following textual description is based on the account in G. Stocking & M. Watkins, *supra* note 146, at 24-26, 28, 31, 37-44, 54-55, 67 & 71-78.

158. In it, the signatories undertook to restrict their exports to specified tonnages, but did not fix prices. Although production of the signatory producers was reduced slightly, that of nonsigners increased by almost exactly the same amount. *Id.* at 37-40.

159. *Id.* at 44.

nonmembers, since the reduction in the members' production removed that much competitive supply from the limited market available.

The problem in rubber, too, was one of world oversupply, though not stimulated by government subsidies and protection. The problem seems to have resulted from the combined effects of the long lead time required for new rubber trees to become productive, and from the sharp swings in demand and in the availability of essential transportation that occurred during the years 1910-1921. Again, a private cartel plan proved ineffective through its inability to include all the producers, and the British Government imposed mandatory controls on Empire sources. For a time the controls brought increased prosperity (and higher prices) to British producers but the plan ran into trouble with increased production from outside sources, both natural and synthetic, that led Britain to drop its restrictions. The Great Depression, however, created new pressures and an intergovernmental cartel agreement was signed on May 7, 1934. The International Rubber Regulation Agreement lasted until 1944. It limited exports and production, barred the accumulation of surplus stocks and prohibited new plantings. These restrictive agreements eventually yielded in importance to the very different type of cartel that evolved in the synthetic rubber industry.

Both the sugar and rubber cartels thus were designed to reduce, not increase, exports, required government action to become effective and encountered their greatest difficulty in the competition of nonparticipating sellers. In each case, the restrictive measures appear to have benefited rather than disadvantaged nonmembers. Cartels of this kind would hardly seem to make a case for permitting American firms to enter cartel arrangements on the ground that they must do so to compete effectively.

2. *The Classic Cartels.*—The *classic* cartel is the most typical in international trade. While occasional market imbalances occur in the industries involved, these cartels typically are not the result of massive dislocations. The examples presented are but a few of the many available.[160] They fall into two general patterns: cooperative arrangements among manufacturers to live and let live; and, in the case of raw material suppliers, combinations for the purpose of extracting monopoly prices.

(a) *The Pre-World War II Steel Cartels.*—Two international steel cartels were formed and broken up between World Wars I and II. These were private horizontal agreements supported by the govern-

160. *See generally* sources cited note 153 *supra.*

ments (except that of the United States) of the participating countries.[161]

The first cartel was organized on September 30, 1926, between steel producers of Germany, Luxembourg, Belgium, the Saar and France. Its object was to stabilize the steel markets in those areas by determining the total level of production, dividing it among the respective countries by formulas and by penalizing the members from any country whose collective exports exceeded its quota. The quotas applied to an entire country's production, including both members and nonmembers of the cartel—a circumstance that gave the members a strong incentive to organize their own national industries. The cartel did not work well, however, because of outside competition. Constant German pressure for increases in that country's quota resulted in the division of the quota limits into two parts: one for domestic and one for export trade, with a smaller fine for exceeding the domestic than the export quota (hardly an incentive to increase exports); the cartel was dissolved in 1931.

The second international steel cartel went into effect on June 1, 1933, initially consisting of groups from Germany, France, Belgium and Luxembourg, but later expanded to include the major producers in Czechoslovakia, Poland, Austria, Britain and the United States, representing in total approximately 90 per cent of all iron and steel in international trade during 1937.

The basic operating principles were the same as in the earlier steel cartel, although the administrative organization was much more elaborate. Export quotas again were distributed among groups of producers on a country-by-country basis, with penalties imposed for exports in excess of the quota even if attributable to nonmembers of the cartel.

A stated purpose of the association was "to conduct export operations in such a manner as to disturb foreign markets as little as possible."[162] The asserted advantages of the association to this end were the establishment of uniform terms and contracts for export sales, standardization of weight and qualities, and collection and exchange of information regarding foreign markets.[163] In addition to these advantages, however,

> the Export Association agreed, on behalf of its members, to recognize the domestic markets of other cartel members as their exclusive marketing

161. The description of the steel cartels is based on G. STOCKING & M. WATKINS, *supra* note 146, at 182-88, 211.

162. *Id.* at 199.

163. *Id.*

territory. In return, the cartel recognized certain areas as American spheres of influence. American exporters received quotas based on their share of certain export markets during the year 1936.[164]

Furthermore,

the Export Association assumed responsibility at the outset for keeping American exports within the assigned quotas. Should total American exports of any product exceed the American quota, the Association obligated itself to pay penalties even though the excess resulted from failure of independents to cooperate in the programs.[165]

The association members thus had to pay fines for nonmembers' exports in excess of the quota, and so they

urged their European colleagues to cut prices in certain export markets to eliminate American nonmembers from the trade. As one Association member expressed it, 'the sooner these mills are eliminated from taking export business the better our chances will be of bringing them under control in our own group.'[166]

It may be recalled that the basic premise of the Webb Act was that exports could be increased by making it possible for smaller firms to sell through associations and thereby overcome the disadvantages of exporting individually. The experience of this Webb association appears to have been exactly the reverse. The second international steel cartel was disrupted by World War II.[167]

(b) *The International Petroleum Cartel.*—The vast cartel that controlled the international markets for crude oil and refined products was described in detail by a staff report of the Federal Trade Commission in 1952.[163] The extensive control accomplished through joint ownership and operation of reserve and producing assets and through interlocking stock ownership need not detain us here.[169] The restrictive agreements dividing markets are the significant indications

164. *Id.* at 199-200 (footnotes omitted).

165. *Id.* at 200.

166. *Id.* at 202 (footnotes omitted).

167. *Id.*

168. FTC STAFF, 82D CONG., 2D SESS., REPORT ON THE INTERNATIONAL PETROLEUM CARTEL (Comm. Print No. 6 1952). Those practices that restricted United States commerce were terminated by consent decrees against the principal defendants. *See generally* United States v. Texaco, 1963 Trade Cas. ¶ 70,819 (S.D.N.Y. 1968); United States v. Standard Oil Co., 1969 Trade Cas. ¶ 72,742 (S.D.N.Y. 1968); United States v. Gulf Oil Corp., 1969 Trade Cas. ¶ 72,743 (S.D.N.Y. 1968).

169. *See* G. STOCKING & M. WATKINS, *supra* note 146, ch. 1-7.

of behavior to which these companies resorted in their belief, however mistaken, that they were free of antitrust restraints.

There were four main agreements that, like the steel cartels, had as their central object the division of markets to avoid competition, most especially, price competition. The basic agreement was the Achnacarry, or "As is" Agreement of 1928.[170] The first of its governing principles was "the acceptance by the units of their present volume of business and their proportion of any future increases in consumption."[171] This represented a broad agreement or charter of principles that served, even when it was not observed in detail, as a statement of common objectives.[172] There was in addition a "Memorandum for European Markets" of 1930 that contained detailed quota arrangements and "as is" provisions with careful formulas governing the admission of outsiders.[173] The memorandum was updated and elaborated by the "Heads of Agreement for Distribution" in 1932,[174] and was modified again in the "Draft Memorandum of Principles" in 1934.[175] As in the steel cartels, the common theme was the elimination of competitive infringements on members' markets. And here, too, a Webb-Pomerene association (actually two) provided the vehicle for enlisting United States producers in the world scheme.[176] Perhaps the most important similarity with the steel cartels, however, was that this negative form of collaboration tended to break down under the pressure of the unrestrained competition of outsiders.[177]

(c) *The Incandescent Electric Lamp Cartel.*—The international cartel in incandescent electric lamps possessed many of the attributes of a private government. The agreement creating the cartel was signed on December 23, 1924.[178] The impetus appears to have been in part a reaction to the relative price inelasticity of demand for lamps, and in part to a desire by General Electric, which had an effective monopoly in the United States market,[179] to insure that its position would not be

170. *Id.* at 199. The agreement was named for Achnacarry Castle in England, where the labors required in its formulation were spelled by intervals of grouse shooting.

171. *Id.* at 200.

172. *Id.* at 210.

173. *Id.* at 228 *et seq.*

174. *Id.* at 241 *et seq.*

175. *Id.* at 253 *et seq.*

176. *Id.* at 218-28.

177. *Id.* at 210.

178. *Id.* at 331-32.

179. United States v. General Electric Co., 82 F. Supp. 753 (D.N.J. 1949).

disrupted by foreign competition.[180] The cartel did not function by fixing prices, but through an elaborate exchange of patent and technical information, and by a division of markets.

The cartel was administered by a Swiss corporation, Phoebus, S.A., which was organized for that purpose. The members subscribed to the stock in proportion to their lamp sales during a period from July 1, 1922 to June 30, 1923; their lamp sales during that period also determined voting power in a general assembly that met twice a year. An Administrative Board issued rules and regulations for applying the terms of the agreement and was responsible for carrying out the policies of the Assembly. A Board of Arbitration, consisting of a Swiss law professor, a Swiss federal judge and "a technical expert on international cartels," resolved disputes over patent claims, royalty payments and the like.

The Administrative Board had four divisions: accounting, which determined the allowable sales for each member under its quota; sales, which administered price policies, cooperating with "national assemblies" in each area; propaganda, which sought to increase the use of electric lamps and to promote sales of members' lamps over those of noncartel members; and technical, which supervised the programs of standardization and exchange of technical information.

The standardization and technical exchange program was used, with astonishing cynicism, actually to reduce the life of some lamps for the purpose of increasing sales.[181] The success of this policy, however, conflicted with the quota arrangements since the resulting sales increases exceeded the quota levels.[182]

The cartel made other contributions to inefficiency. The quota system was enforced by the imposition of substantial penalties on sales in excess of the alloted quotas; the proceeds from the penalties were distributed to those members that undersold their quotas.[183] The system provided a subsidy for weaker firms threatened with bankruptcy. The cartel simply assigned them larger quotas than they could fulfill, and then paid them a share of the penalties for the shortages.[184] Competitors of the cartel were treated less charitably. Phoebus,

180. The following description is based on G. STOCKING & M. WATKINS, *supra* note 146, at 325-26, 332-35.

181. United States v. General Electric Co., 82 F. Supp. 753, 896-99 (D.N.J. 1949); C. EDWARDS, ECONOMIC AND POLITICAL ASPECTS OF INTERNATIONAL CARTELS, *supra* note 153, at 16-18; G. STOCKING & M. WATKINS, *supra* note 146, at 353-55.

182. G. STOCKING & M. WATKINS, *supra* note 146, at 354-55.

183. *Id.* at 337.

184. *Id.* at 352.

outside the United States, fought nonmembers wherever they arose by advertising its members' products, and even by setting up "fighting companies" to drive out the competition.[185] In this practice we see the predatory side of the cartel, as contrasted to the weaknesses evident in the examples thus far.

Ironically, the one source of successful competitive discipline against this cartel came from Japan, and from the noncartelized portion of the Japanese industry. The largest Japanese producer (in which General Electric owned a 40 per cent interest) was a member of the cartel, but the numerous small Japanese producers, operating with low labor costs and at a favorable exchange rate, carved out a growing share of the world export market and forced General Electric to respond by offering cheaper lamps and reducing the price of Christmas tree lights.[186] Significantly, this competitive upsurge was not unleashed until the expiration of two major patents.[187]

The lamp cartel is also instructive on the possibility of separating restrictive behavior abroad from some carryover into the domestic market.[188] General Electric's affiliation with the cartel reportedly was executed through a wholly owned subsidiary incorporated in Britain and through local subsidiaries in Brazil, China and Mexico.[189] Stocking and Watkins contend that

> [i]t goes virtually without saying that General Electric adjusted its operations to the cartel program. Nor were the express commitments of these subsidiaries the only ties binding General Electric to Phoebus. By separate contractual arrangements between International, its subsidiary, which is an American corporation, and the principal cartel members, General Electric had woven its operations into the cartel pattern as effectively as though it were an outright member.[190]

The district court's decision in the *Lamp* case, in effect, confirmed this conclusion by its finding that the network of foreign licenses had

185. *Id.* at 353.

186. *Id.* at 346-49. Stocking and Watkins state that of 310 factories producing incandescent lamps in Japan in 1933, only 12 employed more than 100 workers and more than 250 employed fewer than 30 each. Eleven firms formed a domestic cartel in 1933 but the great majority of the 298 smaller factories did not belong. *Id.*

187. *Id.* at 346.

188. *See* notes 228-30 *infra.* This argument was also made during the debates on the Webb Act. H.R. REP. NO. 50, 65th Cong., 1st Sess. 5-8 (1917). *See, e.g., 1972 Hearings, supra* note 145, at 235.

189. G. STOCKING & M. WATKINS, *supra* note 146, at 337-38.

190. *Id.* at 337.

the purpose and effect of dividing markets "to reduce interest of potential foreign competition in United States trade."[191]

Appraised in terms of its impact on export trade, the lamp cartel had little to commend it. By dividing markets, it tended both to exclude imports and to inhibit American exports. The system of fines for sales in excess of quota limits was an obvious disincentive to export. And, in yet a further irony, the high monopoly price in the United States served as a magnet for Japanese imports, which were excluded from most other countries by quota restrictions.[192]

(d) *The Chilean Nitrate Cartel.*—The foregoing examples of the classic cartels contained horizontal agreements between private firms in different countries, though in the case of steel, the private agreements were accompanied by some government involvement. Another variation is possible when a single country has monopoly control over a commodity and the government cartelizes its domestic industry. This variation occurred in Chilean nitrates, with highly instructive results.

Chile had a monopoly of the world's source of natural nitrates; the monopoly provided a major source of Chile's national revenues for half a century, from 1880 to 1930.[193] The nitrate deposits were easily developed, and the Government at first permitted unlimited entry to the deposits by auctioning off blocks of land to private bidders. Production soon outran even rapidly growing demand and the Chilean Government cooperated with private schemes to cartelize the industry, while maintaining a high export tax to exploit its monopoly position. The cartelization consisted of an apportionment of quotas for the available demand among all producers on a pro rata basis; there were penalties for exceeding quotas.

All export sales were made through the Chilean Nitrate Producers' Association, which was organized in 1919 with the support of the Government. Quotas were salable and some producers apparently were able to shut their plants and receive an income from the sale of their continuing quota allocations. Since quotas were prorated among all producers, new entrants reduced the share of existing producers; since quotas could not be increased by increasing production, there was no incentive for the development of technology, which stagnated.

The high price extracted by Chile for its monopoly supply of natural nitrates, with the desire of foreign governments to avoid

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191. United States v. General Electric Co., 82 F. Supp. 753, 847 (D.N.J. 1949).

192. G. STOCKING & M. WATKINS, *supra* note 146, at 346.

193. The following description is based on *id.* at 120-39.

dependence on a foreign source for this important war material, led to widespread development of synthetic sources. A world "nitrogen rush" in the years 1926-1934 ensued, breaking the Chilean monopoly and permanently diminishing Chile's foreign revenues.

(e) *The Organization of Petroleum Exporting Countries* (OPEC).—Perhaps the most ambitious of the export cartels is OPEC, the intergovernmental cartel established by major oil exporting countries. This group is too new to permit judgments concerning its long-term effectiveness, but it clearly has succeeded thus far in its efforts to increase prices.[194] The experience of the Chilean nitrate cartel, which drove consumers to develop alternative, synthetic sources, may suggest a parallel should OPEC remain successful in artificially raising prices.[195]

One result of OPEC has been the formation of a joint bargaining position by the international oil companies. Since the subject matter of the agreement is imports, not exports, the Webb-Pomerene Act is inapplicable, but the companies have utilized the Justice Department's standard business review procedure to conform the legality of their actions to the current antitrust laws.[196]

(f) *Characteristics of the Classic Cartels.*—The foregoing examples reveal that there is nothing inherent in the nature of cartels that strengthens either the ability or the propensity of their members to export. Businessmen, when relieved of the rules enforcing competition, generally tend to become not more aggressive, but less so. Their

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194. For two conflicting views on the past and future of OPEC see Akins, *The Oil Crisis: This Time the Wolf Is Here,* 51 FOREIGN AFFAIRS 463 (1973), *and Adelman, Is The Oil Shortage Real?,* 1972-1973 (Winter) FOREIGN POLICY 69.

195. Vast sources of synthetic crude are available in shale and coal, for example, which were not economical to develop at previous world price levels. *See* CABINET TASK FORCE ON OIL IMPORT CONTROL, REPORT ON THE OIL IMPORT QUESTION ¶ 246, at 54, app. J, at 303-04 (1970).

196. The role of the Department's business review procedure (28 C.F.R. § 50.6) was explained as follows by former Assistant Attorney General McLaren in reply to a letter from Sen. Proxmire, as reported in PLATT's OILGRAM, March 9, 1971, at 3: "The Department of Justice does not have power to grant immunity to anyone for a violation of the antitrust laws or for violations of a court decree. What we can do is state our present enforcement intentions based on representations that are made to us as to a course of conduct then proposed to be undertaken. This is our standard business review procedure.

"Before we can conclude that a violation of the antitrust laws may occur, there must be 'evidence of a substantial and adverse impact on the domestic or foreign trade of the United States.' When a proposed course of action described to us would not, in our opinion, have such an effect, a business review letter is common reaction to competition abroad is to arrive at a truce with their foreign competitors—normally accomplished by an agreement either to stay out of each other's markets altogether or to set firm limits on the extent of interpenetration. The high prices and restricted output that result tend to make collaborating enterprises more, not less, vulnerable to competition. And the cartel practices of exporting countries that have sought to maximize prices tend to alienate their import customers, who must then seek alternative sources. Viewed as a device for preserving and enlarging its export markets, the Chilean nitrate cartel was a complete disaster.

The success of cartelization is precarious and dependent on almost complete control of the market; even small increments of competitive supply can raise havoc with the tightest of cartels.[197] At the same time, cartels sometimes behave in a way that threatens competing nonmembers. Price discrimination and "fighting companies" are serious predatory threats that must be recognized. There are specific legal remedies for these practices, however, including antidumping laws,[198] exclusion orders for unfair trade practices,[199] countervailing duties,[200] antitrust and unfair competition laws generally and legislatively imposed tariffs and quotas. And as the OPEC development indicates, the antitrust laws allow sufficient flexibility, wholly apart from Webb-Pomerene, to accommodate whatever measures are reasonably necessary to counter monopolistic practices abroad. In the cartels described as the classic type, their negative, handicapping effects appear to have been predominant. Another type of cartel, however, poses very definite threats to competing nonmembers and has been

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appropriate. But the matter does not rest there. At an appropriate time we may require full information on what was in fact done under the clearance given, and all business review applicants are on notice of this.

. . . .

"[T]he reported activities of the companies involve a joint effort on the part of both large and small to assure that the concerted approach of the producing countries will not work to the greater prejudice of some competitors—especially the smaller ones—than to others. Faced with this combination of oil producing countries, demanding higher fees in the form of taxes or royalties, the companies' actions of which we are aware represent no more than a countervailing force to minimize the adverse price effect on consumers . . . ."

197. Cartel agreements have provided escape clauses based on the per centage of the total market outside cartel control, with the limit set as low as five percent. *See* G. STOCKING & M. WATKINS, *supra* note 12, at 96-97.

198. 15 U.S.C. § 72 (1970); 19 U.S.C. § 160 (1970).

199. 19 U.S.C. § 1337 (1970).

200. 19 U.S.C. § 1303 (1970).

emphasized in arguments stressing the difficulties of competing abroad—what might be termed the "aggressive cartels."

3. *The Aggressive Cartels.*—A purpose to drive out or foreclose competitors, in contrast to the live-and-let-live philosophy of the classic cartels, is distinctive of the aggressive cartels. The archetypes were the German and Japanese pre-World War II chemical cartels.[201] Other members of the chemical cartels tended to behave in the pattern of the classic cartels; but their interaction with the more aggressive members is integral to the story of the latter members. Here again, we encounter both private and governmental involvement.

The aggressive cartels noted here were highly interconnected across industry lines. I. G. Farbenindustrie A.G. (I.G.), the German combine, was a competitor of duPont in chemicals, of Standard Oil in synthetic rubber and of Dow Chemical and Alcoa in magnesium. I.G.'s aggressive role was a matter of governmental policy. The German Government identified the entire field of chemistry as "the wave of the future" and sought to harness the industry to its own special objectives.[202] I.G. was the vehicle for implementing this policy and its success was considerable. As Stocking and Watkins stated:

> Possessing superior technical resources and a head start in several directions over other producers, benefiting also from greater governmental assistance, I.G. has been unwilling to merge its interests in a genuine, equal partnership with any other company. Instead, it has tried to use its advantages to achieve comprehensive international dominion in the chemical realm.... A shrewd bargainer, with strong nationalistic interests, I.G. has played the game of cartelization not merely as a way of living with its business rivals, but as a means of supervising, circumscribing, and, wherever possible, controlling their activities. It has used cartel agreements as instruments of economic aggression.[203]

By contrast, the American and British firms reacted in the classic tradition of cartel behavior:

> I.G. and the Japanese chemical manufacturers were often brusque, quick to take offense at real or fancied transgressions by others.... DuPont and ICI, on the other hand, were generally conciliatory and polite; their tactics were often defensive and conservative, their policy one of appeasement....[204]

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201. Much of the same attitude was reflected in the German steel industry. *See* G. STOCKING & M. WATKINS, *supra* note 146, at 212-14. But in steel a comparable drive by other governments on behalf of their own industries did not permit the Germans to dominate in steel as they did in chemicals, and they were thus forced into the more compromising pattern of the classic cartels. *Id.* at 211.

202. *Id.* at 373-74.

203. *Id.* at 466.

204. *Id.* at 423.

Synthetic rubber provides a case in point. I.G. was the world leader in synthetic rubber technology. (The technological effort was subsidized by the German Government, which sought to extend its monopolistic position abroad.[205]) DuPont, I.G.'s obvious American counterpart, was not eager to restrict its own promising development in this field,[206] but Standard Oil of New Jersey was a more willing partner for I.G. Standard had an interest in keeping I.G. out of the oil business, in which I.G. had developed potentially important technology in the hydrogenation of coal.[207] The companies concluded a series of agreements on November 9, 1929, based on a division of fields: Standard would stay out of chemicals except as that industry might affect oil. The agreements also called for close cooperation between Standard Oil and I.G.[208] This spirit of cooperation extended to the accommodation of I.G.'s objective of holding back American progress in synthetic rubber development because of that product's strategic importance.[209] Standard reportedly delayed at I.G.'s request a synthetic rubber project that it was undertaking in cooperation with other companies, even though the delay was not required by their written agreements.[210] Standard also followed a restrictive licensing policy toward American rubber companies, confining license use to high-priced specialties only, in fulfillment of Standard's obligation to I.G. to respect DuPont's vested interest in the synthetic rubber market.[211] The consequence was a laggard synthetic rubber industry at the outbreak of World War II, when the attack on Pearl Harbor cut off 95 per cent of the United States' crude rubber supplies.[212]

Standard Oil later sought to justify the restraint by claiming that the agreements with I.G. provided certain patents and know-how.[213] Since this rationale has been criticized on the ground that the technology might have been available otherwise,[214] the more basic question would appear to be whether the decision to make this kind of trade-off should be left to private business. Standard had a self-interest in eliminating competition with I.G. in petroleum.[215] That

205. *Id.* at 90.
206. *Id.* at 90-91.
207. *Id.* at 90-93.
208. *Id.* at 93-94.
209. *Id.* at 97-98.
210. *Id.* at 101.
211. *Id.* at 105-106.
212. *Id.* at 56, 92.
213. *Id.* at 98.
214. *Id.* at 98, 498-99.
215. The Department of Justice sued to break up the Standard-IG agreements, which resulted in a plea of *nolo contendere* and a consent decree. *Id.* at 106.

self-interest may have loomed larger in the company's eyes than the natural interest in the development of a synthetic rubber industry.[216]

A similar subordination of United States interests occurred in magnesium. Alcoa had a minor interest in magnesium but its primary interest was in aluminum, with which magnesium competes in some respects.[217] A joint venture between Alcoa and I.G. limited Alcoa's use of the technology it received to the United States, thus effectively excluding Alcoa from foreign markets;[218] this circumstance was reinforced by a specific cartel agreement not to compete with I.G. in Europe.[219] Alcoa also sold to I.G. at discriminatorily lower prices than to its American customers; an arrangement that both supplied the German rearmament program[220] and contributed to retard the development of the war-related magnesium industry in the United States.[221]

The supervening interests of the German Government pursuing policies outside the commercial realm distinguished the cartel arrangements in synthetic rubber, chemicals generally and magnesium from the classic cartels. In all other respects, these cartels fit the classic pattern of market division and peaceful coexistence. And the cartelized performance of American firms when faced with aggressive state-supported cartels—so often emphasized as a principal reason for an export exemption—was the worst of all. Left to its own devices, private business showed neither the inclination nor the ability to counteract the aggressive policies of its foreign counterparts. And the conglomerate nature of the I.G. combine effectively precluded the formation of any domestic combination to offset it. So while it may well be that aggressive cartels abroad require policies different from the normal competitive rules applied in our domestic markets, it is far

216. The box score on Standard's dealings with IG is less than comforting: "So far as synthetic rubber developments are concerned, the Americans gave the fruits of American technical programs, such as they were, to their German cartel partner but received only empty promises and barren patent specifications in return." *Id.* at 117 (footnote omitted). "The men with whom they [Standard's representatives] dealt were not simon-pure businessmen, like themselves, intent predominantly on advancing their private interests. A totalitarian state in Germany had effectively subordinated private business interests to its aggressive nationalistic designs. Standard's German partner was, in fact if not in law, an arm of the state, and was deliberately used as an instrument of economic warfare." *Id.* at 116-17 (footnote omitted).

217. *Id.* at 278.

218. *Id.* at 290.

219. *Id.* at 299.

220. *Id.* at 300.

221. *Id.* at 300, 303.

from clear that merely freeing American firms to deal as they like with such foreign interests is the best—or even a defensible—means of coping with the problem.

C. *Can Competition Work in International Trade?*

The experience with international cartelization hardly commends it as a model for the formulation of economic policy in the future. The only instances in which national objectives appear to have been significantly advanced were the unusual cases in which the cartel was itself an instrument of state policy. National policy implemented in that manner readily can be frustrated through countermeasures by the governments of importing countries.[222] Left free to pursue their own interests, businessmen consistently place a higher value on avoiding competition and preserving existing investments than on increasing exports or otherwise serving national interests. The devices that businessmen have employed—quota arrangements with penalties for overproduction and rewards for underproduction, restrictive technology licensing arrangements that fence off national markets and undertakings to avoid competition—tend to increase costs and to impede technological progress.

The justifications offered in support of these practices are quite plausible and sometimes even valid. Faced with an aggressive, state-supported cartel, or with the special requirements of a state trading company for projects of a size or orders in quantities exceeding the capacities of individual firms,[223] the formation of foreign consortia to reduce bidding costs on construction contracts,[224] for example, are reasonable factors to be considered in determining what kinds of competitive conduct should be allowed. Factors peculiar to certain industries also tend to impair the efficiency of competition as a regulator of supply and demand, in either domestic or international trade. Agricultural production, for example, may be unresponsive in the short run to changes in price;[225] the magnitude of investments needed for some industrial[226] and natural resource

222. Antidumping sanctions, exclusion orders under § 337 of the Tariff Act of 1930, countervailing duties and resort to tariff or quota legislation are among the obvious measures of retaliation. This factor was cited as one of the problems leading to the sugar cartel. *See id.* at 26-27.

223. *1972 Hearings, supra* note 145, at 368-70.

224. *See, e.g., id.* at 375, 376 & 381; *1916 Hearings, supra* note 78, at 4.

225. This argument frequently is made with respect to chemical plants. *See* G. STOCKING & M. WATKINS, *supra* note 146, at 400-01.

226. *See, e.g., id.* at 364-65.

projects[227] may justify resort to some regulatory devices other than the uninhibited working of the marketplace. (Coincidentally, industries in which such conditions occur often are actively involved in international trade.) But it does not follow that the solution is simply to remove the rules against restraints of competition. To do so is to treat export trade as an isolatable segment of commerce. Students of competition long have contended that it is impossible (at least as a general rule) to maintain partly cartelized and partly competitive interrelated domestic and international markets.[228] International cartel schemes in the past typically have been extensions of domestic monopolies, and it has been argued that an international control scheme is unworkable without complementary controls in domestic markets.[229] To require that businessmen adhere to different and inconsistent patterns of behavior in the domestic and international sales of the same products and services is asking too much.[230]

In each of these situations there is some element of choice. Some alternatives will meet the problem without undue prejudice to competition, others will impair it more than necessary; almost surely there will be others that do nothing but eliminate competition. The indicated need is a mechanism to replace the present universal exemption of export trade with a flexible application of the normal rules of competition.

III. A Workable Regime for Exports: Immunity Versus the Rule of Reason

A. *When Is a Cartel Not a Cartel?*

Justice Frankfurter observed that "cartel" is not a talismanic word.[231] In American usage it has been used to define arrangements among producers to limit competition between them, generally

227. *See, e.g., id.* at 216.

228. *See, e.g., id.* at 29; Testimony of Donald F. Turner in *1967 Hearings, supra* note 138, at 124.

229. G. Stocking & M. Watkins, *supra* note 146, at 184 (steel), 222 (aluminum), 304-05, 325-26 (lamps).

230. The Webb Act sought to meet this problem by requiring that the association engage solely in export trade, the theory being that different people would be involved. But this proved unrealistic (as some foresaw), since wholly owned subsidiaries in whatever form have their policies set by the same management as the parent company. G. Stocking & M. Watkins, *supra* note 146, at 255-56 (aluminum), 328-29, 337-38 (lamps); *1917 Hearings, supra* note 73, at 73-75.

231. Timken Roller Bearing Co. v. United States, 341 U.S. 593, 605 (1951).

referring to international marketing arrangements.[232] In Japan and Germany, however, the negative connotation that we give the concept does not appear; the Japanese term includes practices described in the United States merely as oligopolistic.[233]

Many joint activities do not fit the traditional American idea of cartels and do not violate the antitrust laws. Jointly owned facilities or service agencies are obvious examples (provided that fair access is available if any such common agency acquires monopoly characteristics).[234] The list of joint activities delineated in the Japanese Export and Import Trading Act for the most part would not necessarily involve Sherman Act violations.[235] The joint activity envisaged by the Webb-Pomerene Act—joint selling agencies for exports—arguably is not necessarily violative of the antitrust laws even in the absence of an immunity statute.[236] Indeed, as former Assistant Attorney General Turner has pointed out, the kinds of activity made permissible by the Webb Act that would not have been permissible without it—*e.g.*, price fixing and division of markets—more likely inhibit than promote exports.[237]

The above sampling from the historical experience with cartels manifests that the mere existence of cartel arrangements abroad implies no necessary disadvantage for American exporters. Likewise, permitting restrictive activity by our own firms is no assurance that exports will be promoted. Some of the experience with early Webb associations demonstrates that they had exactly the opposite effect. The arguments in support of the Webb Act, however, were characterized by indiscriminate references to cartels and cartel practices; no real effort was exerted to distinguish between cartels that are

232. G. STOCKING & M. WATKINS, *supra* note 12, at 3. Significantly, the term appears to have been derived from an old Latin word for a military truce. For a detailed history of the usage of the word "cartel" see E. HEXNER, INTERNATIONAL CARTELS 3-42 (1946).

233. For a discussion of the usage of the term under Japanese law see E. HADLEY, ANTITRUST IN JAPAN 358-89 (1970).

234. Associated Press v. United States, 326 U.S. 1 (1945); United States v. Terminal R.R. Ass'n, 224 U.S. 383 (1912). *See also* Silver v. New York Stock Exchange, 373 U.S. 341 (1963), which emphasized that there is a special obligation to be fair and objective where concerted action may harm some competitors.

235. *See* note 100 *supra* and accompanying text.

236. *See, e.g.*, note 121 *supra;* FTC STAFF REPORT, *supra* note 64, at 7; *1972 Hearings, supra* note 145, at 809; *1967 Hearings,* note 138 *supra.*

237. *See 1967 Hearings, supra* note 138, at 125. This is confirmed by experience. The Webb association for potash set export prices at a level that made

predatory, inhibitory of the members' own competitiveness or neutral.[238] This indiscriminate approach was carried over into the Webb Act itself, which contains no criteria to distinguish between constructive and unnecessarily restrictive behavior so long as the association's activities are confined to export trade.[239] Also, neither the FTC nor the Attorney General was authorized to differentiate constructive from needlessly restrictive practices.

In sum, a wide range of possible joint activity in export trade, from the helpful and legal to the counterproductive and illegal (absent the statutory immunity), are lumped together without distinction in the Webb Act's immunity bath. The asserted need for across-the-board immunity is the elimination of uncertainty. There is obvious merit in the argument that if legality is to be measured by a rule of reason that might sanction some activities in export trade that would not be permitted domestically, there should be some way of deciding beforehand whether a proposed activity is legal. Immunity is one way of doing this. Another technique would be implementation of ad hoc procedures that could provide assurances of legality on a case by case basis. Businessmen traditionally have favored immunity. But should they?

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it advantageous for members to sell outside the association to meet competition from low cost Canadian production. *See* FTC STAFF REPORT, *supra* note 64, at 65. Experience also tends to show that Webb associations do not offer superior administrative advantages to export brokers or trading companies, and that the latter are a more effective way of promoting exports. In the Webb Act hearings, for example, one such broker who did substantial export business in textiles, where there are hundreds of U.S. firms, testified that ". . . no foreign selling corporation could represent successfully a very large number of competing concerns. It could not make good for them. It might represent one or two or three; in certain lines it could represent a dozen, but it could not represent the entire industry and make good for it." *1916 Hearings, supra* note 78, at 55. The *FTC Staff Report* notes the generally successful use of export brokers and their possible advantages over Webb associations. FTC STAFF REPORT, *supra* note 64, at 7. The *Report* also observed that a number of Webb associations were scaled down from fully functioning export houses to administrative service organizations because the members found that they could do better selling individually. *Id.* at 27, 29. It further found that among active associations, those which function like joint selling agents represent firms with dominant domestic and world market positions—which would be fully capable of exporting on their own. *Id.* at 33.

238. *See generally* notes 119, 120 & 123-24 *supra.*

239. Section 4 of the Webb Act, which bars unfair acts, may afford some protection as between cooperating exporters—where it is least needed—but does not extend antitrust rules to export trade. *See* note 84 *supra.*

B. *The Illusory Quest for Immunity*

The difference between immunity and the rule of reason is that the former permits activity that would otherwise violate the law, while the latter permits a conclusion that, under the circumstances, the law is not violated. The immunity, if it is not to repeal the antitrust laws entirely, must have some strict bounds on its scope. The risk of overstepping these bounds may be just as great as the risk of misjudging what conduct is permissible under the rule of reason. Because immunity is antithetical to the antitrust law itself, enforcement of the limitations on its scope will necessarily be very strict.

The second risk is that resort to immunity carries no presumption that the activity otherwise would be legal, and may well imply the contrary. This facilitates the drafting of complaints. Nearly all that a treble damage plaintiff need allege to survive a motion for summary judgment is that the defendant's activities exceeded the scope of the immunity. The fact that the activities were joint and that immunity was sought may be sufficient in many cases to raise an issue of fact.[240]

The alternative to immunity—an advisory opinion from the FTC or a business review clearance from the Department of Justice—provides a law enforcement official's view that no violation of law is involved. Common sense indicates that prospective plaintiffs would be much less tempted to sue when confronted with such a prima facie indication of legality than with the opposite implication of a grant of immunity.

One of the reasons cited for the general neglect of the Webb Act is that using it carries the risk of a violation.[241] What seems not to have been recognized is that this is inevitable as long as the Act's protection is in the form of immunity.

C. *Two Options Under the Rule of Reason*

1. *The Business Review Procedure and FTC Advisory Opinions.*—Antitrust officials have urged businessmen who believe that opportunities in foreign business are denied them for antitrust reasons to submit their proposals under the Justice Department's business review

240. Summary judgment was denied in such a suit alleging that immune cooperation in tanker use among oil companies during the Suez Crisis of 1956 extended beyond the period of applicable immunity. Oceanic Petroleum Carriers, Inc. v. The Atlantic Refining Co. (S.D.N.Y. Civ. Action No. 150-162, Nov. 4, 1963) (memorandum opinion of Judge Dawson, not reported).

241. *See, e.g., 1972 Hearings, supra* note 145, at 548.

procedure.[242] This is a procedure used routinely in domestic cases but infrequently in foreign trade. While no immunity attaches to such a clearance, or to an FTC advisory opinion,[243] both are commonly and successfully relied on in practice. Many fears cited in congressional hearings may be groundless, or mollified easily by adjustments in the specifics of a proposal.[244]

Since the business review procedure inquiry is under the rule of reason, the limitations of the Webb Act are not controlling. Foreign investment projects and licensing arrangements, for example, are excluded from Webb Act coverage, but if not unnecessarily restrictive, they can be cleared by Justice and FTC procedures. The same would be true of arrangements including foreign entities, or having some impact on domestic prices.

These procedures provide the flexibility needed to separate the valid needs of foreign business from restrictions that are unnecessary, undesirable and even counterproductive. There is a range of choices available in most transactions, and it is common for an initial proposal to contain (or omit to include) features that can be changed to both the legal and business advantage of the proposal. The failure to consider such modifications when a proposal is still in an early planning stage may, in fact, account for some of the asserted tendency to abandon proposals on antitrust grounds. More frequent resort to these consultative procedures could go far toward removing the uncertainty complained of in foreign transactions and could prove superior to the sometimes treacherous immunity of the Webb Act.

2. *An Administrative Alternative.*—The existing Justice and FTC procedures fall short of legal certainty, and the Justice business review procedure does not yield reasoned explanations of the Department's

242. 28 C.F.R. § 50.6. *See* remarks by Donald I. Baker, Director of Policy Planning, Antitrust Division, Department of Justice, at the New York State Bar Association Meeting, January 24, 1973, 5 CCH TRADE REG. REP. ¶ 50,161 (1973); Remarks by Keith I. Clearwaters, Special Assistant to the Assistant Attorney General, Antitrust Division, Department of Justice, to the Association of General Counsel, 5 CCH TRADE REG. REP. ¶ 50,169 (1973); Testimony of former Deputy Assistant Attorney General Walker B. Comegys, *1972 Hearings, supra* note 145, at 811 (reprinted with case examples); 5 CCH TRADE REG. REP. ¶ 50,129 (1973). See also note 196 *supra.*

243. *See* 3 CCH TRADE REG. REP. ¶ 9801-.01 to -.04 (1972).

244. *See, e.g., 1972 Hearings, supra* note 145, at 809. The FTC legal expert who testified in the Webb hearings remarked that: "There is a very curious state of mind on the part of businessmen of the country. They seem to believe that the Sherman law is actually more restrictive in regard to foreign trade than it is in regard to domestic trade." *1916 Hearings, supra* note 78, at 36.

rationale that can be cumulated into an instructive body of precedents. These additional advantages could be provided by conversion to a system like the negative clearance procedures under article 85(3) of the European Economic Community. The European Economic Community Commission's action, unlike the opinions of the Department of Justice and the FTC, has legal effect.[245] The systematic processing of applications and publication of the rationales for decisions promotes a growing body of jurisprudence that contributes to predictability and certainty.[246]

Like the rule of reason, a procedure like the negative clearance has built-in requirements to assure that restrictive measures do not exceed legitimate needs, and that consumers receive some share of the benefits.[247] A comparable procedure could be adopted in the United States by legislation replacing the Webb-Pomerene Act. If this is done, some provision should be made for continuing supervision by the administrative agency which should retain the power to revoke its approval prospectively if abuses are discovered.[248]

IV. Conclusion

The purpose of the Webb-Pomerene Act to permit cooperative export activities by eliminating uncertainty is consistent with the objectives of the antitrust laws. The resort to a categorical grant of immunity, however, has important defects. First, it fails to distinguish between desirable and undesirable activities; secondly, it risks a spillover of restrictive practices into the domestic market; thirdly, it invites conflict with the new antitrust legislation of other nations (and encourages foreign nations in turn to export restrictive practices to the United States); and finally, it does little to promote exports because of the rigidity inherent in any system of categorical immunity. Perhaps the greatest disadvantage to the categorical grant of immunity is that it tends to preempt other ways of dealing with export

245. EEC Comm'n Reg. No. 17, 1 CCH Comm. Mkt. Rep. ¶ 2471 (1971).

246. *See, e.g., id.* at ¶ 2061 (digests of actions under article 85(3)). The group exemptions that have arisen out of the many requests for individual exemptions are a further example of the empirical evolution of rules through this process. *See* EEC Comm'n Reg. No. 2821/71, 1 CCH Comm. Mkt. Rep. ¶ 2729 (1973).

247. *See* note 89 *supra* and accompanying text.

248. Advance information may be insufficient to appraise longer term actions. The FTC urged that some form of supervision be retained as a safeguard. *1972 Hearings, supra* note 145, at 238-39. The Administration bill would give the FTC continuing supervisory authority. *See* note 151 *supra.*

problems, such as the consultative procedures of the Department of Justice and the FTC.

The experience with international business behavior when free of antitrust restraints demonstrates that exports tend to be inhibited rather than expanded, and that aggressive behavior by state-supported cartels is acquiesced in rather than resisted. Some form of governmental antitrust review, therefore, should be included in any special regime for export trade. Legitimate export activities may be sanctioned under the rule of reason and uncertainty avoided either by the consultative procedure of the Department of Justice and the FTC, or by legislation that would substitute a new form of administrative clearance for the Webb-Pomerene Act.