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Antitrust and World Trade: Tempest in an International Teapot?

DONALD I. BAKER*

For several years, we have heard a great deal of *shouting*—and quite a lot of *lawyering*—about the impact of American antitrust law on international trade and investment. Unfortunately, we have not seen much quiet *thinking* on the relevance of antitrust to our broader goals as a nation of both consumers and producers.

Various American business groups have complained loudly that antitrust hampers their efforts to compete in an increasingly competitive world.[1] Foreign businessmen have sometimes complained that American antitrust merger enforcement discriminates against them and hampers foreign investment in the United States. Both groups repeatedly stress that we in the United States apply legal rules which foreign governments do not apply to enterprises. American business asks for broad antitrust exemptions to make it "more competitive" with firms abroad (and foreign firms sometimes seem to be asking for "diplomatic immunity" for various U.S. activities).

Both arguments rest on some doubtful factual assumptions. Both seem to assume a "least common denominator" approach to law enforcement. If the criticism that "the United States is tougher" amounts to no more than saying "the United States protects its consumers better than other governments," then most would say "so be it."

I believe that the business criticism of the antitrust laws in the international field involves serious errors, both of fact and of law.

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1. *See generally Hearings on S. 2754 Before the Subcomm. on Foreign Commerce and Tourism of the Senate Commerce Comm.*, 92d Cong., 2d Sess., ser. 92-83 (1972) [hereinafter cited as *Export Expansion Hearings*].

American businessmen, when pressed, have generally been unable to come up with hard factual instances where American antitrust law has prevented them from doing things that were constructive and worthwhile for our overall international interest. Moreover, the critics have failed to perceive the primary thrust of our antitrust law—to protect the interests of Americans as consumers—and they have failed to see the broad flexibility written into the antitrust statutes. Beyond this, they fail to perceive the broad interest of the United States, as an exporting nation, in having a vigorous and competitive domestic economy—a message which has not been lost on a number of important industrial nations abroad.[2]

I believe that we can compete abroad and also protect the consumer at home. But we must be willing to think hard about both our goals and our legal tools if we are to succeed.

I

TRADING IN A COMPETITIVE WORLD

When the Sherman Act was passed in 1890, the United States was still a largely agrarian nation and most of its exports were primary products. Sixty years later, after World War II, we were the great industrial power of the western world—a leading exporter of capital, high technology products, and still a major exporter of many primary agricultural products. Most other leading industrial countries had been badly damaged in the war and the United States stood far ahead of the pack. In time, things had changed again. By 1970, other leading industrial countries—including particularly Japan and West Germany—had fully recovered, and thus had applied themselves with great energy to developing new business methods and new products; as a result, the United States no longer enjoyed an overwhelmingly dominant economic advantage over the western world. Indeed, the United States was running large balance of payments deficits and was encountering increasing difficulty in competing in many world markets with its industrial products. This was due, in part, to unfavorable currency exchange rates; in part, to foreign barriers to various of our products; and in part, to the price and quality of our products.

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2. *See, e.g.*, W. FUGATE, FOREIGN COMMERCE AND THE ANTITRUST LAWS ch. 16 (2d ed. 1973); Holloran, *Tokyo Aide Startles Business by Enforcing Antitrust Laws*, N.Y. Times, June 13, 1974, at 69, col. 1.

In his perceptive 1971 report to the President entitled *The United States and the Changing World Economy*,[3] Peter Peterson examined this situation and stressed that we were going to have to compete in the world on our merits. Peterson looked at many things—the new competition brought into our own markets by European and East Asian industrial firms, as well as our difficulties in competing abroad—and he asked us to look at our future. In essence, he said we have two choices. One is the road to mercantilism—to "erecting a variety of new restrictions . . . against the products of our trade partners." He rejected this choice as "a prescription for defeat and an admission of failure." Instead, he recommended the second alternative, looking in the opposite direction:

> "[T]o meet head-on the essential—if demanding—task of improving our productivity and our competitiveness in an increasingly competitive world, to seize the initiative in designing a new, comprehensive program designed to build on America's strengths, and to encourage a competitive world trading system with the confidence that comes with having a sense of our future. . . . [T]he basis for this confidence must be a strong domestic economy, . . . stimulated by . . . the technological advances which will both increase our international competitiveness and help our society fulfill its promise of a better life and productive work for its citizens."[4]

As Peterson makes clear, strong competition at home is vital to our mission. A firm which has trouble competing in Columbus or Cleveland will have an even harder time in Munich or Milan. Competition is particularly vital to the high-technology products which have been America's strongest suit. To invent and develop a new product requires skill, imagination, capital and hard work. These are qualities people do not develop unless promised the rewards of success or threatened with the penalties of failure. An unchallenged dominant firm (or group of firms) can go on practicing the art of the past, while export opportunities are missed and consumer demands go unmet. The situation is only exacerbated, both for the consumer, and for the country, if the dominant firm or group is protected at home by the government against more enterprising foreign competitors.

The automobile industry offers one highly topical example of dominant firms missing important opportunities. For years, Detroit resisted the small car because the industry leaders felt that "mini-cars mean mini-profits." The small car market—then small—was left to the Europeans, and later the Japanese. They found at first a few, and

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3. P. PETERSON, THE UNITED STATES IN THE CHANGING WORLD ECONOMY (2 vols. 1971).
4. 1 P. PETERSON, *id.* at iv.

gradually many more Americans who preferred small cars to the large gas-guzzling cars so favored by Detroit. And in time, Detroit could no longer resist the tide; it too has had to develop small cars and advertise their gas mileage, rather than their horsepower. Of course, we may still have too many large gas-guzzling cars on the road to serve our national need in a time of energy shortage, but think how much worse it would be today if we had nothing but giants on the road! And this might well have been the case, but for the important role played by foreign competition in the domestic market. (One might add that the large Detroit cars have never done very well in foreign markets, where people have had generally poorer roads, shorter distances and much higher fuel costs.)

Steel is another case where the dominant American firms have been slow to innovate and are now hard-pressed in the world market. Our American firms did not develop or promptly deploy the basic oxygen process. Rather, it was developed abroad and first introduced into this country by a small manufacturer. Of course, in the end, the dominant American steel-makers had to come around to the new process, despite their heavy fixed investments in the old technology—but they did so only reluctantly, only under pressure. Meanwhile, they screamed, increasingly loudly, for government protection against imports; and ultimately they received such protection in the form of voluntary steel quotas, negotiated with government assistance. This in turn led—not too surprisingly—to domestic price increases, which Professor Adams has described as "electrifying." Within three years, steel industry prices rose to almost ten times their prior rates; and some key products, such as cold rolled sheet, rose over 30 percent.[5] These increases were passed on, not only to the American consumer, but to American firms seeking to sell finished steel products abroad.

What is disturbing is not only the increases in prices paid by American customers, but the implications of protection for the firms protected. It seems highly unlikely that a firm, artificially protected at home this year, will prove better able to compete abroad next year. With a few exceptions, the general rule seems to be that those who live off protection need ever more; and those who must buy from a protected industry need ever more outside competition.

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5. W. Adams, *Competitive Measures and Competitive Facts As They Affect Economic Standards* in CONFERENCE BOARD, ANTITRUST PROBLEMS AND NATIONAL PRIORITIES 5-6 (Transcript of Eleventh Conference on Antitrust Issues in Today's Economy, Mar. 2, 1972).

II
AN OVERVIEW OF THE AMERICAN ANTITRUST LAWS

For almost a century, antitrust laws have provided our principal legal tool for enforcing competition. These laws have worked successfully because they have both breadth and flexibility—two elements of great importance in international trade problems. In general, these laws seek to deal with restraints imposed by competitors, restraints involving customers and suppliers, mergers and acquisitions, and the abuse of monopoly power.

The statutes which are most relevant here are section 1 of the Sherman Act, which prohibits anticompetitive trade restraints,[6] and section 7 of the Clayton Act, which prohibits anticompetitive acquisitions of corporate stock and assets.[7] Section 1, which was enacted in 1890, declares illegal "every contract, combination . . . or conspiracy in restraint of" interstate or foreign commerce. Since the Supreme Court's 1911 *Standard Oil* decision,[8] the "every contract" language in section 1 has been subjected to the so-called "rule of reason," under which the courts analyze the conduct involved to determine whether it is unreasonable on a comparison of its legitimate purpose with its effect as a restraint on free competition. However, the Supreme Court has concluded over the years that certain types of conduct are so generally unreasonable that they should be regarded as illegal per se. The per se category generally covers price fixing agreements, agreements among competitors dividing geographic markets or classes of customers, tying agreements, concerted refusals to deal, and certain kinds of reciprocity agreements. The Supreme Court has explained per se liability in these terms:

> However, there are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use.[9]

For reasons explained below, I believe that many types of conduct which are treated as per se in terms of domestic commerce can and should be fully analyzed under the "rule of reason" when applied in the international context.

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6. Sherman Act § 1, 26 Stat. 209, 15 U.S.C. § 1 (1970).
7. Clayton Act § 7, 38 Stat. 731, 15 U.S.C. § 18 (1970).
8. Standard Oil Co. v. United States, 221 U.S. 1 (1911).
9. Northern Pacific Ry. v. United States, 356 U.S. 1, 5 (1958).

Section 7 of the Clayton Act, enacted in 1914 and amended in 1950, prohibits any corporation engaged in commerce from acquiring stock or assets from another corporation "... where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."[10] Section 7 is quite different from section 1 in that it does not require the government to prove an *actual* lessening of competition, but only that the transaction's effect "may be substantially" to lessen competition in the future. Moreover, since section 7 only applies to acquisitions whose effect is "in any section of the country," it reaches only domestic mergers, and overseas mergers which have some impact on our domestic markets.

Section 1 of the Sherman Act is a legal provision of especially great breadth and flexibility. It was recently described by the Supreme Court as "the Magna Carta of free enterprise."[11] Thirty years earlier Chief Justice Hughes had said:

> The purpose of the Sherman Anti-trust Act is to prevent undue restraints of interstate commerce, to maintain its appropriate freedom in the public interest, to afford protection from the subversive or coercive influences of monopolistic endeavor. As a charter of freedom, the Act has a generality and adaptability comparable to that found to be desirable in constitutional provisions. It does not go into detailed definitions which might either work injury to legitimate enterprise or through particularization defeat its purposes by providing loopholes for escape. The restrictions the Act imposes are not mechanical or artificial. Its general phrases, interpreted to attain its fundamental objects, set up the essential standard of reasonableness.[12]

As already noted, the Supreme Court has qualified this general statement in subsequent cases imposing certain types of per se liability, on the theory that the restraints at issue are so commonly unreasonable that it is not worth holding long and complex trials over them. In the main, these decisions have not involved foreign trade, where flexibility is still present. The statute still can be construed by the courts and by the enforcement agencies to achieve rational policies in the real world of international trade.

Much of the present confusion arises from the fact that antitrust lawyers have spent too much time parsing footnotes and not enough time thinking about where our national interests lie. Thus, they worry about whether some particular rule of antitrust law, generally applied in the domestic economy, would have some perverse effect in the

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10. Clayton Act § 7, 38 Stat. 731, 15 U.S.C. § 18 (1970).
11. United States v. Topco Associates, 405 U.S. 596, 610 (1972).
12. Appalachian Coals, Inc. v. United States, 288 U.S. 344, 359-60 (1933).

international realm, and they do this over and over again. The situation must be examined in a wider context.

The broad goal of antitrust law is to protect the American consuming public by providing a spur to business efficiency, innovation and cost-based pricing. In the words of the Supreme Court,

> [T]he Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions.[13]

A second goal of antitrust is to protect individual firms from "bully-boy" tactics by their more powerful competitors. Such tactics may not have an immediate and measurable effect on the aggregate market, but the Supreme Court has made it clear that this is not necessary. A coercive restraint

> . . . is not to be tolerated merely because the victim is just one merchant whose business is so small that his destruction makes little difference to the economy. Monopoly can as surely thrive by the elimination of such small businessmen, one at a time, as it can by driving them out in large groups.[14]

What then is the antitrust interest with respect to international trade? First—and foremost—it is to insure that the American consumer receives the benefit of import competition. This is particularly vital where our domestic industry is dominated by a very few firms or otherwise is not itself particularly competitive. The second major U.S. interest is to protect the export opportunities of U.S. firms—primarily to protect them against "bully-boy" tactics by other enterprises subject to our jurisdiction. We have also had a third and relatively minor interest: to protect the American taxpayer from anticompetitive restraints which increase the cost of overseas procurement of either goods or services financed by the U.S. government (and very often limited by our law to U.S. sources of supply).

As a practical matter, the main antitrust concern has been with the classic international cartel. This is an arrangement by which leading firms in different countries get together and agree not to compete in each other's "home" markets. Where American firms are involved, such a cartel has a direct and immediate impact on both our markets at

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13. Northern Pacific Ry. Co. v. United States, 356 U.S. at 4.
14. Klor's Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 213 (1959).

home and our firms' export opportunities abroad. It may serve the "private" interests of the parties, but it certainly does not serve the "public" interests of the United States as a trading and consuming nation. Historically, the most important antitrust decisions in the entire international field involve cases of this "classic" cartel type of restraint. These are discussed in the succeeding sections on import competition and competitive export opportunities.

III
PROTECTING COMPETITIVE MARKETS AT HOME

Foreign competition has proven particularly important to American buyers in two situations. The first is where most or all of the goods originate abroad. The second occurs where we have a sluggish domestic industry, which very much needs the spur of outside competition. The latter situation has been particularly apparent in a number of our large oligopolies; as a result, we have seen such products as small cars and stainless steel razor blades become available in this country largely because of the pressure of foreign firms selling here. It is an important goal of antitrust policy to preserve this kind of foreign competition as a factor in the American market.

Antitrust law has been used in a number of different ways to preserve the competition of imports (and foreign firms) in our domestic market. First, and most important, have been the Sherman Act section 1 cases directed at what I have called the classic cartel—a worldwide territorial allocation scheme by leading firms in different countries. *National Lead*[15] and *Timken*[16] are the leading decisions in this field. Both involved different American and foreign producers who divided up the world into exclusive territories, and thereby barred foreign competitors from coming into the United States. Sometimes this has been largely accomplished by technology agreements which effectively divided territories into exclusive "home" markets, as in the *ICI-DuPont* case.[17] These decisions, in effect, treated such territorial allocations as per se illegal: ". . . the law is crystal clear: a conspiracy to

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15. United States v. National Lead Co., 63 F. Supp. 513 (S.D.N.Y. 1945), *modified*, 332 U.S. 319 (1947).
16. United States v. Timken Roller Bearing Co., 83 F. Supp. 284 (N.D. Ohio 1949), *modified*, 341 U.S. 593 (1951).
17. United States v. Imperial Chemical Industries, Ltd., 100 F. Supp. 504 (S.D.N.Y. 1951).

divide territories, which affects American commerce, violates the Sherman Act."[18]

The pending *Westinghouse-Mitsubishi* case[19] is probably the most important current case in this classic cartel area. The Government is challenging very long-term agreements between leading American and Japanese electrical equipment manufacturers covering both patents and know-how. Each firm is licensed to the technology of the other, and each is prevented by the agreement from selling products under the licensed technology in the "home" market of the other. The broad result has been to keep these two large electrical equipment manufacturers out of each other's "home" markets—an important consideration for the United States given the highly concentrated nature of its domestic market and its anticompetitive history.[20]

A second, and perhaps less familiar, kind of cartel involves a worldwide price fix—usually on products which come mainly from foreign sources, and may even have no reasonable domestic substitutes. Any such scheme is bound to have a serious impact on our domestic market where import competition is significant. The best recent example is the international quinine cartel which was prosecuted by the Department of Justice in 1968[21] (and by the European Economic Community a few years later). This cartel involved foreign firms and some foreign subsidiaries of American firms, which were engaged in a long-term and broadly successful effort to control the world prices on quinine, by straight price fixing agreements and by collusive bidding to keep United States Government stockpile disposals from disrupting the high price. The Government brought criminal and civil suits against the foreign firms, the American firms with subsidiaries involved, and the United States quinine importers. It was able to secure personal jurisdiction over enough of them to put a stop to the cartel and bring down the price of quinine, a product area in which the United States consumed about a third of the world's supply.

The foregoing types of cartel restraints have been and should be subjected to per se rules. They are clearly harmful to domestic consumers, just as are purely domestic price fixes and territorial allocation

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18. *Id.* at 592. *See also* United States v. National Lead Co., 63 F. Supp. at 523.

19. United States v. Westinghouse Electric Corp., Civ. No. C-70-852-SAW (April 22, 1970).

20. United States v. Westinghouse Electric Corp., 1960 Trade Cas. ¶ 69,699 (E.D. Pa. 1960) (rejection of *nolo contendere* pleas).

21. United States v. N.V. Nederlandsche Combinatie Voor Chemische Industrie, 1970 Trade Cas. ¶ 73,181 (S.D.N.Y. 1970) (consent decree).

schemes. The whole rationale of per se liability, as discussed above, is that the particular restraints are so generally harmful that no purpose is served by conducting a detailed factual inquiry in every case. Classic international cartels among private firms fully meet this test: they directly affect U.S. consumer interests and have no redeeming public values at all. In general, where such a cartel is involved, the Government will proceed against both the American firm and the foreign party where it is able to obtain personal jurisdiction (as has generally been possible in the leading cases).

The domestic market may also be affected where a group of American firms cooperate in a joint purchasing program. The issue is particularly lively in a market dominated by foreign sellers (often including foreign governments). It thus presents an issue analogous to that which occurs when employers combine to negotiate (and perhaps shut down their facilities) in a labor negotiation where the other side (labor) is exempt from the antitrust laws. The Department of Justice has recognized that such joint purchasing arrangements may be acceptable, where they are likely to result in lower prices for imports and adequate safeguards insure that the joint efforts do not spill over into domestic pricing, marketing and business operations. The most important example is, of course, the Government's granting business review clearance in 1971 for leading American oil companies to engage in joint negotiation with the OPEC governments over the production of crude oil in the Middle East and elsewhere in the world. The Department felt that the joint bargaining and sharing arrangements offered safeguards against individual firms—particularly smaller ones—being eliminated one at a time:

> [I]t was then believed that these actions were necessary as a countervailing force to the producer government cartel with which the oil companies were confronted, and that these actions would more likely have a beneficial than an adverse effect on U.S. foreign commerce. It is important to recall that the stated intent of these proposed arrangements was to maintain oil prices at lower levels than would exist if the OPEC nations could negotiate with the companies one-by-one. . . .[22]

Recognizing that such joint purchasing arrangements involve serious competitive risks, the Government at all times insisted on careful surveillance of the joint operations and on avoidance of spillover

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22. Testimony of Assistant Attorney General Thomas E. Kauper, Hearings on the International Oil Crisis and the Antitrust Laws before the Subcomm. on Multinational Corporations of the Comm. on Foreign Relations, 93d Cong., 2d Sess., at 9 (June 5, 1974).

effects in the domestic market. When conditions had changed, the Department indicated in 1974 that the original letters were no longer applicable.[23]

Mergers involving foreign firms may also affect the American market. As noted above, the "section of the country" language in Clayton Act section 7 gives merger enforcement an obvious domestic focus, although it would possibly have this focus even absent such specific statutory language.

Thus, the Department of Justice has challenged a merger between two foreign corporations which would have the necessary effect of merging their two American subsidiaries, in circumstances where those American subsidiaries were important direct competitors in the same market.[24] The result of the case was to force divestiture of one of the American subsidiaries so that pre-existing competition continued in the American market. This is a fairly unusual factual situation, but it is a straightforward application of our normal prohibitions—which are very strict—against mergers of direct competitors in the same market. The same prohibition would apply where a foreign company, already operating a subsidiary in the United States, sought to acquire an American firm which was a direct competitor of that subsidiary.

Section 7 will also reach a merger between a leading American firm and a foreign firm, not operating in the United States, which is a leading potential entrant into the market of the American firm. Domestic decisions recognize that a potential entrant, while standing at the edge of the market, may have an important effect on the performance of an oligopolistic industry.[25] This is equally true whether the potential entrant is a domestic or foreign firm and, indeed, in certain industries where entry barriers are particularly high (*e.g.*, automobiles), the only important potential entrants may be from outside the United States. Imagine—recalling my earlier discussion on automobiles—how different our domestic situation might have been had General Motors in the early 1950's bought up Volkswagen, Fiat and Renault! Such potential competition is lost when the leading foreign firm and the leading domestic firm are allowed to merge.

The potential competition theory has been applied to at least two

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23. *Id.* at 14.
24. United States v. Ciba Corporation, 1970 Trade Cas. ¶ 73,269 (S.D.N.Y. 1970) (consent decree).
25. FTC v. Procter & Gamble Co., 386 U.S. 568 (1967).

cases involving foreign firms. One is the pending *Gillette-Braun* case,[26] which challenges the acquisition by a dominant American razor manufacturer of a leading European electric razor manufacturer which had not yet entered the United States market. Another challenged the British Petroleum-Sohio merger—which involved a leading international oil company, with major U.S. resources, buying the dominant firm in the Ohio market.[27] BP did not then compete in Ohio, but was engaged in marketing on the East Coast. Both *Gillette* and *BP* involved application of a potential competition doctrine which has been widely applied against American firms.

Thus, broadly speaking, the main thrust of American antitrust law and enforcement has been to preserve and promote competition in the domestic American market. This has been accomplished by applying American law to restrictive practices of both foreign and American firms affecting this market, regardless of where the restrictions were entered into; and it has been accomplished by applying merger law to insure that both actual and potential competition are preserved in the American market. Other aspects of American law enforcement are considered in the next section.

IV
COMPETITIVE EXPORTS ABROAD

The second part of the international antitrust enforcement mission is to protect American exports of goods, services and capital against privately-imposed restraints barring them from foreign markets. In other words, we want our goods to be able to compete abroad on their merits. Cartels can prevent this.

American firms are normally permitted to collaborate in selling abroad, so long as they avoid anticompetitive spillovers into the domestic market. Thus, in general, they can collectively agree on prices and markets, since the Sherman Act does not extend to the protection of foreign buyers against such horizontal restraints (a matter primarily for foreign law).

The Webb-Pomerene Act specifically authorizes such arrangements,

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26. United States v. Gillette Co., Civ. No. 68-141 (D.C. Mass. 1968); *see* 1 TRADE REG. REP. ¶ 4,345.19.

27. United States v. The Standard Oil Co., 1970 Trade Cas. ¶ 72,988 (N.D. Ohio 1969) (consent decree).

where "goods, wares and merchandise" are involved and where certain safeguards are met.[28] In fact, Webb-Pomerene has proven to be of little practical importance because most joint export arrangements may be carried on under the Sherman Act, and because American firms selling highly differentiated products have generally not wanted to merge sales efforts with their competitors. To eliminate any doubt, however, the Administration has in 1974 proposed to expand Webb-Pomerene to cover various types of services.[29]

There are, of course, several kinds of situations in which private arrangements may foreclose export and investment opportunities for American firms abroad, and may therefore be subject to our antitrust laws. One is the classic cartel, already discussed, whereby the American firm agrees to limit its own exports into a foreign competitor's market as part of an international market allocation scheme.[30]

Another is where a joint venture is formed among the leading firms in an industry to promote exports to a foreign country or countries. Such a joint venture may not exclude the remaining American firms, where this would deprive them of the benefit of making export sales. This is but a particular application of the standard antitrust principle that, where different firms in an industry jointly control an essential facility, they must grant equal access to this facility to all competitors in the trade; this principle has been applied to enterprises as diverse as a terminal railway, a fish market, the Associated Press and the New York Stock Exchange.[31] It seems fully applicable to joint arrangements designed to promote or sell American goods or services abroad.

Yet another situation in which market opportunities abroad may be unlawfully foreclosed would be where American firms conspire to drive another American firm out of an export market. A leading example involved predatory pricing by a group of American steamship lines for the purpose of driving an independent line off a route reserved for American-flag carriers (*i.e.*, an export market for U.S. services).[32] A variant would be where an American firm, enjoying monopoly power

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28. Webb-Pomerene Act § 40, 40 Stat. 516-18, 15 U.S.C. §§ 61-65 (1970).

29. S. 1774, 93d Cong., 1st Sess., tit. II (1973). *See also* testimony of Assistant Attorney General Thomas E. Kauper, September 6, 1973 on this bill and on S. 1483.

30. *See, e.g.*, Timken Roller Bearing Co. v. United States, 341 U.S. 593 (1951).

31. United States v. Terminal Railroad Association of St. Louis, 224 U.S. 383 (1912); United States v. New England Fish Exchange, 258 F. 732 (D. Mass. 1919); Associated Press v. United States, 326 U.S. 1 (1945); Silver v. New York Stock Exchange, 373 U.S. 341 (1963).

32. *See* Pacific Seafarers, Inc. v. Pacific Far East Line, Inc., 404 F.2d 804 (D.C. Cir. 1968).

in a foreign market, exercised it to exclude other American imports from that market. The *Continental Ore* case, discussed below, is a leading example.[33]

Exclusive dealing arrangements can also create problems by excluding other American firms from export opportunities. For example, if a leading U.S. firm enters into an exclusive, long-term contract with a leading foreign customer, this contract would have the necessary effect of preventing any other American firms from competing for that customer's business. Such a contract would have to be scrutinized in terms of its competitive effect, particularly with regard to the foreign buyer's importance in the total market for U.S. exports.[34] A tie-in may have a similar effect. Thus, a patent license which requires procurement of goods from *the* U.S. licensor may run afoul of U.S. law, although an arrangement which simply ties the procurement to *any* U.S. supplier might be permissible, since such an arrangement involves no restraint on U.S. foreign commerce.

A final example illustrating the way in which foreign market opportunities can be foreclosed is the foreign buying cartel. If a group of foreign firms combine to allocate their purchasing among various American sources, they are necessarily limiting competition within our domestic economy for goods which will be exported. Such buying cartels are of direct interest to our government, and should be subject to American antitrust scrutiny to the extent that we can assert jurisdiction over the parties.

What is equally important is the broad range of export arrangements which are *not* covered by U.S. antitrust laws because they involve no unreasonable restraint of U.S. foreign commerce. The Department of Justice discussed this issue during the 1972 Congressional hearings on an "export promotion" bill giving the Secretary of Commerce broad authority to grant antitrust exemptions for the promotion of exports. The Department (which was obviously concerned by the open-ended authority) pressed the bill's proponents, inside government and out, to provide some *real* examples of where antitrust was limiting exports. A rather short list was then produced, which the Department analyzed in its testimony.[35]

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33. Continental Ore Co. v. Union Carbide Corp. 370 U.S. 690 (1962).
34. *Cf.* Tampa Electric Co. v. Nashville Coal Co., 365 U.S. 320 (1961).
35. Testimony of Deputy Assistant Attorney General Walker B. Comegys, *Export Expansion Hearings*, *supra* note 1, at 807-16 (1972); *see also* 5 CCH Trade Reg. Rep. ¶ 50,129 (1972).

Among other things, the Department dealt with a series of examples of territorial restrictions *outside the United States.* It concluded that such restrictions, whether vertically or horizontally imposed, were generally unobjectionable from the standpoint of U.S. antitrust law (even if highly objectionable under Common Market or foreign antitrust law). Some of the examples involved territorial schemes based on patent and know-how licenses. The Department indicated that a patent is territorial by nature and that know-how restrictions are reasonable, if limited in time and scope and truly related to valuable know-how. Tie-ins on foreign licensing arangements were said by the Department probably to be reasonable so long as they did not foreclose competing American sellers (as opposed to foreign sellers) of the tied products. Several other examples concerned various types of joint venture arrangements, including joint construction contracts, joint bidding on foreign jobs, and joint manufacturing. The Department indicated:

> In general, joint ventures abroad by American companies in cooperation with foreign companies present no antitrust problems unless (1) participation in the joint venture is a prerequisite to competition and some American firms are arbitrarily excluded . . . or (2) the activities of the joint venturers has [*sic*] some substantial impact on the domestic commerce of the United States, in which case the venture will be judged by rules applying domestically. Joint ventures have been held illegal in a number of international cartel cases . . ., but the joint venturers there went down as part of larger illegal schemes and involved dominant enterprises.[36]

The law indeed affords American firms considerable discretion in the structuring and conduct of their export operations. Moreover, explicit protection is provided by the Webb-Pomerene Act for certain joint-sale arrangements involving goods, wares, and merchandise.[37] The main utility of this statute has been in its application to sales abroad of primary products where United States exporters have enjoyed some monopoly power. Here American firms found it worthwhile to create a genuine export cartel. Webb-Pomerene has not proven particularly useful as a joint-selling tool for highly technical or differentiated products—the most important of our national exports—since each American firm has wished to push its own distinct product rather than to undertake a joint effort for the benefit of all.

Even under the Sherman Act, American exporters of goods and services enjoy wide latitude in how they structure their arrangements and carry on their business. Of course, the Sherman Act may be

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36. *Export Expansion Hearings, supra* note 1, at 815.
37. Webb-Pomerene Act § 40, 40 Stat. 516-18, 15 U.S.C. §§ 61-65 (1970).

applied to foreign arrangements which impose substantial limitations on re-export back into the United States of the goods exported abroad, or which prevent foreign firms (*e.g.*, joint venture partners) from themselves exporting into the United States market. Generally, such restraints would be examined under the rule of reason. The question here concerns the spillover effect into the American market and, where such effect is significant, the restriction should be struck down. Where it is not significant, it may qualify if an ancillary restraint to a legitimate venture. To give broader antitrust protection would be to make the American consumer subsidize exports of our firms by paying noncompetitive, or less competitive, prices here in the United States.

There is one other relatively minor caveat to the general liberality of American antitrust law with respect to exports. That concerns exports financed by the United States Government and reserved to American suppliers. Thus, in the 1968 *Concentrated Phosphate* case,[38] the Supreme Court held that a Webb-Pomerene export cartel could not be used in a foreign fertilizers sale to Korea financed under the American A.I.D. program. The Court noted that the main Congressional motive behind the Act was to ". . . increase American exports by depriving foreigners of the benefits of competition among American firms, without in any significant way injuring American consumers. . . ."[39] In this case, the Court stressed that the particular market (*i.e.*, A.I.D.-financed fertilizer) was reserved to American suppliers by law and that, therefore, particular transactions did not come within the scope of the statute. "The major impact of allowing the combination appellees desire would not be to encourage American exports; it would be to place the burden of noncompetitive pricing on the shoulders of the American taxpayer. . . ."[40]

Somewhat related is *Pacific Seafarers, Inc. v. Pacific Far East Lines, Inc.*, decided by the D.C. Circuit earlier the same year.[41] This case involved a conspiracy among the members of a conference of American-flag lines to drive the non-conference plaintiff line off the route for transportation of fertilizer from Viet Nam to Korea. The cargoes were financed by A.I.D. and the business was reserved by law to U.S.-flag carriers. However, since only services were involved there was not even an arguable Webb-Pomerene exemption. The Court of Appeals re-

38. United States v. Phosphate Export Assn., 393 U.S. 199 (1968).
39. *Id.* at 208.
40. *Id.* at 209.
41. 404 F.2d 804 (D.C. Cir. 1968).

jected defendant's contention that the commerce in question was not in the reach of the Sherman Act. The court found that carriers "in participating in the market of supplying the service of transportation in United States-flag vessels, were engaged in foreign commerce of the United States."[42] In essence, the court found the parties were engaged in the export of U.S. services.

> [S]ince there is an identifiable, distinctive market for American-flag shipping service where the American characteristic is dominant—a market defined as involving the transportation of A.I.D.-financed cargoes, which has a definite nexus with significant interests of the United States—the Sherman Act is applicable to a conspiracy to exclude newcomers from the trade.[43]

Earlier the court had indicated:

> It may be assumed that, as a matter of construing Congressional intent, the Sherman Act has no application where the market involved consists of shipping services between two foreign ports, without any American characteristic, and the only American aspect is that one or some of the persons competing in the transportation market is offering American-flag ships. . . .[44]

I find *Concentrated Phospate* and *Pacific Seafarers* to be rather narrow—and wise—exceptions to the general rule. Where the U.S. Government is financing the transactions involved and reserving the business to U.S. firms, we have no national interest in having American firms restrain commerce in that area.

Finally, in the export area, there may be some special problems posed by the activities of foreign governments. This subject is discussed in a succeeding section. Suffice it to say, however, that where a foreign government requires an American firm to do something that would otherwise be illegal under the antitrust laws of the United States, no antitrust violation follows.

V

COMPETITION AND CRITICISM

This twofold approach—emphasizing domestic compensation and competitive export opportunities—has been criticized from both sides. Some feel that it leaves a wider role for antitrust than is "realistic" in the modern world. Others think it assumes too narrow an antitrust role.

The first group would generally like to roll back antitrust, even at the

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42. *Id.* at 811.
43. *Id.* at 816.
44. *Id.*

price of significant spillover effects in the domestic market. This approach is typified by a speech which former Treasury Secretary Connally gave before the Antitrust Section of the American Bar Association in April 1973. He treated antitrust as an historical relic, left over from the quiet horse-and-buggy days of the 1890's. "The world in [*sic*] changing, and we must change with it." These changes, he argued, dictate "substantial amendment" to our antitrust laws today.[45] He saw American firms as being inhibited by a too vigorous application of what he regarded as outdated laws. Mr. Connally did not propose any precise reforms, but he clearly seemed to favor broad authority for American firms to enter into agreements which would in any way promote exports, and he opposed any antitrust monopoly or merger cases which might limit exports in any way.

Others have been less rhetorical, but have still generally favored broad antitrust exemptions. Thus, the U.S. Chamber of Commerce has recently urged antitrust exemptions

> . . . which would effectively and fully place American exporters and overseas contractors on a fair and comparable competitive basis with foreign sellers and contractors competing in world markets. Alternatively, the Congress should adopt laws exempting American exporters and overseas contractors from U.S. antitrust laws insofar as their activities are limited to operations designed to increase the volume of American exports . . . .[46]

The Chamber's report seems to assume a much broader application of the U.S. antitrust laws to overseas operations than has in fact been the case. As the Department of Justice put it in responding, "the United States is quite lenient toward joint foreign business activity."[47] If the Chamber wants American firms operating overseas to be able to enter into broad international cartels (and this is not wholly clear from the report), then such a policy is bound to have a serious impact on our domestic consumer interests. This is true even if such a cartel could be shown as "designed to increase the volume of American exports." Similarly, coercive conduct designed to drive an American competitor out of an export market (as in *Pacific Seafarers*) hardly seems to further our exporting interest.

Such critics as former Secretary Connally and the Chamber of

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45. BNA ANTITRUST & TRADE REG. REP. No. 609, A-4 (April 17, 1973).

46. U.S. Chamber of Commerce, Antitrust Task Force on International Trade and Investment, *Final Report on U.S. Antitrust and American Exports* 3 (1974). The report says that it is assuming the "continued application of each country's own antitrust laws to *all competitors,* foreign and domestic, operating in any country's own domestic markets."

47. Letter from Assistant Attorney General Kauper to Arch N. Booth, reprinted in BNA ANTITRUST & TRADE REG. REP. No. 663, F-1 (May 14, 1974).

Commerce force us to ask the hard economic questions. Do we want less competitive domestic markets on the theory that American consumers should subsidize export opportunities? Do we want export cartels even if they have a substantial anticompetitive spillover into the domestic market? Do we really think that America will lead the world in developing new products, services and delivery systems if our large and vital national market is walled off from the rest of the world? Unless we are willing to answer those questions in the affirmative—which I am not—we must look to antitrust as an affirmative tool of continuing importance. Maintaining our competitiveness here is vital to our standard of living at home and to our place in the world.

The critics on the other side say that the application of antitrust argued for here does not go far enough. They would argue for a broader application of our antitrust laws to situations overseas which neither directly affect our home markets or our export opportunities. A leading member of this group is Dean James A. Rahl of the Northwestern University Law School.[48] He disagrees both on policy and legal grounds. On the policy level, he disagrees with the view outlined above that:

> Foreign trade and foreign markets . . . should be viewed differently from domestic problems—in our own self-interest, and because it is not the business of Congress to concern itself with restraints inflicted by Americans upon foreigners abroad. . . .[49]

He suggests instead that:

> [It] would not be so strange for Congress to be concerned with what our businesses do to foreigners. If we are concerned with warfare and crime carried on by Americans abroad, we might reasonably be concerned with the infliction of economic damage abroad by conduct considered illegal at home.[50]

The answer to this, I believe, is that it misses the real world. Most countries provide antitrust exemptions for export activities (as we do ourselves with the Webb-Pomerene Act), and governments take all kinds of frequently highly anticompetitive actions to promote their nation's exports. Some also take anticompetitive measures to protect their producers (which has the consequence of denying their consumers the benefit of import competition!). We do the same in some areas.

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48. *See* Address by James A. Rahl, "American Antitrust and Foreign Operations: What is Covered?", Corporate Counsel Institute, Northwestern University Law School, Oct. 3, 1973, 8 CORNELL INT'L L.J. 1 (1974).
49. *Id.* at 8-9.
50. *Id.* at 9.

This world is thoroughly documented in the Peterson study, and it exists, like it or not. It seems to serve little analytic purpose to equate the international business world of hard-nosed competition and protectionism with bombing Cambodian villages. Moreover, nothing prevents a foreign government, if it chooses, from applying its own antitrust laws to the activities of foreign (including American) enterprises which allocate markets or fix prices in that country. In other words, there is no reason why the European Common Market should not treat an American Webb-Pomerene association as an illegal price fixing conspiracy. Nor is there any reason why the United States should not treat a European export cartel the same way under the Sherman Act. This approach has great merit over what one might call vague internationalism: it throws the burden of enforcing antitrust law, and protecting consumers, on the governments of the affected consumers. Government rarely works effectively unless it has an affirmative interest, and enforcement in this area is no exception.

Dean Rahl's second criticism might be labelled "legal." In Rahl's words:

> Personally, I would stick to what I consider to be the only reliable guide to the scope of the Act—that is, that the Act is concerned with restraints of competition which occur in, or which substantially affect any of the commerce, interstate or foreign, which Congress regulates. This is what I think the Supreme Court decided in the *Timken* case, and it is what antitrust policy is all about. From there on out, it is a question of the particular substantive rules of effect on competition to be applied to determine the ultimate legality of the conduct.[51]

The simple answer to this point is that it is *not* what was decided in the *Timken* case—nor in any other case that I can find. At the very least, it implies a great deal less flexibility in the Sherman Act than is reasonably present in it.

In *Timken,* the Supreme Court was dealing with an American firm which was overwhelmingly dominant in its field. The company controlled 70-80 percent of the American output of tapered roller bearings, and its 1947 sales were over $77 million. These bearings competed for many uses with other antifriction bearings and, in the broader total market, the defendants still accounted for some 25 percent of all United States sales.[52] The defendant was charged with a long-term international allocation of markets with a British and a French firm. Under these agreements, each of the parties had allocated trade territories, fixed prices on sales into each other's territories, cooperated

51. *Id.* (citation omitted).
52. 341 U.S. at 603-04 (Reed, J., concurring).

to protect each other's markets and to eliminate outside competition, and participated in specific cartel arrangements to restrict imports to and exports from the United States.[53] The defendant American firm held 30 percent of the outstanding stock of the British company and 50 percent of the outstanding stock of the French company.

On these facts, the defendant made the unsuccessful argument that the three firms were a single "joint venture" or enterprise, and hence exempt from the antitrust laws. What the Court was left with, having dealt with the affiliation question, was a broad world-wide cartel of leading firms engaged in selling an important product amid elaborate arrangements to ensure noncompetition. The defendants did argue that ". . . the Sherman Act should not be enforced in this case because what appellant has done is reasonable in view of current foreign trade conditions."[54] The Court responded,

> The argument in this regard seems to be that tariffs, quota restrictions and the like are now such that the export and import of antifriction bearings can no longer be expected as a practical matter; that appellant cannot successfully sell its American-made goods abroad; and that the only way it can profit from business in England, France and other countries is through the ownership of stock in companies organized and manufacturing there. This position ignores the fact that the provisions in the Sherman Act against restraints of foreign trade are based on the assumption, and reflect the policy, that export and import trade in commodities is both possible and desirable. Those provisions of the Act are wholly inconsistent with appellant's argument that American business must be left free to participate in international cartels, that free foreign commerce in goods must be sacrificed in order to foster export of American dollars for investment in foreign factories which sell abroad. Acceptance of appellant's view would make the Sherman Act a dead letter insofar as it prohibits contracts and conspiracies in restraint of foreign trade. If such a drastic change is to be made in the statute, Congress is the one to do it.[55]

What the Supreme Court did here was to reject a very broad argument in favor of cartels—a point on which it was clearly correct. What the Court did not do was to say that all domestic antitrust rules are going to be applied in precisely the same way in the international field. As the Court stressed, the Sherman Act does reflect the policy that export and import trade in commodities is both possible and desirable. The reality is that the defendant over-argued its case. If in fact it was impossible for it to sell its bearings in foreign markets without manufacturing there, then the elaborate territorial allocation scheme was not necessary. Even if it could not sell its bearings in

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53. *Id.* at 595-96.
54. *Id.* at 599.
55. *Id.*

certain foreign markets, this was not a justification for a private arrangement that prevented others from selling their bearings in the American market. The *Timken* decision never explicitly stated that the cartel scheme at issue was per se illegal, let alone that all domestic per se rules would be applied in a foreign context. In fact, as I have argued, such a naked territorial allocation scheme designed to isolate the United States from outside competition should be treated as per se illegal under the *Topco* standard. The impact on the domestic American market is fundamental and immediate, especially where a leading competitor is involved.

Nor is the issue one of jurisdiction. In an early antitrust case, *American Banana v. United Fruit Co.,*[56] the Supreme Court held fairly broadly that acts done abroad were subject only to the laws of the place where they were committed, even if they injured foreign commerce. Subsequent antitrust cases have retreated from this broad statement of territoriality.[57] The full sweep of the reversal is seen, for example, in Judge Hand's celebrated *Alcoa* decision in 1945. He stated that "it is settled law . . . that any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends. . . ."[58] This very broad language had caused some perhaps appropriate concern. Suffice it to say, however, that it is no longer the place of the act that is key. When the act or agreement can be shown to have a direct effect on markets within the United States, our law should reach it—and this is especially so where the act was clearly intended to affect our market. Of course, under our traditional jurisprudence, it is necessary to have personal jurisdiction over the party committing the act.[59] This normally presents no problem with respect to the subsidiary of an American corporation, let alone the corporation itself. It may, of course, pose a problem where the potential defendants are foreign corporations which do no business in the United States.

Thus, in the end, we are not dealing with a legal issue of jurisdiction, but of substance. The ultimate question is whether American antitrust laws, particularly the Sherman Act, are sufficiently broad to allow the application of more flexible rules to foreign transactions. The answer, I submit, is "yes." Kingman Brewster makes this case very clearly and

56. 213 U.S. 347 (1909).
57. *See* K. Brewster, Antitrust and American Business Abroad 65 (1958).
58. United States v. Aluminum Co. of America, 148 F.2d 416, 443 (2d Cir. 1945).
59. *See* International Shoe Co. v. Washington, 326 U.S. 310 (1945).

analytically in his treatise.[60] He indicates that a naked economic restraint isolating the United States should not be treated any differently than a naked territorial restraint within the country. The principal area in which a different rule applies is where a restraint which is imposed on export sales neither has nor is intended to have direct impact on the American market. For example, an agreement between an American firm and a British firm that the American firm will sell only in South Africa and the British firm will sell only in Australia may restrain American exports to the latter and hence, is arguably within the jurisdiction of the Sherman Act; beyond that, competition within Australia or within South Africa is a matter for their respective governments rather than our own. On the other hand, an agreement between the British firm and the American firm that the British firm will not sell in the United States and the American firm will not sell abroad raises an immediate and direct United States interest, which we should protect by strict antitrust enforcement.

VI

THE AWKWARD PRESENCE OF GOVERNMENTS

National governments are especially important in the international business realm. They are conspicuously active in organizing producer cartels for primary products; they sometimes impose anticompetitive restrictions on foreign firms and products; and in communist countries, they operate state trading monopolies for internal distribution of goods and services.

Government activity can create special antitrust problems. For example, long-term exclusive arrangements between an American firm and a state trading monopoly may necessarily exclude all other American firms from that market. The antitrust answer to these problems turns on the factual realities of the situation. Where the foreign government, as sovereign, *requires* an American firm to engage in some activity which would otherwise be offensive to our antitrust laws, that is the end of the antitrust inquiry. The same is not true where the American firm has been the *moving force* in getting the anticompetitive contractual restrictions adopted—or has discretion in how they are administered.

The law in this area can be traced to the Supreme Court's 1943

60. K. Brewster, *supra* note 57, at 79-96.

decision in *Parker v. Brown.*[61] There, the Supreme Court held that a California state scheme for regulating raisin marketing was on its facts exempt from the antitrust laws.

> The state in adopting and enforcing the prorata program made no contract or agreement and entered into no conspiracy in restraint of trade . . . , but as sovereign, imposed the restraint as an *act of government* which the Sherman Act did not undertake to prohibit.[62]

This policy is broadly applicable in the international field.

The other side of the coin is illustrated by the Supreme Court's 1962 decision in *Continental Ore v. Union Carbide.*[63] A defendant subsidiary of an American company had been appointed during the war to act for the Canadian Metals Controller as the sole buyer for Canada of a particular metal, and it had used its position to favor its own interests and to squeeze the plaintiff (another American firm) out of the Canadian market. The Supreme Court held that this was actionable as part of an alleged attempt to monopolize U.S. foreign commerce. The Court noted that the defendant's control ". . . was *aided* by discriminatory legislation of the foreign country . . ." but that the action was "taken within the area of its *discretionary powers* granted by the Metals Comptroller. . . ."[64]

To summarize, that which is *required* by a foreign government is exempt from antitrust liability; but that which the foreign government simply affords one the opportunity to do, may or may not be illegal, depending upon its effect on American commerce.

CONCLUSION: THE NEED FOR REASON AND FLEXIBILITY

The world of international trade is competitive and complex. It is also changing. Such circumstances offer a constant temptation to unwise policies—including antitrust repeals and protectionist devices. We should resist that temptation, because those policies are expensive to us as a nation of consumers, and because they fail to come to grips with the hard issues of skill and efficiency.

We must face up to the complexities of the real world. In fact, the antitrust laws are conducive to such pragmatism.

The draftsmen of the Sherman Act created a statute of great breadth and flexibility (the same is true of the amended Clayton Act § 7). The

61. 317 U.S. 341 (1943).
62. *Id.* at 352 (emphasis added).
63. 370 U.S. 690 (1962).
64. *Id.* at 706 (emphasis added).

Sherman Act has worked well because generations of prosecutors and judges have given it specificity in dealing with particular types of conduct in the ever-changing world of business. Some kinds of conduct have been found to be so generally harmful as to be deemed per se illegal, without actual proof of anticompetitive impact or other public harm. Other kinds of conduct have been subjected to full factual inquiry in both section 1 and section 2 cases.

Of course, the line has been close in certain cases—particularly joint business ventures—as to whether particular conduct should be subjected to a per se rule or not. Crucial in this determination are the particular circumstances of the case and the attitude of the courts.[65] To this extent, there is uncertainty in the law—and there always will be—for, by definition, close cases are uncertain in their effect as precedent. One alternative is to have inflexible rules, to be applied without regard to real facts or consequences (as we have in parts of the Internal Revenue Code and in various forms of absolute tort liability). The other alternative is to have no law at all. The proponents of absolute antitrust exemption for all export activity are clearly asking for the latter. Such a solution does eliminate legal uncertainty, but at an unacceptable price to our consumer and business interests.

In fact, antitrust has been used relatively infrequently against foreign business operations, and most of the actual use has been in "easy" cases involving straight old-fashioned cartels. The Supreme Court has not locked us into inflexible rules in the broad international business area, and it has given no indication that it would do so.

In these circumstances, what is needed is rational argument, not irrational recrimination; facts not footnotes; and a sense of our national public interest as competitive buyers and sellers and international traders. With these, we can in fact protect our consumers at home and allow our producers the fullest capability to compete abroad. That which would be a clearly illegal restraint of trade in the domestic market, can be a rational attempt by a group of American firms to improve their export trade position in the face of stiff foreign competition abroad; it may even promote competition in the foreign market. At the other extreme, the group agreement may purport to improve export competitiveness, yet in reality produce clear adverse effects on

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65. *E.g.*, United States v. Topco Associates, 405 U.S. 596 (1972); Worthen Bank & Trust Co. v. National BankAmericard, 485 F.2d 119 (8th Cir. 1973), *cert. denied*, 415 U.S. 918 (1974).

competition among American firms at home and thus, ultimately, on American consumers. Between the two extremes necessarily lies a "grey area" subject to a "rule of reason"—even in situations which would call for strict application of per se rules in a domestic setting.

In the final analysis, antitrust law is basic consumer protection legislation. We should not weaken *our* law as a protection for *our* consumers, even in the name of a fashionable issue like "export promotion." Rather, we should apply the law firmly and rationally to all who limit competition within our markets. By the same token, we should expect that other nations and communities will use *their* antitrust laws to protect *their* consumers against those who restrain competition in *their* markets.