

# Northwestern Journal of International Law & Business

---

Volume 1  
Issue 1 *Spring*

---

Spring 1979

## Is Somebody "Crying Wolf"?: An Assessment of Whether Antitrust Impedes Export Trade

John Will Ongman

Follow this and additional works at: <http://scholarlycommons.law.northwestern.edu/njilb>

 Part of the [International Law Commons](#), [International Trade Commons](#), [Law and Economics Commons](#), [Legislation Commons](#), and the [Politics Commons](#)

---

### Recommended Citation

John Will Ongman, *Is Somebody "Crying Wolf"?: An Assessment of Whether Antitrust Impedes Export Trade*, 1 *Nw. J. Int'l L. & Bus.* 163 (1979)

This Article is brought to you for free and open access by Northwestern University School of Law Scholarly Commons. It has been accepted for inclusion in Northwestern Journal of International Law & Business by an authorized administrator of Northwestern University School of Law Scholarly Commons.



## Is Somebody Crying "Wolf"?: An Assessment of Whether Antitrust Impedes Export Trade

*John Will Ongman\**

*The impact of the United States antitrust laws on American exports has in recent years become a controversial issue, especially in view of the increasing U.S. trade deficit. In this article, Mr. Ongman employs economic analysis to determine the desirability of a protectionistic Sherman Act. He concludes that such a policy, resulting in foreign retaliation and spillover into the domestic market, would be unwise.*

Although the economic world is interdependent, national chauvinism in international trade still abounds. World leaders solemnly pledge to defuse protectionist pressures in trade.<sup>1</sup> Prestigious private conferences are convened to minimize the effects of parochial views.<sup>2</sup> Never-

---

\* Presently associated with Sidley & Austin, Chicago, Illinois; member, Illinois Bar; J.D., 1976, Northwestern University. The author would like to acknowledge and thank Professor James A. Rahl, Northwestern University School of Law, for his thoughtful criticisms of the earlier drafts of this article.

<sup>1</sup> At the Rambouillet Economic Summit, concluded Nov. 17, 1975, the leaders of the United States, France, West Germany, Japan, Britain, and Italy "vow[ed] to avoid protectionism and to accelerate multinational trade negotiations." Ryan, *Goal of 6 Industrial Nations: Avoid Protectionism, Inflation*, J. COM., Nov. 18, 1975, at 1, col. 6. See *Text of Statement After 6 Nation Economic Parley*, N.Y. Times, Nov. 18, 1975, at 14, col. 1.

Finn Olav Gundelach, a member of the Commission of the European Economic Community, has made a more detailed description of this commitment:

Nevertheless, in this matter there is an important—indeed, a crucial—distinction to be made between protectionist pressures and protectionist measures. So far both in the community and in the United States those responsible for deciding policy have on the whole been able to avoid the adoption of protectionist measures. But we are all facing great and mounting pressures. Our task is to ensure that these pressures are not translated into concrete measures of protection. In this common task we are all responsible—both the Community and its member states, and the United States itself.

The moral we must surely draw from the present situation is that in a period of exceptional economic difficulty governments everywhere must be especially active not only in resisting protectionist pressures but also in explaining to their citizens exactly why the protectionist soft option must be resisted.

Address by Finn Olav Gundelach, Member of the Commission of the European Community, 62d Nat'l Foreign Trade Convention, New York, N.Y. (Nov. 17, 1975).

<sup>2</sup> The 62d National Foreign Trade Convention meeting in N.Y., Nov. 17-18, 1975, recognized evidence of budding protectionism. In a general policy communiqué, it was noted that:

International cooperation and coordination of policy responses by the major nations are

theless, in times of economic slump, countries look homeward. Indeed, the Trade Act of 1974, while ostensibly a move to establish the free trade principle in U.S. foreign policy, has been viewed by some as a "vener of free trade platitudes over a hard core of home market protectionism."<sup>3</sup>

Accompanying this protectionist mood is the view that American export traders "must take advantage of every legitimate technique to win export orders in third markets" just as their European and Japanese competitors do.<sup>4</sup> This position is bolstered by a current trend in the United States towards trader nation status.<sup>5</sup> This trend exists despite America's vast domestic market. Consequently, export expansion programs are being given renewed attention.<sup>6</sup> These programs seek to reduce the barriers to American export trade.

One of the factors most often claimed to be a barrier to American export trade has been the extraterritorial application of American anti-trust law.<sup>7</sup> Commentators have given continuing attention to the areas

---

urgently required to meet the pressures both of economic recession and continuing inflation in world markets, and to deal with continuing balance of payments strains resulting from the sharp escalation of oil prices. Such coordination of effort is essential to avert the danger of a "beggar-thy-neighbor" spiral of protectionism which would only result in economic retrogression for all nations. The Council calls for continued action through the Organization for Economic Cooperation and Development (OECD) and the International Monetary Fund (IMF) in securing agreement for avoidance of unilateral restrictive trade measures as a means of coping with balance of payments deficits. It calls for the sustained effort which will be required in the GATT negotiations, and in other forums, to overcome the difficulties and conflicts which can impair the prospects for achieving significant liberalization of world trade and updating of trading rules to fit modern economic reality.

Policy Declaration of the National Foreign Trade Council, Inc. at 29-30 (Nov., 1975). Crittenden, *Warning Sounded on Protectionism*, N.Y. Times, Nov. 18, 1975, at 49, col. 8.

<sup>3</sup> Address by Will E. Leonard, Chairman, U.S. International Trade Commission, 62d National Foreign Trade Convention, New York, N.Y. (Nov. 17, 1975). See generally Dale, *How the New Trade Law May Backfire*, N.Y. Times, Oct. 26, 1975, § 3, at 2, col. 1.

<sup>4</sup> Address by Reginald H. Jones, Chairman and Chief Executive Officer, General Electric Company, 62d National Foreign Trade Convention, New York, N.Y. (Nov. 17, 1975) [hereinafter cited as Jones Speech].

<sup>5</sup> If one considers foreign investment as an exported "product" and income generated on this investment as the sale "price", total United States exports of goods and services amounted to \$140 billion in 1974 or about 10% of GNP. In 1971, the corresponding figures were \$66 billion and 6% of GNP. Nearly 13% of total manufacturing output was exported in 1974. During 1971-74, exports grew at a rate 2.5 times the rate of growth of the GNP. Jones Speech, *supra* note 4.

<sup>6</sup> See generally Mullen, *Export Promotion: Legal and Structural Limitations on a Broad United States Commitment*, 7 LAW & POL'Y INT'L BUS. 57 (1975).

<sup>7</sup> In the past 15 years a number of congressional hearings have developed a rich collection of materials in the international antitrust field. The various hearings repeatedly used in this article are: *International Aspects of Antitrust Laws Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary*, 93d Cong., 1st & 2d Sess. (1973-74) [hereinafter cited as 1974 *International Antitrust Hearings*]; *Export Expansion Legislation Before the Subcomm. on Foreign Commerce and Tourism of the Senate Comm. on Commerce*, 93d Cong., 1st Sess., pts. 1 & 2 (1973) [hereinafter cited as 1973 *International Antitrust Hearings*]; *Hearings on S. 2754, Export Expansion*

where businessmen repeatedly object that American efforts are hamstrung by the broad scope of American antitrust enforcement: export trade,<sup>8</sup> foreign licensing,<sup>9</sup> consortia and joint ventures in manufacturing abroad,<sup>10</sup> overseas acquisitions,<sup>11</sup> and East-West trade.<sup>12</sup>

This article will not analyze the application of the antitrust laws to the full range of foreign commercial activity engaged in by American business.<sup>13</sup> Rather, attention will be focused upon a single important issue: whether extraterritorial application of American antitrust laws does indeed impede American export trade in goods and services.

The issue of whether U.S. export trade is impeded by American

---

*Act of 1971 Before the Subcomm. on Foreign Commerce and Tourism of the Senate Comm. on Commerce, 92d Cong., 2d Sess. (1972) [hereinafter cited as 1972 International Antitrust Hearings]; International Aspects of Antitrust: Hearings on S. Res. 26 Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary, 90th Cong., 1st Sess. (1967) [hereinafter cited as 1967 International Antitrust Hearings]; International Aspects of Antitrust: Hearings on S. Res. 191 Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary, 89th Cong., 2d Sess., pt. 1 (1966) [hereinafter cited as 1966 International Antitrust Hearings]; Foreign Trade and the Antitrust Laws: Hearings on S. Res. 262 Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary, 88th Cong., 2d Sess., pt. 1 (1964) [hereinafter cited as 1964 International Antitrust Hearings].*

Antitrust has received much attention. However, as a trade barrier it may be much less important than other non-tariff trade barriers. *1973 International Antitrust Hearings* at 297. For a good overview of the complexity of international trade which shows that antitrust may be a relatively minor factor in the overall assessment of international trade, see SUBCOMM. ON INT'L TRADE OF THE SENATE COMM. ON FINANCE, 93D CONG., 2D SESS. EXECUTIVE BRANCH GATT STUDIES, (Comm. Print 1974), and SENATE COMM. ON FINANCE, 93D CONG., 2D SESS., SUMMARY AND ANALYSIS OF H. R. 10710, THE TRADE REFORM ACT OF 1973 (Comm. Print 1974).

<sup>8</sup> See, e.g., Chapman, *Exports and Antitrust: Must Competition Stop at the Water's Edge?*, 6 VAND. J. TRANS. L. 399 (1973).

<sup>9</sup> See, e.g., Davidow, *Antitrust and International Patent Licensing*, 43 ANTITRUST L.J. 530 (1974); Van Cise, *Our Antitrust Laws and International Licensing*, in PRIVATE INVESTORS ABROAD—PROBLEMS AND SOLUTIONS IN INTERNATIONAL BUSINESS IN 1974 (1974).

<sup>10</sup> See, e.g., Donovan, *Joint Ventures*, 43 ANTITRUST L.J. 563 (1974); Holley, *United States Antitrust Laws as They Affect Investments Abroad*, in PRIVATE INVESTORS ABROAD—PROBLEMS AND SOLUTIONS IN INTERNATIONAL BUSINESS IN 1974 (1974).

<sup>11</sup> See, e.g., W. FUGATE, FOREIGN COMMERCE AND THE ANTITRUST LAWS 330-53 (2d ed. 1973).

<sup>12</sup> For an introduction to the problem of East-West trade and its antitrust aspects, see *1974 International Antitrust Hearings*, *supra* note 7, at 110-45 (testimony of Samuel Pizar). The Commerce Department has sponsored discussions and studies in the area of East-West trade. J. Miller & P. Marer, *Issues of Antitrust in East-West Industrial Cooperation* (August 19, 1975) (discussion paper prepared for a round table discussion at the Commerce Department).

<sup>13</sup> One of the most valuable and comprehensive volumes in the field is W. FUGATE, FOREIGN COMMERCE AND THE ANTITRUST LAWS (2d ed. 1973) which includes an extensive table of sources. *Id.* at 577-93. For a useful overall discussion of the extraterritorial scope of the American antitrust laws, see ANTITRUST LAW SECTION OF THE ABA, ANTITRUST LAW DEVELOPMENTS 354-90 (1975). For a comparative study of extraterritorial application of antitrust laws, see EXTRATERRITORIAL APPLICATION OF NATIONAL LAWS WITH SPECIAL REFERENCE TO ANTITRUST LAWS, INT'L B.J., Nov. 1974, at 51-86. See also, COMMON MARKET AND AMERICAN ANTITRUST: OVERLAP AND CONFLICT 50-116 (J. Rahl ed. 1970).

antitrust laws has been vigorously debated. The advocates of the "adverse effect" position have complained principally of an undue drag on export trade because of the extraterritorial application of the Sherman Act.<sup>14</sup> They claim that the American businessman is disadvantaged because other developed countries impose relatively mild antitrust sanctions on their nationals. Government-backed export cartels, receiving such subsidies as special rediscount rates, currency convertibility guarantees and insurance against credit and political risks, are said to pose major obstacles to American export trade. In accordance with the "adverse effect" position, a number of proposals to limit the application of the Sherman Act have been offered in the export trade context.<sup>15</sup> These

---

<sup>14</sup> Nearly all of the extraterritorial applications of antitrust law in areas relevant to export trade have been under the Sherman Act. 15 U.S.C. §§ 1-7 (1976).

The Robinson-Patman price discrimination prohibition applies only where there are goods sold "for use, consumption, or resale" in the United States or somewhere within its territories. 15 U.S.C. § 13 (1976). No decided cases have been found in the export area probably because only an exotic effect from a complex transaction would allow the Robinson-Patman Act to apply to export trade.

The broker allowances and services sections of the Robinson-Patman Act, 15 U.S.C. § 13(C) (1976), do not have a limitation to the territory of application while § 3 of the Clayton Act dealing with exclusive dealing arrangements, is territorially limited to the United States. 15 U.S.C. § 14 (1976). See *Baysoy v. Jessop Steel Co.*, 90 F. Supp. 303 (W.D. Pa. 1950); *Canadian Ingersoll-Rand Co. v. D. Loveman & Sons, Inc.*, 227 F. Supp. 829 (N.D. Ohio 1964).

Finally, § 5 of the Federal Trade Commission Act may reach conduct prohibited by the Sherman Act and the Clayton Act as well as incipient violations of either act. 15 U.S.C. § 45 (1976). The FTC Act's jurisdictional clause, 15 U.S.C. § 44 (1976) is comparable to the Sherman Act's, 15 U.S.C. §§ 1-2 (1976). However, the application of the FTC Act to nondomestic transactions has been exceedingly rare. *Branch v. FTC*, 141 F.2d 31 (7th Cir. 1944). See *McManis, Questionable Corporate Payments Abroad: An Antitrust Approach*, 86 YALE L.J. 215, 239-49 (1976).

Thus, the Sherman Act will continue to be the most important and the broadest applying antitrust law in the export trade field. See COMMON MARKET AND AMERICAN ANTITRUST: OVERLAP AND CONFLICT 50-54 (J. Rahl ed. 1970).

<sup>15</sup> The Williams Commission Report calls for a broadening of the Webb-Pomerene exemption. However, the Report is totally devoid of analysis in the antitrust area. "No doubt it is mere surmise, but it is difficult to suppress the notion that not more than a handful of the members and staff of the Commission appreciated the background and significance of the recommendations on Webb-Pomerene." Metzger, *American Foreign Trade and Investment Policy for the 1970's: The Williams Commission Report*, 66 AM. J. INT'L L. 537, 545 (1972).

Arthur Dean believes that there are real problems in international antitrust but does not provide analysis. *1964 International Antitrust Hearings*, *supra* note 7, at 96. Similarly, Peter Peterson stated without sufficient analysis that the antitrust laws "may contain inhibiting disadvantages to many potential exporters." P. PETERSON, A FOREIGN ECONOMIC PERSPECTIVE 36 (1972).

In general, most advocates of retention sponsor exemption on the theory that while it may not be doing any demonstrable good, it is also not doing any demonstrable harm. In such a case, they argue that the dollars deriving from Webb-Pomerene Associations are enough to warrant retention. *1972 International Antitrust Hearings*, *supra* note 7, at 242 (statement of Miles Kirkpatrick). ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS, REPORT OF THE COMM. 113, 114 (1955); *1967 International Antitrust Hearings*, *supra* note 7, at 157-58 (statement of Joseph Barr, Under Secretary of the Treasury).

Only the trade associations assert a positive need for an exemption covering the international

proposals generally supplement and augment the exemption from the antitrust laws that the Webb-Pomerene Act gives for qualified horizontal export associations.<sup>16</sup>

On the other hand, many free trade advocates have argued that antitrust exemptions in export trade are not warranted and are in fact dangerous. Proponents of this position point out the failure of the Webb-Pomerene exemption to expand exports. They are concerned that broadened horizontal exemptions might permit anti-competitive spillover in the domestic market, to the detriment of American consumers. Accordingly, they would limit or repeal antitrust exemptions in export trade.<sup>17</sup>

---

scope of American antitrust law. See ANTITRUST TASK FORCE ON INTERNATIONAL TRADE AND INVESTMENT OF THE CHAMBER OF COMMERCE OF THE UNITED STATES. FINAL REPORT ON U.S. ANTITRUST LAWS AND AMERICAN EXPORTS (Feb. 26, 1974), reprinted in 1974 *International Antitrust Hearings*, *supra* note 7, at 163; NATIONAL ASSOCIATION OF MANUFACTURERS, INTERNATIONAL ECONOMIC AFFAIRS DEPARTMENT, THE INTERNATIONAL IMPLICATIONS OF U.S. ANTITRUST LAWS: AN ISSUE ANALYSIS OF GLOBAL ECONOMIC REALITY (1974), reprinted in 1974 *International Antitrust Hearings* at 1416.

<sup>16</sup> See 15 U.S.C. § 61 (1976). See generally FTC, ECONOMIC REPORT ON WEBB-POMERENE ASSOCIATIONS: A 50-YEAR REVIEW (1967).

<sup>17</sup> The calls for repeal or limitation of antitrust exemptions in export trade have come from a wide base. The Stigler Task Force called for repeal of Webb-Pomerene because it is antithetical to the underlying theory of the Sherman Act and because of the danger of domestic spillover. TASK FORCE ON PRODUCTIVITY AND COMPETITION, REPORT OF THE TASK FORCE, reprinted in 115 CONG. REC. 15932, 15937 (1969). Thomas Kauper, the former head of the Antitrust Division at the Dep't of Justice, does not favor antitrust exemptions unless a convincing showing can be made that firms presently are impeded by the antitrust laws. However, all the exhaustive efforts to uncover real impediments have had meager success. See note 164 *infra*. In light of EEC antitrust enforcement and the dynamics of international trade, the assumption that raising prices and restricting output will increase American export trade appears dubious. Address by Thomas E. Kauper, Ass't Attorney General, Dep't of Justice, Antitrust Division to N.Y. State B.A. (Jan. 24, 1973) reprinted in 5 TRADE REG. REP. (CCH) ¶ 50,160. See also Address by Keith J. Clearwaters, Special Ass't to the Ass't Attorney General, Dep't of Justice, Antitrust Division (May 4, 1973), reprinted in 5 TRADE REG. REP. (CCH) ¶ 50,169; Address by Donald I. Baker, Director of Policy Planning, Dep't of Justice, Antitrust Division (Jan. 24, 1973), reprinted in 5 TRADE REG. REP. (CCH) ¶ 50,161. As Baker put it:

To summarize, the United States should not pursue import policies which are blind to our domestic needs. Overt protectionism breeds the need for more protectionism. There is a sort of cost-push-protection spiral. Once protected, the domestic firm is even less likely to be able to hold its own against its most efficient foreign rivals—here or abroad. By contrast, competition—like exercise—enables one to play the game better on any field in any part of the world.

*Id. Cf. 1964 International Antitrust Hearings*, *supra* note 7, at 120 (statement of Lee Loevinger, former Ass't Attorney General in charge of the Antitrust Division, indicates that antitrust is often used as a smoke screen to veil business failure). Organized labor contends that the available evidence does not support the proposition that the antitrust laws are substantially hampering export trade. *Id.* at 138.

Sen. Hart, who chaired a number of international antitrust hearings, came to the conclusion that the allegations of injury to American business are without substance. He supports more vigorous enforcement of United States antitrust laws and was in favor of other countries more closely

Recently, the debate on the effect of the antitrust laws on export trade seems to have split the ranks of the Carter Administration. President Carter himself has launched a new export policy which includes a pledge to curb overly broad applications of the Sherman Act which "unnecessarily inhibit our firms from selling abroad."<sup>18</sup> President Carter referred particularly to the uncertain legal status of foreign joint ventures and stated that "this uncertainty can be a disincentive to exports."<sup>19</sup> Consequently, the President undertook several initiatives in an attempt to remedy this perceived disincentive.<sup>20</sup>

Meanwhile, the Carter Justice Department has shown a predilection for more activity in the international antitrust field. Attorney General Bell has warned multinational companies that the Justice Department will not hesitate to pursue antitrust violators beyond U.S. borders.<sup>21</sup> And John H. Shenefield, Assistant Attorney General in charge of the Antitrust Division, has reaffirmed the Department's commitment to extraterritorial enforcement of the antitrust laws.<sup>22</sup>

Plainly, the extraterritorial application of the Sherman Act to export trade is a matter of considerable uncertainty and confusion. This article attempts to provide a useful analytical framework for approaching the doubts over the appropriate scope of the Sherman Act's application to U.S. export trade.

---

following the competitive norm. *1972 International Antitrust Hearings, supra* note 7, at 247. Fugate agrees that Americans have more to gain than to lose by mutual agreements to give up export cartels. W. FUGATE, *FOREIGN COMMERCE AND THE ANTITRUST LAWS* 252 (2d ed. 1973).

A few commentators, although generally against the exemption, see it warranted in special cases. Stocking and Watkins would allow joint export associations for small companies with low market coverage. G. STOCKING & M. WATKINS, *MONOPOLY AND FREE ENTERPRISE* 561 (1951). Brewster generally supports repeal but leaves open the question whether exemptions could be granted "on an ad hoc basis in special situations" to industries which could show a real need to bargain collectively in the face of foreign restrictions. K. BREWSTER, *ANTITRUST AND AMERICAN BUSINESS ABROAD* 454-56 (1958).

<sup>18</sup> Excerpts from President Carter's Sept. 26, 1978 press conference *reprinted in* [July-Dec. 1978 Transfer Binder] *ANTITRUST & TRADE REG. REP.*, (BNA) No. 882, A-4, Sept. 28, 1978.

<sup>19</sup> *Id.* at A-5.

<sup>20</sup> The President instructed the Justice Department, together with the Commerce Department, "to clarify and explain the scope of the antitrust laws in this area, with special emphasis on the kinds of joint ventures that are unlikely to raise antitrust problems" and "to give expedited treatment to [business review] requests by business firms for guidance on international antitrust issues." *Id.* The President also appointed a business advisory panel to work with the National Commission for the Review of Antitrust Laws and Procedures. *See Wall St. J.*, Dec. 7, 1978, at 20, col. 3.

<sup>21</sup> *Wall St. J.*, Aug. 9, 1977, at 12, col. 3.

<sup>22</sup> *See* Interview with John H. Shenefield, [July-Dec. Transfer Binder] *ANTITRUST & TRADE REG. REP.* (BNA) No. 875, AA-1 to AA-8, Aug. 3, 1978 [hereinafter cited as Shenefield Interview].

AN OVERVIEW

*Horizontal Restraints of Trade*

It is clear that a horizontal restrictive business practice, which would be illegal if practiced wholly domestically, will not be countenanced merely because it occurs in export trade. Taking this premise as given, this article will demonstrate how restrictive business practices ostensibly aimed only abroad may, nevertheless, have adverse effects on domestic competition.

After showing the great danger of adverse effects on domestic competition from restraints supposedly aimed only at foreigners, the discussion will then address the ultimate policy question: whether purely foreign injuries—assuming such purity can exist—should find remedy under the Sherman Act. Some commentators have suggested that, as a matter of economic protectionism, the Sherman Act should not protect foreign buyers against horizontal restraints by American firms who collaborate in selling abroad when such restraints are only felt in foreign markets.<sup>23</sup> An opposing thesis is that American exporters who engage in market allocation, price fixing, boycotts, and other restraints on foreign buyers should be subject to Sherman Act regulation.<sup>24</sup>

Ought the Sherman Act be protectionist? This question is best explored by means of theory. The economics of export trade demonstrate that antitrust protectionism does not make economic sense. Armed with the knowledge that antitrust protectionism is counter-productive, an analysis of horizontal restrictions in export trade is offered, one that attempts to strike an appropriate mean between the application of domestic per se rules and the rule of reason to the export trade cases.

*Vertical Restraints of Trade*

Finally, attention will focus on vertical restraints. A normative jurisdictional model suggests that in the majority of the restrictive distribution practice cases, which principally occur within the foreign

---

<sup>23</sup> See, e.g., 1972 *International Antitrust Hearings*, *supra* note 7, at 808-09 (statement of Walker Comegys); Baker, *Antitrust and World Trade: Tempest in an International Teapot?*, 8 CORNELL INT'L L.J. 16 (1974); Speech by Treasury Secretary Connally before the Antitrust Section of the ABA, *reprinted in* ANTITRUST & TRADE REG. REP. (BNA) No. 609, A-4, April 17, 1973; K. Brewster, ANTITRUST AND AMERICAN BUSINESS ABROAD 82 (1958); 1964 *International Antitrust Hearings*, *supra* note 7, at 27 (statement of Corwin Edwards).

<sup>24</sup> See, e.g., Rahl, *American Antitrust and Foreign Operations: What is Covered?*, 8 CORNELL INT'L L.J. 1 (1974); Rahl, *A Rejoinder*, *id.* at 42. See also I VON KALINOWSKI, ANTITRUST LAWS AND TRADE REGULATION § 5.02 (1971); Hale & Hale, *Monopoly Abroad: The Antitrust Laws and Commerce in Foreign Areas*, 31 TEX. L. REV. 493 (1953).



market, the interests of the United States in extending the Sherman Act to these cases are less than those of the target country.

If the goods are supplied from a third country or from an American subsidiary in the target country, our separately developed jurisdictional model indicates that subject matter jurisdiction often does not exist.<sup>25</sup> But when the goods are supplied from the United States, subject matter jurisdiction can probably be maintained.<sup>26</sup> In addition, if the foreign subsidiary of an American firm participates in a restrictive distribution practice which cuts off exports by other American exporters to the foreign country, jurisdiction might well be found. Thus, this article will conclude with a brief analysis of the substantive law concerning restrictive distribution practices in the international context for those cases where subject matter jurisdiction can arguably be established.

HORIZONTAL RESTRICTIVE BUSINESS PRACTICES IN EXPORTING  
FROM THE UNITED STATES

*Substantive Law When the Effect on the Domestic Economy is Direct  
and Unquestioned*

Horizontal restrictive practices in export trade seem to be treated the same way as they are in the domestic context when the adverse effect on domestic competition is obvious. For example, "there is no doubt"<sup>27</sup> that a horizontal combination that manipulates prices of commodities in import and export trade is illegal per se.<sup>28</sup> Nor is there any

---

<sup>25</sup> Ongman, "Be No Longer a Chaos:" Constructing a Normative Theory of the Sherman Act's Extraterritorial Jurisdictional Scope, 71 Nw. U.L. REV. 733 (1977).

<sup>26</sup> *Id.*

<sup>27</sup> Kramer, *The Application of the Sherman Act to Foreign Commerce*, 3 ANTITRUST BULL. 387, 397 (1958).

<sup>28</sup> When the import trade of the United States is implicated, it is well settled that the Sherman Act applies and that the substantive law governing is the same as what would apply purely domestically. See *Zenith Radio Corp. v. Hazeltine*, 395 U.S. 100 (1969); *United States v. Sisal Sales Corp.*, 274 U.S. 268 (1927). See generally *Steele v. Bulova Watch Co.*, 344 U.S. 280 (1952); *Long Island Lighting Co. v. Standard Oil Co. of Calif.*, 521 F.2d 1269 (2d Cir. 1974); *Occidental Petroleum Corp. v. Buttes Gas & Oil Co.*, 331 F.Supp. 92 (C.D. Cal. 1971); *Interamerican Refining Corp. v. Texaco Maracaibo, Inc.*, 307 F.Supp. 1291 (D. Del. 1970).

However, when only the export trade of the United States is involved the application of the Sherman Act is more complex. Reading the dicta literally, *Socony-Vacuum* establishes that price fixing is per se illegal. "Under the Sherman Act a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in . . . foreign commerce is illegal per se." *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 223 (1940). "And the amount of . . . foreign trade involved is not material." *Id.* at 224 n.59. Cf. *United States v. Learner*, 215 F. Supp. 603, 605 (D. Haw. 1968). Indeed, as early as 1918, it was felt an exemption for joint export selling entities from the Sherman Act was required, causing the Webb-Pomerene Act to be passed. Export Trade Act, 15 U.S.C. § 61 (1971). And in *Pfizer, Inc. v.*

question that an allocation of territories in a horizontal combination of firms is illegal if the United States is one of the allocated territories.<sup>29</sup> In addition, if competing American firms combine to reduce or eliminate exports to some parts of the world in favor of sales in those markets from their foreign manufacturing plants, an illegal restraint will be found.<sup>30</sup> When the effect on the domestic economy is direct and unquestioned, the substantive law applied seems to be the same as that applied to purely domestic cases.<sup>31</sup>

*Substantive Law When the Restraints and Their Adverse Effects are Purportedly Directed Strictly at Foreign Markets*

*The Cases.* Several recent cases have opted for substantive Sherman Act coverage to provide a remedy for foreign buyers who are injured by horizontal restraints in export sales entered into by collaborating American firms. In *State of Kuwait v. Charles Pfizer & Co.*,<sup>32</sup> Kuwait sued to collect treble damages for price fixing in a sale of broad spectrum antibiotics. Because the antitrust violation included price fixing in the United States which affected American consumers, the extraterritorial aspects of the case were not essential to its resolution.

Nevertheless, in denying Pfizer's motion to dismiss, the court in effect stated that, as a matter of substantive law, injury from a horizontal restraint by American exporters could never be confined to a foreign country:

A conspiracy among domestic producers of antibiotic drugs to reduce or eliminate competition as to foreign sales would certainly have an ad-

---

India, 434 U.S. 308, 313 n.11 (1978), the Supreme Court stated that "it is established that the antitrust laws apply to exports as well." Nevertheless, a full analysis of the impact of the Sherman Act on export trade reveals that the problem of antitrust and export trade is a sophisticated one.

<sup>29</sup> *Timken Roller Bearing Co. v. United States*, 341 U.S. 593 (1951).

<sup>30</sup> *United States v. Minnesota Mining & Mfg. Co.*, 92 F. Supp. 947 (D. Mass. 1950). However, where a multinational company has unilaterally set up foreign manufacturing subsidiaries which sell products only in a designated territory rather than in territories allocated with a competitor which it may (or may not) have later acquired, an antitrust violation should not be found. See U.S. DEP'T OF JUSTICE, ANTITRUST DIV., ANTITRUST GUIDE FOR INTERNATIONAL OPERATIONS, reprinted in [1977] 2 TRADE REG. REP. (CCH) No. 266 at 12 [hereinafter cited as GUIDE].

<sup>31</sup> Cases testing the Webb-Pomerene exemption are founded on the theory that price fixing and allocation of export sales violate the Sherman Act if they are outside the exemption. See, e.g., *United States v. Concentrated Phosphate Export Ass'n*, 393 U.S. 199 (1968).

<sup>32</sup> 333 F. Supp. 315 (S.D.N.Y. 1971). *But cf. Pfizer, Inc. v. Lord*, 522 F.2d 612 (8th Cir. 1975), cert. denied, 424 U.S. 950 (1976) (foreign government not permitted to sue in *parens patriae* for antitrust injury to its citizens, rather they must sue in their individual capacities or as a class). For a case where a horizontal market allocation was held illegal, even though the effect was purportedly only in foreign markets, see *United States v. General Dyestuff Corp.*, 57 F. Supp. 642, 647 (S.D.N.Y. 1944).

verse effect on domestic competition. Not only would it enable the domestic manufacturers to build up a substantial 'war chest' from excessive profits from foreign sales but such a conspiracy might prevent either a domestic or a foreign manufacturer from entering into the foreign market in order to build up its strength to enter into the restricted domestic market. In an age of expanding world trade, a truly successful monopoly requires control of both domestic and foreign markets. For these reasons, this court is convinced that the fundamental goal of the antitrust laws could be seriously frustrated by not permitting Kuwait to maintain a treble damage action for damages resulting from the alleged conspiracy.<sup>33</sup>

While the facts of *State of Kuwait* made it unnecessary to consider whether an antitrust injury entirely confined to a foreign country could support a Sherman Act violation, more recently a district court has reached this issue. In *Todhunter-Mitchell & Co. v. Anheuser-Busch, Inc.*,<sup>34</sup> a district court held that the Sherman Act could be applied to grant relief to a foreign corporation for damage to its business in a foreign country. Todhunter-Mitchell & Co. was a Bahamian wholesale distributor of liquor and beer. In direct competition with Todhunter-Mitchell in the large scale distribution of alcoholic beverages, Bahama Blenders, Ltd. was given an exclusive distributorship of Anheuser-Busch products in the Bahamas. Anheuser-Busch wholesalers in Miami and New Orleans, at the direction of Anheuser-Busch, refused to supply Todhunter with Anheuser-Busch products. As a result, there was no intrabrand price competition in Anheuser-Busch products in the Bahamas.<sup>35</sup> However, the "business potential" for export from the United States to the Bahamas by other manufacturers of beer was not

---

<sup>33</sup> 333 F. Supp. at 316-17. *State of Kuwait* was appealed to the Eighth Circuit but the appeal was dismissed when Kuwait withdrew its claim. *Pfizer, Inc. v. India*, 434 U.S. 308, 311 n.5 (1978). See also Petitioners Joint Reply Brief in support of their Petition for Certiorari to the United States Court of Appeals for the Eighth Circuit, at 3 n.3, *Pfizer, Inc. v. India*. However, other consolidated Antibiotic Antitrust cases of which *State of Kuwait* was a part were affirmed both in the Eighth Circuit, 550 F.2d 396 (8th Cir. 1976), and in the Supreme Court, 434 U.S. 308 (1978).

The issue before the Supreme Court in *Pfizer v. India* was limited to the question of whether a foreign nation was a person within the meaning of § 4 of the Clayton Act. Nevertheless, the Supreme Court decision supports the analysis of the *State of Kuwait* opinion. See text accompanying notes 48-49, *infra*. Indeed the Court cited with approval an article which outlined the "spill-over" problem outlined in the *State of Kuwait* decision:

It has been suggested that depriving foreign plaintiffs of a treble-damages remedy and thus encouraging illegal conspiracies would affect American consumers in other ways as well: by raising worldwide prices and thus contributing to American inflation; by discouraging foreign entrants who might undercut monopoly prices in this country; and by allowing violators to accumulate a "war chest" of monopoly profits to police domestic cartels and defend them from legal attacks.

434 U.S. at 315 n.14 (*citing* Velvel, *Antitrust Suits by Foreign Nations*, 25 Cath. U.L. Rev. 1, 7-8 (1975)).

<sup>34</sup> 375 F. Supp. 610 (E.D. Pa.), *findings partially amended*, 383 F. Supp. 586 (E.D. Pa. 1974). See Note, 10 TEX. INT'L L.J. 579 (1975).

<sup>35</sup> 383 F. Supp. at 587.

reduced.<sup>36</sup> Therefore the injury could be viewed as falling solely in the Bahamas.<sup>37</sup>

The *Todhunter-Mitchell* court fully opted in favor of that thesis:

The Court is in substantial agreement with the defendant's contention that the ultimate result of the restraint imposed on the Miami and New Orleans wholesalers is the elimination of competition in the Bahama Islands. However, the territorial restraints imposed upon the Miami and New Orleans distributors directly affected the flow of foreign commerce out of this country. Restraints which directly affect the flow of foreign commerce into or out of this country are subject to the provisions of Section 1 of the Sherman Act.<sup>38</sup>

And in another recent case, *Industria Siciliana Asfalti, Bitumi, S.p.A. v. Exxon Research and Engineering Co.*,<sup>39</sup> (*Exxon*) a district court extended the *Todhunter* ruling from the export of goods to the export of services as well. The *Exxon* court held that a foreign corporation doing no business in the United States could sue under the Sherman Act for injury "confined" to a foreign country. *Industria Siciliana Asfalti, Bitumi* (ISAB) was an Italian company formed to erect and operate a petroleum refinery in Italy. Two American companies, Universal Oil Products (UOP) and Exxon Research and Engineering (ERE) offered ISAB competing proposals for the refinery's design, engineering and associated technology licensing. Although UOP offered the lowest bid, the ERE proposal was chosen, allegedly because ERE's parent, Exxon Corporation, acting through its subsidiaries, improperly applied its economic power to coerce ISAB.

---

<sup>36</sup> This holding goes beyond the point where some distinguished antitrust commentators begin to become uneasy. They would limit Sherman Act application to those cases where, although the effects of the restraint supposedly fall abroad, it is reasonable to presume an effect on domestic competition.

Kingman Brewster's views are representative. He agrees that "[l]oose agreements governing price, output, or territories for export would seem to fall under the Sherman Act ban," but only if the "business potential" of exporters in the United States would be lessened. K. BREWSTER, *ANTITRUST AND AMERICAN BUSINESS ABROAD* 105, 134 (1958). "Even a naked restraint on foreign local or 'third-market' commerce would seem subject to liability if, and only if, the government could prove the effect on competition in United States domestic or foreign commerce." *Id.* at 82 (spillover).

<sup>37</sup> In *State of Kuwait* there was a horizontal combination of competing firms. Interbrand competition thereby was lessened. The effect in the United States might be felt in two ways. First, other American drug companies, not parties to the combination, would be excluded from an export market by entry barriers. Second, the combining firms' collective behavior in foreign markets might well spill over to domestic markets. Cf. Davidow, *Antitrust, Foreign Policy, and International Buying Cooperation*, 84 *YALE L.J.* 268, 276-77 (1974). However, in *Todhunter-Mitchell*, intrabrand competition was lessened. Thus, neither of the putative effects above would be felt in the United States.

<sup>38</sup> 383 F.Supp. at 587.

<sup>39</sup> 1977-1 Trade Cas. 70,775 (S.D.N.Y. Jan. 18, 1977).

Again, in *Exxon* as in *Todhunter*, the quantum of export trade from the United States was not lessened, although the competition in export trade was adversely affected.<sup>40</sup> The defendants moved to dismiss on the grounds that "since ISAB is an Italian corporation, not engaged in business with the United States, and which suffered the averred damage in Italy, then its injury falls without United States commerce, thereby removing it from the protection of our antitrust statutes."<sup>41</sup> The court denied the motion to dismiss on this ground. In so doing, the court noted that the alleged reciprocal dealing consisted of two evils: "the foreclosure of competition from a particular market and the imposition upon a buyer of either an unwanted product, or a desired product on unacceptable terms."<sup>42</sup>

Consequently, the court held that a domestic restraint of trade and a foreign restraint could not be distinguished and that as a consequence the Sherman Act should apply to the "Italian" injury.

Plaintiff is not precluded from raising this domestic restraint of trade [engaged in by the Exxon group] in support of its own case because its 'injury', in defendants' view, can in a theoretical sense be confined to Italy. *Such is not the case.* As previously stated, when coercion is present in a reciprocal relationship, the antitrust injury experienced by the buyer-victim is comprised of both the foreclosure and imposition aspects of that anticompetitive practice, and consequently, the foreign plaintiff is not without standing to cite the deleterious domestic effects in support of his own antitrust complaint. In so doing, the foreign plaintiff is not asserting the rights of third parties, but his own, since the 'imposition' which it has suffered is *inextricably bound up with the domestic restraints of trade which have enabled the defendant to enforce the reciprocal transaction upon the plaintiff.*<sup>43</sup> (Emphasis added).

But undoubtedly the most important recent development in the international antitrust area is the Supreme Court's decision in *Pfizer Inc. v. India*,<sup>44</sup> which addresses the problem of extending Sherman Act protection to anticompetitive practices regardless of the fact that they are confined to a foreign nation. In *Pfizer*, the Supreme Court held in a five to three decision that a foreign country otherwise entitled to sue in American courts was a "person" under the Sherman Act.<sup>45</sup>

Apparently, the question which divided the majority and the dissent was whether the framers of the Sherman Act intended to make

---

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 70,783.

<sup>42</sup> *Id.* The case was dismissed on the alternative ground that ISAB had not adequately pleaded that it had been coerced through the oppressive use of market power. *Id.* at 70,782.

<sup>43</sup> *Id.* at 70,783-84.

<sup>44</sup> 434 U.S. 308 (1978).

<sup>45</sup> *Id.*

treble damages available solely to American consumers, or to foreign consumers as well. However, on closer inspection it becomes clear that the Court's disagreement was even more fundamental. In their analysis, the dissenters emphasize who, in fact, was injured by the restraint. Thus, noting that the injured party was a foreigner, and pointing to evidence of economic protectionism in the Webb-Pomerene Act and in the legislative history of the Sherman Act, the dissenters concluded that the Sherman Act does not protect foreigners from this type of injury.

In contrast, Mr. Justice Stewart, writing for the majority, rather than focusing on the identity of the injured consumer, emphasized the premier importance of maintaining competition in export trade.<sup>46</sup> The court proposed that the "alternate purposes of the antitrust laws" were best served by focusing analysis on injury to, rather than on the identity of, the injured party for two principal reasons. First, foreign anticompetitive practices may spill over into American markets and extending treble damages increases the deterrent against injury to American markets.

If foreign plaintiffs were not permitted to seek a remedy for their antitrust injuries, persons doing business both in this country and abroad might be tempted to enter into anticompetitive conspiracies affecting American consumers in the expectation that the illegal profits they could safely ex-

---

<sup>46</sup> Section 4 of the Clayton Act provides that "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws, may sue therefore in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." 15 U.S.C. § 15 (1976).

The notion that the Sherman Act protects competition rather than consumers *qua* consumers was first introduced by Professor James A. Rahl. Rahl, *Foreign Commerce Jurisdiction of the American Antitrust Laws*, 43 ANTITRUST L.J. 521, 526 (1975).

The Justice Department's *Antitrust Guide for International Operations* has suggested that enforcement of the Sherman Act should only be extended to foreign restraints which spill over into the domestic market and to restraints of American export and foreign investment opportunities. GUIDE, *supra* note 30, at 4-6. Professor Rahl has noted the practical problems that this test raises because of the nearly certain spillover of foreign restraints onto the American domestic market. But more importantly, Professor Rahl fundamentally disagrees with the *Guide's* theory:

It assumes that the purpose of the antitrust laws is to guard the interests of American consumers and of American sellers and investors against restraints which would impose upon them additional costs or other detriments. But I have always understood the purpose of the antitrust laws to be to protect competition in the commerce, domestic and foreign, regulated by Congress, on the theory that this will promote efficiency, better allocation of resources and economic progress. Restraints of competition are to be prevented in our foreign commerce, as in our domestic, not because this gives short-run help to some group of consumers or entrepreneurs, but because it is our choice of policies as to how commerce should be conducted. It thus does not matter who the victim of the restraint would be or the beneficiary of the prohibition. What matters is the value of the competitive process itself to the commerce involved.

Rahl, *Antitrust and International Transactions—Recent Developments*, 46 ANTITRUST L.J. 965, 969 (1977).

tort abroad would offset any liability to plaintiffs at home. If, on the other hand, potential antitrust violators must take into account the full costs of their conduct, American consumers are benefited by the maximum deterrent effect of treble damages upon all potential violators.<sup>47</sup>

But secondly, the court noted that, wholly apart from spillover effects, to deny an injured foreign plaintiff the right to sue under the Sherman Act would defeat its purpose. "It would permit a price fixer . . . to escape full liability for his illegal actions and would deny compensation to certain of his victims, merely because he happens to deal with foreign customers."<sup>48</sup>

*State of Kuwait*, as affirmed by *Pfizer v. India*, *Todhunter-Mitchell*, and *Exxon*, thus naturally suggests a format for analyzing whether the extension of the Sherman Act to these situations should be legislatively reversed. Opponents of such broad application of the Sherman Act to export trade argue that, as a matter of policy, restraints of trade causing injuries solely in foreign markets should be beyond American concern. In essence, the argument is one for economic protectionism; so long as the injury falls abroad, anticompetitive practices should be allowed in U.S. export trade.

This argument may be met at two levels. First, it may be shown that the assumption that the injury falls only abroad is erroneous. *State of Kuwait*, as affirmed by *Pfizer v. India*, is an example of the class of cases in which an adverse effect from the horizontal restraint may be presumed to be felt domestically. Second, the wisdom of economic protectionism in the international application of the Sherman Act may be dealt with frontally. *Todhunter-Mitchell* and *Exxon*, representing the class of cases where the horizontal restraint may have no domestic impact, provide an opportunity to assess the wisdom of economic protectionism in antitrust policy.

*Do Horizontal Restrictive Practices Aimed Abroad Result in Injuries Which Fall Only in Those Foreign Markets?* *State of Kuwait*, as affirmed by *Pfizer v. India*, offers two theories to justify the expectation of an adverse effect on competition in American interstate or foreign commerce even though the restraint is ostensibly directed strictly at a foreign market. Either the foreign cooperation could "spill over" into the domestic market or the cooperation could erect a barrier to entry into the foreign market against American exporters not parties to the combination.<sup>49</sup>

---

<sup>47</sup> 434 U.S. at 315.

<sup>48</sup> *Id.* at 314-15.

<sup>49</sup> See generally Hale & Hale, *Monopoly Abroad: The Antitrust Laws and Commerce in For-*

The operation of these two theories may be tested against the data gleaned from the operation of Webb-Pomerene associations. Webb-Pomerene associations are provided a horizontal antitrust exemption if the effect of the restraint falls abroad.<sup>50</sup> Thus, the Webb-Pomerene experience can help us assess the realism of the assertion that the effects of restraints aimed abroad may in fact be contained within foreign markets.

Turning first to the spillover theory, Webb-Pomerene critics have argued that exporting, by its very operation, reduces domestic supply. Under classical economic theory, a decrease in supply in a fixed-capacity market raises the price of a demand-elastic commodity.<sup>51</sup> Axiomatically, the implication is that horizontal restrictive practices will necessarily affect domestic prices.<sup>52</sup>

The inevitable domestic consequences of horizontal combinations in export are explicitly recognized in the legislative history of the Webb-Pomerene Act.<sup>53</sup> However, these inevitable consequences have

---

*ign Areas*, 31 TEX. L. REV. 493, 519-23 (1953). It is illuminating to note that spillover and the raising of market barriers invalidate the Webb-Pomerene exemption as well. The operative provision of the Act provides that nothing in the Sherman Act shall be construed to make illegal:

(1) An association entered into for the sole purpose of engaging in export trade and actually engaged *solely* in such export trade; or

(2) an agreement made or act done in the course of such export trade by such association; *provided that*:

(a) such association, agreement or act is not in restraint of trade within the United States; and

(b) such association, agreement or act is not in restraint of the export trade of any domestic competitor of such association; and

(c) such association does not, either in the United States or elsewhere, enter into any agreement, understanding, or conspiracy, or do any act which

(i) artificially or intentionally enhances or depresses prices within the United States of commodities of the class exported by such association, or

(ii) substantially lessens competition within the United States, or

(iii) otherwise restrains trade within the United States.

See 15 U.S.C. § 62 (1970).

<sup>50</sup> See generally Editorial Note, *The Webb-Pomerene Act: Some New Developments in a Quiescent History*, 37 GEO. WASH. L. REV. 341 (1968).

<sup>51</sup> J. Rahl, *Cases and Materials on Antitrust Law* (multilithed), chap. 3 (1975). The classic treatise in price theory is STIGLER, *THE THEORY OF PRICE* (3d ed. 1966).

<sup>52</sup> See Diamond, *The Webb-Pomerene Act and Export Trade Associations*, 44 COLUM. L. REV. 805, 827 (1944); Fournier, *The Purposes and Results of the Webb-Pomerene Law*, 22 AM. ECON. REV. 18, 19 (1932); Comment, *Export Combinations and the Antitrust Laws: The Dilemma of the Webb-Pomerene Act*, 17 U. CHI. L. REV. 654, 659-61 (1950) [hereinafter cited as CHICAGO comment]; *Investigation of Concentration of Econ. Power: Hearings Before the Senate Temporary National Economic Comm.*, 76th Cong., 3d Sess., pt. 25 at 13037, 13158 (1940); Allison, *Antitrust and Foreign Trade: Exemption for Export Associations*, 11 Hous. L. REV. 1124, 1138 (1974); 1967 *International Antitrust Hearings*, *supra* note 7, at 127 (statement of Donald Turner).

<sup>53</sup> Senator Cummins insisted: "it is utterly impossible to disassociate the activity of an association organized for export trade and the industries carried on for consumption within the United States." 56 CONG. REC. 175 (1917). In addition, the Senate Report on the bill realized "that any



been held not to be an "unlawful restraint" under the Webb-Pomerene Act<sup>54</sup> which, literally read, does not exempt export trade associations with such effects.<sup>55</sup>

Ignoring such inevitable effects may be economically justifiable. Absent any intentional depression of prices within the United States, price fluctuations should equilibrate about a norm with only a small variance from the price median.<sup>56</sup> If an undue amount of supply is channeled into exports, the marginal price increases will correspond to marginal enhancement of the market share of the industry competitors who are not overexporting.<sup>57</sup> Assuming that the profits from foreign trade are lower than domestic trade because of more expensive transportation, finance and marketing costs, the overexporting firm will lose more money from the loss of domestic profits in its shrinking domestic marginal sales volume than will be offset from its increasing foreign marginal sales volume.<sup>58</sup>

Thus, there is a correcting market mechanism against unintentional overexporting. As a result, it is proper to ignore these inevitable domestic effects in deciding whether restraints ostensibly aimed abroad have sufficient domestic effects to suggest that domestic Sherman Act substantive tests should be applied.

However, this mechanism will be inoperative if there is a substantial over-capacity in the market. If substantial volume cannot be absorbed by the domestic market, export of this surplus would preserve a price structure that would be depressed if the excess capacity were dumped on the domestic market.<sup>59</sup>

---

sales in foreign commerce may incidentally and temporarily result in the increase in prices of the same articles to home consumers." S. REP. No. 1056, 64th Cong., 2d Sess. 3 (1917).

<sup>54</sup> *United States v. Minnesota Mining & Mfg. Co.*, 92 F. Supp. 947, 965 (D. Mass. 1950).

<sup>55</sup> See note 22 *supra*.

<sup>56</sup> See generally Weiner, *Expanding Small Firm Exports in the United States*, 6 J. WORLD TRADE L. 355 (1972).

<sup>57</sup> This, of course, assumes workable competition. If the combination is oligopolistic or if market coverage of its members in the product is otherwise nearly total, the counterforce will not exist because there are no non-combining market members. Due to the conscious parallelism in such markets, discussion of these markets is deferred to the intentional spillover section of this article. See also Diamond, *supra* note 52, at 827.

<sup>58</sup> Indeed the primary importance of participating in the domestic market is seen as the principal component in the inertia with respect to increased exporting.

<sup>59</sup> To succeed in such domestic price support, a combination must have control over domestic supply and the exports in the product. The sulphur and alkali industries, in which domestic price supports were implemented through Webb-Pomerene Associations, met these prerequisites. FTC, *THE SULPHUR INDUSTRY AND INTERNATIONAL CARTELS* 14, 95 (1947); FTC, *REPORT ON INTERNATIONAL CARTELS IN THE ALKALI INDUSTRY* 50, 89-96 (1950).

The self-correcting mechanism might also be short-circuited if a Webb-Pomerene member is controlled by foreign interests who compete in the associations product. Such a result is appar-

Such a market structure came under attack in *United States v. United States Alkali Export Ass'n*<sup>60</sup> (*Alkasso*). In *Alkasso*, the export market represented only five to seven percent of the caustic soda in the United States. Nevertheless, the stabilization of the domestic price structure by dumping excess industry capacity abroad was held to be a violation of the Sherman Act.<sup>61</sup> The *Alkasso* court appreciated that it was interference with domestic market mechanisms that should be condemned. “[A]ny agreement for the purchase of ‘distress’ or surplus material amounting to a small percentage of the total product where it is shown that such practice would materially interfere with the free interchange of those competitive forces which ultimately determine the commodity’s going price [is illegal].”<sup>62</sup>

In a market with over-capacity, selective export abroad can interfere with the domestic market. Therefore, it is appropriate to suspect that a restraint purportedly aimed only at foreign markets can have a domestic market effect.

Generally, “spillover” suggests a collusive, rather than just a stabilized, domestic price structure as a result of cooperation in export trade. The argument runs that if cooperation in export trade is allowed, similar activity will eventually be practiced in the domestic markets.<sup>63</sup>

---

ently allowed by a recent FTC advisory opinion that a domestic corporation owned or controlled by foreign interests may join a Webb-Pomerene association. [1973-1976 Transfer Binder] TRADE REG. REP. (CCH) ¶ 20,491.

<sup>60</sup> 86 F. Supp. 59, 77-80 (S.D.N.Y. 1949).

<sup>61</sup> Whether dumping, in the technical sense of selling abroad at lower prices than at home, hurts domestic consumers is a complex question that probably is intractable when stated generally. See Hale & Hale, *Monopoly Abroad: The Antitrust Laws and Commerce in Foreign Areas*, 31 TEX. L. REV. 493, 517 n.82 (1953). However, “where the object of dumping is to maintain full production without reducing domestic prices below the point of maximum profit,” injury to domestic consumers is no longer problematical. J. VINER, *DUMPING: A PROBLEM IN INTERNATIONAL TRADE* 102 (1966).

<sup>62</sup> 86 F. Supp. at 80.

<sup>63</sup> Mason, *Consensus Report on the Webb-Pomerene Law*, 37 AM. ECON. REV. 848, 853, 862 (1947); Simmons, *Webb-Pomerene Act and Antitrust Policy*, 1963 WIS. L. REV. 426, 440; CHICAGO COMMENT, *supra* note 52, at 660-62; 1967 *International Antitrust Hearings*, *supra* note 7, at 124, 128 (statement of Ass’t Attorney General Donald Turner). The mechanism of spillover was aptly described by the Organization for Economic Co-operation and Development (OECD):

Thus, the side effect of most pure export cartels may be a restraint of domestic competition mainly through conscious parallelism. This is all the more likely when it is realized [sic] that many export agreements probably impose a cost on the parties concerned in the form of exports foregone. Not only will the price rigidity imposed by an export agreement tend to prevent member firms from meeting foreign competition but the agreed price level itself will tend to reflect some average of the costs of all members rather than those of the most efficient members. If the more efficient firms incur losses in export markets the assumption must be made that they obtain compensating advantages on the domestic market by means of the restraints of competition previously mentioned.

REPORT OF THE COMMITTEE OF EXPERTS ON RESTRICTIVE BUSINESS PRACTICES, OECD, EXPORT CARTELS 50 (1974).

The possibility for collusive spillover into the domestic market is especially present in horizontal export combinations formed under the Webb-Pomerene Act.<sup>64</sup> Although there is no common pattern of activity, Webb-Pomerene associations were meant to operate as a simple sales agency with all exports made in the name of the association. Under the exemption, the association would then set prices and divide up markets.<sup>65</sup> The thesis has been offered that “[s]ince the domestic market is the larger and more important market, certainly production

---

<sup>64</sup> Judge Wyzanski recognized this possibility for collusion in *Minnesota Mining*, 92 F. Supp. at 963. “The intimate association of the principal American producers in day-to-day manufacturing operations, their exchange of patent licenses and industrial know-how, and their common experience in marketing and fixing prices may inevitably reduce their zeal for competition *inter se* in the American Market.” *Id.* Thus collusive spillover could activate the interstate commerce clause of the Sherman Act. *Id.*

The danger is that the Webb-Pomerene exemption permits the sharing between members of future price, cost and production data. These are the very data which can be utilized to support parallel pricing in domestic markets. Note, *An Appraisal of the Webb-Pomerene Act*, 44 N.Y.U. L. REV. 341, 375-76 (1969) [hereinafter cited as N.Y.U. Note]. Of course, such conscious parallelism in oligopolistic markets has practical effects identical to price fixing, but it is virtually impossible to attack under the antitrust laws. See Turner, *The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal*, 75 HARV. L. REV. 655-63 (1962). But see In the Matter of Kellogg Co. et al. (Complaint Jan. 24, 1972); Wilson, *The FTC's Deconcentration Case Against the Breakfast-Cereal Industry: A New 'Ballgame' In Antitrust*, 4 ANTITRUST L. & ECON. REV. 57 (1971) (conscious parallelism not needed to make out violation of § 5 of the FTC Act).

Further, it is significant that almost every Webb-Pomerene association (WPA) industry also has a domestic trade association. Indeed, the WPA's and the domestic trade associations often operate out of the same office. See Larson Thesis, *infra* note 67, at 24.

Therefore, the possibility also exists of American cooperating firms consciously paralleling the price structure of their foreign “rivals.” The historical evidence developed by the Webb-Pomerene associations establishes that between 1924 and 1950 international cartels operated in such diverse commodities as copper, steel, abrasives, alkalis, oil, and sulphur with American members participating through their WPA's. It is not unrealistic to think that American cooperation, especially in oligopolistic markets, could be used as a tool for what Larson calls the achievement of “peaceful coexistence” with foreign rivals. *Id.* at 113-17.

<sup>65</sup> FTC, ECONOMIC REPORT ON WEBB-POMERENE ASSOCIATIONS: A 50-YEAR REVIEW 28-30, 48-49 (1967) [hereinafter cited as FTC 50-YEAR REVIEW]. Many other functions have been assumed by WPA's such as:

an export sales agent; employing or directing the export sales agents of members; establishing terms and policies of sale, together with uniform contract forms; allocating export business; price fixing; buying for resale; product standardization, including tailoring of the grade or style of the product for foreign tastes or pocketbooks; arranging group-insurance, cargo space and freight rates; collecting trade information; storing members' products here or abroad to avoid market glutting; mass liquidating of, or bartering for, blocked foreign currency; credit investigation; representation for claims of customers; promotion of trade conferences and agreements; and joint representation before foreign governments on legislation effecting [sic] the association's trade. The association may perform all or only a few of these functions.

Note, *Webb-Pomerene vs. Foreign Economic Policy*, 99 U. PA. L. REV. 1195, 1201 (1951). See also *1967 International Antitrust Hearings*, *supra* note 7, at 43 (statement of Willard F. Mueller). However, the associations *qua* associations only export about 2% of total U.S. exports. *Id.* Most of the Webb-Pomerene associations operating now do not actually ship the product and fix the price and terms and conditions of sales of the member's products abroad. *1973 International Antitrust Hearings*, *supra* note 7, at 311.

and domestic sales and prices could not be neglected in any discussion that the Export Corporation's directors might have had about foreign market prices and policies."<sup>66</sup>

This thesis—that collusive spillover exists as a result of some Webb-Pomerene activities—has been empirically verified in case studies of sulphur, copper, and other Webb-Pomerene associations.<sup>67</sup> Each group has been disbanded in the recent past for a short period and then has been reconstituted. The period when there was no export association can thus serve as a control period. By comparing the structure, conduct, and performance of the industry during the control period against the period when the association is functional, one may infer whether domestic spillover has occurred as a result of the horizontal combination authorized under the Webb-Pomerene Act.<sup>68</sup> Since the circumstances are similar in all of these industries, the sulphur industry will be discussed as a representative example.

The sulphur industry is a very tight oligopoly. Four firms control the entire U.S. industry and the American industry dominates the world market. The two largest firms each control about forty-five percent of the market while the smaller two firms share the remaining market nearly equally.<sup>69</sup> However, smaller firms lease their mines from the largest, allowing the latter to control the output of the smaller firms.<sup>70</sup> There is no competitive fringe whatever to the American market.<sup>71</sup>

---

<sup>66</sup> M. LINDAHL & W. CARTER, *CORPORATE CONCENTRATION AND PUBLIC POLICY* 296 (3d ed. 1959). *But see Hearings Before Temporary National Economic Comm., supra* note 52, at 13158 (1940).

<sup>67</sup> The ensuing discussion of the sulphur industry is based on an unpublished Ph.D. dissertation in economics submitted to the University of Maryland. D. Larson, *An Economic Analysis of the Webb-Pomerene Act* (1968) [hereinafter cited as Larson Thesis] (page numbers referred to in the dissertation are those found in an authorized facsimile published on request by the author from University Microfilms, Inc., Ann Arbor, Michigan). A shorter version of the thesis appears as Larson, *An Economic Analysis of the Webb-Pomerene Act*, 13 J. L. & ECON. 461 (1970). For a similar documentation of domestic effect in the copper industry, see Curry Thesis, *infra* note 113, at 229-31. For a discussion of domestic effect in the carbon black industry, see *1967 International Antitrust Hearings, supra* note 7, at 146.

<sup>68</sup> For the sulphur industry's version of the facts, see *1967 International Antitrust Hearings, supra* note 7, at 277-79 (letter from Sulphur Export Corp. to Sen. Hart, July 27, 1967). The letter mainly tries to rebut a causal connection between Sulexco and the British buying cartel. In surrebuttal, see the statement of a member of Nader's group on corporate responsibility, *1972 International Antitrust Hearings, supra* note 7, at 785.

<sup>69</sup> Larson Thesis, *supra* note 67, at 146-48.

<sup>70</sup> *Id.* at 148.

<sup>71</sup> Entry barriers are severe. Absolute costs of production, stockpiling of reserves by market members which could be used in a price war against a new entrant, the time required to get new operations producing and the high degree of diversification of the market members allowing them to absorb losses in the sulphur wing of the business all are substantial barriers. The real "brick

Compounding the anticompetitive effect of the virtual duopoly held by the two largest firms is the fact that sulphur is a highly price-inelastic product. Sulphur has the paradigm characteristics for price inelasticity: a homogeneous product with no suitable substitutes for most of its end uses.<sup>72</sup> Indeed, the data confirms that prices have shown little response to short run perturbations in supply and demand.<sup>73</sup>

Progenitors of Sulexco, a trade association of sulphur companies, have demonstrated a propensity towards international cartelization.<sup>74</sup> However, in 1952, Sulexco was disbanded because no competition existed for its members.<sup>75</sup> All four of the constituent companies continued to export, with the two small firms actually increasing their exports. This showed that Sulexco did not promote scale economies or protection from foreign cartels.<sup>76</sup>

In 1958, at a time when the sulphur market had excess supply, Sulexco was reorganized because of the emergence of Mexican competition deriving from newly discovered sulphur deposits.<sup>77</sup> From 1952 to

---

wall", however, is the fact that existing firms control all known American sulphur mines. The only known deposits of sulphur of a grade which can be processed at a price competitive with American sulphur are in Mexico and are controlled by interests not inclined to compete with the American producers. Any further sulphur that may be found would probably be discovered in the United States. However, sulphur deposits are found in the course of oil exploration by oil companies. But these oil firms give control of the mines to the existing sulphur producers on a royalty basis. Royalty payments are 50-75% of net profits from sulphur sold and, in addition, the oil companies have taken the 23% depletion allowance that has been allowed for sulphur.

In short, the only potential entrants to the market would seem to be the oil companies themselves. But it would not make good business sense for the oil companies to jeopardize high royalties, with no risk to themselves, in order to create competition in the market. This is especially true since the major oil companies are oligopolists themselves with a tendency to maintain the status quo. Larson Thesis, *supra* note 67, at 150-52. *But see 1973 International Antitrust Hearings, supra* note 7, at 380.

<sup>72</sup> Given high concentration, product homogeneity is worse than differentiation. Although price can be fixed (*i.e.*, by a Webb-Pomerene association) in both cases, at least in the case of differentiation there can still be competition on non-price grounds. With homogeneity, no field of competition is left once price competition is eliminated. Inelasticity makes the situation still worse because it implies a lack of good substitutes for the product. This lack gives association members more room to raise prices without losing business.

Larson Thesis, *supra* note 67, at 192. This is particularly true for sulphur because its cost is usually a small fraction of the total cost of the finished manufactured product.

<sup>73</sup> *Id.* at 161, 167.

<sup>74</sup> FTC, THE SULPHUR INDUSTRY AND INTERNATIONAL CARTELS 1-105 (1947). *See also* Larson Thesis, *supra* note 67, at 154-55, 168-69.

<sup>75</sup> Larson Thesis, *supra* note 67, at 168.

<sup>76</sup> *Id.* at 171.

<sup>77</sup> *Id.* The Mexican producers simply undercut the American producer price. The domestic effect was dramatic. No sulphur was exported from Mexico to the United States in 1954. But by 1957, U.S. imports rose to 464,000 long tons or approximately 10% of the domestic supply. W. HAYNES, BRIMSTONE: THE STONE THAT BURNS 286 (1959).

1958, the control period, prices, and profits fell for the four American producers as their share of the world sulphur supply declined. In response to the Mexican competition, one of the large firms decreased the domestic price of sulphur by an unprecedented eleven percent.<sup>78</sup> The other large producer immediately followed by lowering the domestic and export price of its sulphur.<sup>79</sup> This was a move which “jolted the sulphur market and started prices on a steep slide; by '63 they were off 30% from the '56 level.”<sup>80</sup>

Since the reorganization of Sulexco in 1958, prices and profit rates have stabilized.<sup>81</sup> In addition, since the reorganization, there has been no new market entry even though profit rates are high.<sup>82</sup> The association greatly facilitated dealing with the Mexican threat. Only two Mexican producers existed: one was a corporation controlled by Texas oil and gas interests, and the other was one of the large American producers. After Sulexco was reformed, the domestic producer withdrew from Mexico leaving the Mexican market as a virtual monopoly. After this withdrawal, the remaining firm started pricing policies which were parallel to Sulexco's.<sup>83</sup>

Professor Larson has suggested that the disappearance of price competition in a price-inelastic product is to be expected when a tight horizontal combination exists:

In industries producing basic industrial inputs, price cuts most often take the form of absorbing shipping and storage charges. These price decreases tend to spread to overt price declines if excess supply continues. Given inelastic demand, all firms tend to lose. The association is admirably suited to preventing the spread of price cutting. In exports it com-

---

<sup>78</sup> Piombino, *TGS Takes Off*, CHEMICAL WEEK, June 27, 1964, at 104.

<sup>79</sup> In an oligopolistic market with inelastic product demand, total revenue falls when price is lowered. Texas Gulf Sulphur's decrease was immediately followed against the better judgments of the other industry members. Larson Thesis, *supra* note 67, at 149. Indeed, when prices were lowered in response to Mexican competition, total industry revenues fell. *Id.*

<sup>80</sup> Ozimek, *Sulphur: Special Report*, CHEMICAL WEEK, September 12, 1964, at 76. The emergence of the new Mexican supply broke the American grip on the free world's sulphur supply. From a level of 80% in 1954, to a level of 61% in 1958, the U.S. share finally stabilized in 1962 at about 50%. Larson Thesis, *supra* note 67, at 172.

<sup>81</sup> Upon the reappearance of Sulexco, price competition ended among the oligopolists. In 1960, Texas Gulf Sulphur (TGS) announced the closing of a Mexican plant which had only been open since 1957, and not a ton of sulphur produced there had been sold. At the same time that TGS closed its Mexican plant, the overwhelmingly dominant Mexican producer began announcing pricing parallel and equivalent to Sulexco. This parallel pricing “signaled the end of a five year price war set off by Pan American [the Mexican company] itself in 1956 when it launched what turned out to be a highly successful invasion of world sulphur markets.” *New Fire in Brimstone*, BARRON'S, Mar. 20, 1961, at 11.

<sup>82</sup> By 1966, all of the oligopolists were earning a return on investment after taxes of close to 20%. *Sulphur Search is On*, CHEMICAL WEEK, May 21, 1966, at 27.

<sup>83</sup> Larson Thesis, *supra* note 67, at 173-77.

pletely eliminates the possibility. Only the association exports. Consequently, no one firm can absorb shipping or storage costs. All or none must do so. Price shading is most apt to occur overseas first (where it is easier to mask with transportation costs than it is domestically) which makes the role of the export association particularly important. Cutting prices off list in domestic markets is detected much more readily because of the small number of firms comprising the industry and their close geographical proximity. Moreover, the association facilitates price collaboration domestically. There is far less chance that conscious parallelism will break down if there exists a formal cartel in exports. The presence of Sulexco reduces uncertainty for every firm.<sup>84</sup>

The sulphur industry clearly presents a severe market structure. The horizontal combination is in a tight oligopoly with a homogeneous price-inelastic product where the combination has a very large share of the world supply. But, more generally, reporting uncertainty is reduced in horizontal combinations in less tightly oligopolistic industries. Firms tend to shade off list price if there is oversupply.<sup>85</sup> Without the association where formal reporting requirements can be enforced, only tacit agreements can be used to try to prevent price shading—agreements which are much easier to circumvent than cartel-like reporting requirements.<sup>86</sup> In addition, the association permits an explicit allocation of supply which has substantial domestic effects on an industry with substantial over-capacity.<sup>87</sup>

Thus, the sulphur industry serves as a detailed example of the mechanics and motivation for anticompetitive spillover from export trade to the domestic market caused by oligopolistic cooperation. To the extent that the market structure of an oligopolistic industry approaches that of the sulphur industry, the basis for suspecting domestic collusive spillover is increased.<sup>88</sup>

---

<sup>84</sup> *Id.* at 182-83. Indeed price shadings are very similar for all four firms. *Id.* at 159.

<sup>85</sup> Larson gives three reasons for shade-offs. First, firms can use a list price as a point of reference and regulate the amount of shading to correspond to changes in demand. The use of a list price saves the trouble of frequent reprinting of price catalogs. Second, a higher domestic list price would help to prevent the impression that the domestic firms were gouging foreign buyers. Third, a high but shaded list price would allow producers to raise the actual price as demand increased without overtly appearing to do so. This would forestall charges of inflationary cost increases. *Id.* at 159-60.

<sup>86</sup> *Id.* at 193.

<sup>87</sup> However, it is to be noted that the chronic oversupply of the sulphur industry ended in 1963 due to an increase in the rate of consumption and a decrease in the rate of increase of supply. *Id.* at 177.

<sup>88</sup> Larson gives some indication of the relative importance of industry concentration and product homogeneity on the successful operation of a horizontal combination as a joint marketing entity. Larson, *An Economic Analysis of the Webb-Pomerene Act*, 13 J. L. & ECON. 461, 479-80 (1970). Larson's data sample consisted of the 47 Webb-Pomerene associations extant from 1958-1962. Association success as a joint marketing association was considered as a function of indus-

The second theory advanced in justification of an expected adverse effect on competition in American interstate or foreign commerce holds that the cooperation could erect a barrier to foreign market entry against American exporters not parties to the combination. Barriers to market entry can be raised at two levels.<sup>89</sup> First, a horizontal export group might refuse to sell its products to independent exporters. This is normally a restraint on intrabrand competition. If a number of producers export directly to foreign markets, they clearly have a substantial competitive advantage over an independent exporter that buys from them domestically and then exports, since the exporter must absorb his seller's mark-up. But the disadvantage of middleman mark-up is accentuated if the independent exporters must buy from a horizontal combination whose members do not compete *inter se*. If the producers in the combination together own a significant amount of the domestic supply, the combination can freely sell at supracompetitive prices. If the combination has the right of self-determination, the independent exporters will also be refused membership in the combination and will continue to buy from the combination at a supracompetitive price.

A second level of entry barrier exists when the strength of a horizontal combination prevents the entry of a domestic producer into a foreign market. This is the interbrand restriction involved in *State of Kuwait*. In order for a horizontal marketing entity to work effectively,

---

try concentration and product homogeneity. By means of a regression analysis, a regression equation and multiple correlation coefficients were developed which suggested a high, positive correlation between an industry which is concentrated and deals in a homogeneous product and an industry which can successfully support a Webb-Pomerene association. *Id.*

Larson reports that the concentration variable explains three times as much of the variance as does homogeneity. *Id.* If the success of a joint marketing association is principally dependent on industry concentration, incidents of joint marketing (*e.g.*, spillover) might also be reasonably believed to be responsive primarily to industry concentration. Thus, the case study of the sulphur industry may well be generalizable well beyond its severe specific facts.

<sup>89</sup> The law that has evolved around the Webb-Pomerene Act gives some guidance concerning which practices raise impermissible barriers to entry. For example, the members of a Webb-Pomerene association may not be found to restrict resale to nonexporters, *United States v. Alkali Export Ass'n*, 86 F. Supp. 59, 75 (S.D.N.Y. 1949), nor may the association set terms of sale by members to independent exporters, *Pacific Coast Industries Ass'n, TNEC*, Monograph 6 at 130. Associations may not sell on behalf of nonmembers, *Phosphate Export Ass'n*, 42 F.T.C. 555 (1946), and no association may restrict the sale of a nonmember, *Sulphur Export Corp.*, 43 F.T.C. 820 (1947); *Florida Hard Rock Phosphate Export Ass'n*, 40 F.T.C. 843 (1945).

However, certain practices ancillary to exporting through a Webb-Pomerene association appear to be permitted. For example, an association may sell at higher prices to a nonmember exporter than to a foreign distributor, and it may have exclusive foreign distributors which are obliged to resell above a certain price. *United States v. Minnesota Mining & Mfg. Co.*, 92 F. Supp. 947 (D. Mass. 1950). Also, the association may contractually bind the members to treat the association as the sole export agency for member products. *Id.* See generally Note, *Webb-Pomerene v. Foreign Economic Policy*, 99 U. PA. L. REV. 1195 (1951) [hereinafter cited as PENN. Note].



it must have some control of the product supply. It seems to be tautological that a horizontal combination will restrain the export trade of nonmembers because the amount of non-combination controlled supply is relatively small.<sup>90</sup> This supply restraint is reinforced by business practices such as price wars or exclusive agreements.<sup>91</sup>

The Webb-Pomerene Act cases have shown that barriers to entry can generate a serious domestic effect. Thus, even though a Webb-Pomerene association has a qualified exemption from the horizontal application of the Sherman Act, certain barriers to entry are, nevertheless, forbidden. Not surprisingly, it would seem that the test of illegality developed in the Webb-Pomerene cases is whether or not the barriers are "unreasonable." Thus, price discrimination with respect to independent exporters will be allowed only if cost-justified. Similarly, restraints on interbrand competition that are merit-justified should be allowable. But if restraints are not reasonable in this limited sense, then proof of the possibility of profitable American exports in significant volume to the target markets makes out a violation of the Sherman Act.<sup>92</sup>

This Webb-Pomerene experience is arguably directly applicable to horizontal combinations where the effect of the restrictive practice putatively falls only in foreign markets. If the combination creates barriers to entry which are unreasonable by the standards developed in the Webb-Pomerene context, then presumably the injury caused by the horizontal restrictive practice will not be strictly confined within foreign markets.

*The Wisdom of Economic Protectionism in the Application of the Sherman Act to American Export Trade.* The ultimate question which arises in defining the application of the Sherman Act to American export trade is whether purely foreign injuries are actionable.<sup>93</sup> The eco-

---

<sup>90</sup> Simmons, *supra* note 63, at 438; CHICAGO Comment, *supra* note 52, at 659.

<sup>91</sup> PENN Note, *supra* note 89, at 1214.

<sup>92</sup> Minnesota Mining, 92 F. Supp. at 962. See also Simmons, *supra* note 63, at 438. Even if individual entry is impossible, collusive spillover might well invalidate a horizontal combination that passes muster under the necessity test. *Id.* at 964. The Webb-Pomerene Act simply will not allow a restraint to fall upon domestic exporters. As one court noted, "[w]hatever degree of combination the Webb Act may exempt from the antitrust laws, it does not sanction the use of monopoly power to extinguish the competition of independent domestic competitors engaged in the export trade." *United States v. United States Alkali Export Ass'n*, 86 F. Supp. 59, 76 (S.D.N.Y. 1949).

<sup>93</sup> Compare Baker, *Antitrust and World Trade: Tempest in an International Teapot?*, 8 CORNELL INT'L. L.J. 16 (1974) with Rahl, *American Antitrust and Foreign Operations: What is Covered?*, 8 CORNELL INT'L. L.J. 1 (1974) and Rahl, *A Rejoinder*, *id.* at 42.

conomic protectionists answer in the negative; *Todhunter-Mitchell*<sup>94</sup> answers in the affirmative. Analysis must resolve whether the Sherman Act ought to be or needs to be protectionist.

This question is best explored in the context of the Webb-Pomerene associations, where there is relevant and instructive experience for the analyst to examine. In enacting the Webb-Pomerene Act, Congress “thought it could increase American exports by depriving foreigners of the benefits of competition among American firms, without in any significant way injuring American consumers.”<sup>95</sup> What, then, has been the result of such blatant chauvinism?<sup>96</sup>

Under the Webb-Pomerene Act, American antitrust policy became Janus-faced. This inconsistency in policy between the domestic application of the Sherman Act and the exemption granted under the Webb-Pomerene Act was not lost on the Supreme Court in a Sherman Act case decided less than two years after the Webb-Pomerene Act’s passage: “We do not see how the Steel Corporation can be such a beneficial instrumentality in the trade of the world, and its beneficence be preserved, and yet be such an evil instrumentality in the trade of the United States that it must be destroyed.”<sup>97</sup>

The inconsistency has also not been lost on foreign countries who use the existence of the Webb-Pomerene Associations as a justification for their own export cartels.<sup>98</sup>

As a result, international trade has been amazingly exempt from

---

<sup>94</sup> 375 F. Supp. 610, *findings partially amended*, 383 F. Supp. 586 (E.D. Pa. 1974).

<sup>95</sup> *United States v. Concentrated Phosphate Export Ass’n.*, 393 U.S. 199, 208 (1968).

<sup>96</sup> A sampling of the legislative history gives the flavor of the times. Representative Carlin was explicit in his chauvinism: “I am frank to say that personally, I have no sympathy with what a foreigner pays for our products; I would like to see the American manufacturers get the largest price possible . . . .” *Hearings Before the House Comm. on the Judiciary on H.R. 16707*, 64th Cong., 1st Sess., 7 (1916).

The Act’s sponsors were equally blunt. Senator Pomerene said, “[w]e have not reached that high plane of business morals which will permit us to extend the same privileges to the peoples of the earth outside of the United States that we extend to those within the United States.” 55 CONG. REC. 2787 (1917). Representative Webb expressed similar views: “I would be willing that there should be a combination between anybody or anything for the purpose of capturing the trade of the world, if they do not punish the people of the United States in doing it.” 55 CONG. REC. 3580 (1917).

<sup>97</sup> *United States v. United States Steel Corp.*, 251 U.S. 417, 453 (1920).

<sup>98</sup> *Cf. 1967 International Antitrust Hearings*, *supra* note 7, at 124 (statement of Donald Turner, Assistant Att’y. Gen.). For examples and authorities which show specific reliance on the Webb-Pomerene exemption by other countries to justify forming export cartels, see N.Y.U. Note, *supra* note 64, at 346 n.31. Germany explicitly relied on Webb-Pomerene in exempting export cartels. *1974 International Antitrust Hearings*, *supra* note 7, at 48-49, 757. Japan’s exemption of export cartels in 1952 was also aided by the existence of Webb-Pomerene. Ariga & Rieke, *The Antimonopoly Law of Japan and Its Enforcement*, 39 WASH. L. REV. 437, 473 (1964).

the spreading competitive norm in intranation trading throughout the world.<sup>99</sup> Nevertheless, as a matter of international comity, it ill-becomes the United States that its Magna Carta of economic freedom applies differentially as a function of who is injured.<sup>100</sup> Furthermore, this hypocrisy is likely to foster foreign retaliation.

Foreign retaliation against an export cartel can take two forms. The target country may legislate against it or form a countervailing buying cartel to neutralize it. Under objective territoriality, foreign countries would be justified, under international law, in legislating against conduct sanctioned in America which violates their national laws.<sup>101</sup> This two-way street of extraterritorial antitrust has been recog-

---

<sup>99</sup> Antitrust has become firmly established in the legal systems of most of the major trading nations of the free world, as recognized in Chief Justice Burger's dissent in *Pfizer, Inc. v. India*, 434 U.S. 308, 327 (1978). The burst of antitrust legislation in the major trading countries of the West and Japan after World War II reflected two major realizations. First, those historically opposed to antitrust, mainly the Germans and the Japanese, were in no position to block antitrust laws. Second, for various reasons, the major trading countries believed that control of cartels would be desirable. Since the war had done much to seriously weaken international and national cartels, the time for antitrust legislation was opportune. C. EDWARDS, *CONTROL OF CARTELS AND MONOPOLIES: AN INTERNATIONAL COMPARISON* 8-13 (1967). For a superb study of the German experience in comparative perspective with the United States, see *1974 International Antitrust Hearings*, *supra* note 7, at 53-74 (statement of Dr. Mestmacker).

For an in-depth and comprehensive comparative study of the antitrust law of the major trading nations, see *Hearings on Antitrust Development and Regulations of Foreign Countries Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary*, 89th Cong., 1st Sess., pt. 2 (1965).

<sup>100</sup> See Chapman, *Foreign Commerce Section, Department of Justice in Symposium: The International Practice of Law*, 7 J. INT'L L. & ECON. 212 (1972).

The regulation of international competition has been done historically with instruments that are crude and blunt, devoid of the elaborate procedural and substantive rules that have evolved in domestic law. As business is progressively internationalized, this legal schizophrenia obviously cannot continue. The battles now being joined in the Tariff Commission, the Treasury Department and other agencies appear to be only the early developments in the evolution of a legal regime for the regulation of competition in international trade more consistent with that which governs our domestic commerce.

*Id.* at 214. See also *1967 International Antitrust Hearings*, *supra* note 7, at 128 (statement of Donald Turner); Shenefield Interview, *supra* note 22, at AA-2 to AA-3. Ass't Attorney General Shenefield favors repeal of the Webb-Pomerene Act on the grounds that it is not necessary. Mr. Shenefield characterizes as "completely wrong" the argument that the "antitrust laws needlessly prevent a lot of export activity, that the antitrust laws impose tremendous cost, and that they impede things the businessmen ought to be able to do." *Id.* at AA-3.

For a superb analysis of the political costs which more permissive American legislation would cause in UNCTAD and OECD, see *1972 International Antitrust Hearings*, *supra* note 7, at 788-91, 795-97 (statement of Prof. Robert Smith). For a dramatically opposed view (*i.e.*, American antitrust laws should be suspended until Japan and the EEC nations adopt comparable laws to restrain their exporters), see Final Report of United States Chamber of Commerce Task Force on U.S. Antitrust Laws and American Exports, *reprinted in 1974 International Antitrust Hearings*, *supra* note 7, at 163.

<sup>101</sup> See Ongman, *supra* note 25. See also Thiesing, *Antitrust and International Law as Viewed*

nized since the very beginning of important foreign antitrust laws.<sup>102</sup> The scope of foreign and especially EEC antitrust laws is ever-expanding.<sup>103</sup> To the extent that foreign antitrust laws grow stronger, any American exception for export combinations would tend to become futile since the combination would be "escaping" American antitrust law only at the price of being "caught" by foreign law.<sup>104</sup>

Countervailing combinations have been formed to neutralize monopoly with monopsony. The most notorious examples are in the sulphur industry with the formation of a buying pool by the British.<sup>105</sup> Sulphur buying cartels have also surfaced in Australia and New Zealand.<sup>106</sup> Although the American selling cartel claims it did not foster the buying cartels,<sup>107</sup> economic evidence seems to justify the monopsonies as a necessary defense to economic chauvinism.<sup>108</sup> Thus, the prin-

---

*from the United States and European Common Market*, 25 RECORD OF THE ASS'N OF THE BAR OF THE CITY OF N.Y. 208, 209 (1970).

<sup>102</sup> See, e.g., Timberg, *Conflict and Growth in the International and Comparative Law of Antitrust*, 4 ABA SECTION INT'L & COMP. L. BULL. 20, 24-25 (1960).

<sup>103</sup> See Dyestuffs case, 1 COMM. MKT. REP. (CCH) ¶ 2542.39 (1973). Europeans have no sympathy for other countries' restrictive exporting policies they would not tolerate at home. Thiesing, *supra* note 101, at 209.

For a description of liberalization of extraterritorial application of European and EEC antitrust laws, see *1974 International Antitrust Hearings*, *supra* note 7, at 645-46, 670-72. See also Note, *Article 85 and European Antitrust Litigation: A Search for Economic Balancing*, 27 STAN. L. REV. 1275 (1975).

<sup>104</sup> It is interesting to note that a former Attorney General has used the spreading competitive norm as the basis of an argument that American law should apply less frequently:

[Prior to WWII, the absence] of comprehensive antitrust regulation in Western Europe may be one of the reasons that U.S. enforcement agencies were anxious to expand the jurisdiction of the antitrust laws extraterritorially. But now that this antitrust vacuum has been filled in Western Europe, there may not be a pressing need to have our antitrust laws expanded to cover activities there.

Speech by former Attorney General Herbert Brownell to the National Industrial Conference Board (May 16, 1962), *quoted in 1964 International Antitrust Hearings*, *supra* note 7, at 232.

Yet, P. Ver Loren van Themant, a former Director of Competition Policy for the EEC, has testified recently that European antitrust law is snagging American business much more than the extraterritorial application of American law: "[There] are cases in which there has been, on the European side, a control of restrictive practices to which American firms participated, and which had not been forbidden by the American authorities." *1974 International Antitrust Hearings*, *supra* note 7, at 796.

<sup>105</sup> The creation of the buying group required an exemption from the British antimonopoly statutes. This was provided, according to the British statutory scheme, by the Restrictive Practices Court which felt the market conditions justified the creation of a buying cartel. In re National Sulphuric Acid Ass'ns Agreement (No. 2), L.R. 6, R.P. 210 (Rest. Prac. 1966).

For Sullexco's argument that it did not cause the import cartel and that the British buying group engaged in unfair trade practices against Sullexco, see *1967 International Antitrust Hearings*, *supra* note 7, at 277-79 (letter from Sulphur Export Corp. to Sen. Hart, July 27, 1967).

<sup>106</sup> See N.Y.U. Note, *supra* note 64, at 370 n.163 (1969).

<sup>107</sup> *Id.* See also letter from Sulphur Export Corp., *supra* note 105.

<sup>108</sup> In the 1963-1964 export year, Sullexco, the Webb-Pomerene association, refused to export

ciple of countervailing power generates a bilateral monopoly.<sup>109</sup> Various economic theories further indicate that protectionism, espoused by the framers of the Webb-Pomerene Act, does not make economic sense.

Some commentators have suggested that higher prices in foreign markets mean higher profits for American firms. This view was shared by the framers of the Webb-Pomerene Act.<sup>110</sup> Additional present-day support is provided by arguments for improving the balance of payments.<sup>111</sup> However, such a stance "indicates by and large an ignorance of any profound knowledge of the theory of international trade and

---

although the major producers were operating at only 60% capacity. Sulexco felt overseas prices were too low. Since Sulexco's market covered 50% of the world market, the overseas effect was similar to that of the OPEC oil embargo. In 1964, the price to U.S. buyers remained constant while the world price doubled. The British buying cartel was formed in order to cope with this problem. The buying power of the cartel enabled it to purchase all of its requirements from sources of supply other than Sulexco. Larson Thesis, *supra* note 39, at 177-80.

<sup>109</sup> See generally J. GALBRAITH, *AMERICAN CAPITALISM: THE CONCEPT OF COUNTERVAILING POWER* 108-34 (rev. ed. 1956). See also 1972 *International Antitrust Hearings*, *supra* note 7, at 691-92; 1974 *International Antitrust Hearings*, *supra* note 7, at 69-70.

Another example of countervailing power is found in the industrialized nations' response to OPEC. The newly formed International Energy Agency is putting pressure on OPEC by building up emergency stockpiles, enforcing conservation, and encouraging substantial investment in alternative energy sources. See Kraar, *OPEC is Starting to Feel the Pressure*, *FORTUNE*, May 1975, at 285-86. For a generalized discussion of the defensive cartel, see H. KRONSTEIN, *THE LAW OF INTERNATIONAL CARTELS* 142-53 (1973) [hereinafter cited as KRONSTEIN]. Cf. *The Impact of Buyer Concentration in Manufacturing Industries*, 57 *REV. ECON. & STAT.* 125 (1975).

<sup>110</sup> K. Parzych, *An Analysis of Export Trade under the Webb-Pomerene Act of 1918* 60-83 (1970) (unpublished Ph.D. Dissertation in economics at the University of Connecticut); Weiner & Parzych, *The Webb-Pomerene Export Trade Act: A U.S. Antitrust Exemption*, 6 *J. WORLD TRADE L.* 119 (1972).

<sup>111</sup> In recent years the U.S. balance of payments has been in deficit. See SENATE FINANCE COMM., 93RD CONG., 2D SESS., *U.S. BALANCE OF TRADE AND BALANCE OF PAYMENTS* (Comm. Print 1974). A deficit, of course, has the undesirable effect of making the United States an international debtor. See generally Mullen, *Export Promotion: Legal and Structural Limitations on a Broad United States Commitment*, 7 *LAW & POL'Y INT'L BUS.* 57 (1975). It is unclear, however, that restrictive practices in export trade have more than a marginal effect on the balance of payments. For example, American merchandise trade shifted from a \$3.9 billion deficit for the first 3 quarters of 1971 to a \$7.2 billion surplus for the first 3 quarters of 1975. The decrease in U.S. demand for foreign products derived from recession, liquidation of domestic inventories and the favorable cumulative effects on the U.S. competitive position of depreciation of the dollar relative to a number of leading foreign currencies. U.S. COMMERCE DEPT., *BALANCE OF TRADE DEVELOPMENTS: THIRD QUARTER 1975*, 55 *SURVEY OF CURRENT BUSINESS* 14 (Dec. 1975). See also Hein, *United States Foreign Trade: From Deficit to Surplus—and Back?*, *WORLD BUS. PERSPECTIVES*, No. 20 (April 1974). During this time, American substantive antitrust policy in the export field remained unchanged.

The 1975 statistics show a remarkable recovery. Export of goods went from a \$5.3 billion deficit in 1974 to a \$9 billion surplus in 1975. This is the largest surplus since a \$10 billion surplus during the Marshall Plan in 1947. In addition, the basic balance which accounts for purchases and sales of goods as well as transactions in services such as military aid and investment dividends was in surplus by \$1.4 billion as contrasted with a \$10.7 billion deficit in 1974. The basic balance

competitive markets.”<sup>112</sup>

Generally, economic theory suggests that exports may be expanded in three ways.<sup>113</sup> First, goods may be brought to non-domestic markets where their price in such markets is relatively low. Proponents of such expansion advocate their position by means of international trade theory.<sup>114</sup> Second, exports might increase as trade barriers are reduced.<sup>115</sup> Third, reducing the cost of exporting will increase export trade.<sup>116</sup> Within this framework, some judgments are possible about the economic desirability of protectionism.

Two theories explaining the operation of international trade are widely held by economists: the principle of comparative costs and factor proportions analysis.<sup>117</sup> Each of these theories, even in its most ele-

---

surplus was the first recorded since the measure was created in 1960. *U.S. Records First Trade Surplus in 1975*, Chi. Tribune, Mar. 25, 1976, § 4, at 11, col. 3.

<sup>112</sup> Fournier, *The Purposes and Results of the Webb-Pomerene Law*, 22 AM. ECON. REV. 18, 19 (1932).

<sup>113</sup> R. Curry, Jr., *An Economic Analysis of the Gains from Trade Effects of Webb-Pomerene Export Trade Associations 57-58* (1967) (unpublished Ph.D. dissertation in economics submitted at the University of Oregon) [hereinafter cited as Curry Thesis].

<sup>114</sup> *Id.*

<sup>115</sup> This paper shows that bargaining disadvantages are rarely substantial. In addition, tangible negotiation advantages in reducing trade barriers by collective bargaining are scarce as can be seen from the Webb-Pomerene experience.

This is partly because the American Government frequently assumes the role of negotiating agent in freeing opportunities for U.S. exporters. It is apparently due, moreover, to the fact that membership coverage in fragmented industries is rarely sufficient to gain tangible bargaining advantage for member versus nonmember exports. In fact, associations play a significant role as bargaining agents for U.S. products only where domestic producers are few, membership coverage is high, and the U.S. position in world trade is large. *1967 International Antitrust Hearings*, *supra* note 7, at 45 (statement of Willard Mueller, Director, Bureau of Economics, FTCS).

<sup>116</sup> Curry Thesis, *supra* note 113, at 57-58. See also Wolfe, *Transport Costs and Comparative Advantage*, 67 J. POL. ECON. 392 (1959).

<sup>117</sup> Much of the following economic discussion relies on the coherent outline of the various theories of international trade compiled in H. HELLER, *INTERNATIONAL TRADE: THEORY AND EMPIRICAL EVIDENCE* (2d ed. 1973) [hereinafter cited as HELLER]. Heller directs the reader to the classical literature, much of which has received sustained criticism.

It has been noted that international trade theory has not been integrated with theories of imperfect competition in domestic markets. Professor Harry G. Johnson points out that ‘. . . pure international trade theorists have been preoccupied with two major theoretical problems, for the study of which it has been necessary to assume perfect competition; . . . [first], to define the precise sense in which it can be maintained that free trade is a welfare-maximizing policy; . . . and [second], to work out and refine the so-called Heckscher-Ohlin model of international trade, whose power and elegance depend entirely on its assumption of perfect competition . . . . Fascination with these formal theoretical problems has dominated the literature, to the exclusion of empirically derived problems . . . .’  
Curry Thesis, *supra* note 113, at 263 n.72 (quoting Johnson, *International Trade and Monopolistic Competition*, in *MONOPOLISTIC COMPETITION THEORY: STUDIES IN IMPACT* 205 (R. Kuenne ed. 1967)).

Nevertheless, though demonstrations of market performance cannot be predicted by international trade theory, presumptions “as to benefit or injury from particular disturbances [effects] in

mentary form, says something negative about the economic utility of horizontal restrictive combinations in export trade.

The principle of comparative costs states that a country will tend to export, out of a set of commodities, the commodity whose relative cost or comparative cost of production is lower than it is in the potential import country.<sup>118</sup> The short-term maximization of profits in export trade can, therefore, be counterproductive in the long term. As noted above, an assumption of elastic commodity demand implies that as prices increase the number of units of domestically produced commodity will decrease, depressing the domestic economy.<sup>119</sup> In time, the price will rise to the level where the cost of production in the United States and in an export-target nation will be equal. As the comparative cost differential grows smaller, export trade will markedly decrease. If the comparative cost differential turns negative, export trade will halt.<sup>120</sup> Thus, inflated product prices deriving from price fixing in a horizontal combination may tend towards the elimination of American export in the product.

The second theory, factor proportions analysis,<sup>121</sup> assumes that countries are characterized by different factor endowments and that there are different factor intensities between products. The theory also assumes identical production functions for all countries.<sup>122</sup> Given these assumptions, factor proportions analysis concludes that a country

---

foreign trade" may still be garnered. J. VINER, *STUDIES IN THE THEORY OF INTERNATIONAL TRADE* 527 (1937). At the level of judicial intervention, only such general presumptions will be within the scope of proper inquiry.

<sup>118</sup> HELLER, *supra* note 117, at 29-49.

<sup>119</sup> That is, the profit maximizing price may not be the total revenue maximizing price. 1972 *International Antitrust Hearings*, *supra* note 7, at 247 (statement of Sen. Hart). Increased production is only a stop-gap measure. As a result of a horizontal combination's foreign success, target countries will seek self-sufficiency and local investment will be attracted by the anticompetitive profits. When this new production, either in purchaser or exporter countries, is introduced, prices will equilibrate to a normal competitive level leaving the industry with severe overcapacity. See N.Y.U. Note, *supra* note 98, at 373-74; 1967 *International Antitrust Hearings*, *supra* note 7, at 214 (statement of Donald Turner); 1972 *International Antitrust Hearings*, *supra* note 7, at 685, 693.

<sup>120</sup> The available empirical evidence shows a continuous trade decrease as the comparative differential grows small. However, trade does not stop when the differential reaches zero, and the quantum of trade may continue undiminished even when the differential is non-negligibly negative. There are two main causes for this development. First, products may be differentiated within commodity classes. In such cases, brand preference and product price inelasticity arise. Second, oligopolistic firms price products differently than those in competitive markets. These special pricing techniques often allow oligopolists to maintain markets at a supra-competitive price. HELLER, *supra* note 117, at 47-48.

<sup>121</sup> This theory, also called the Heckscher-Ohlin model, was originally presented in 1919 by Eli Heckscher and elaborated upon in 1933 by Bertil Ohlin. *Id.* at 64 n.3.

<sup>122</sup> Factors of production may be defined as those productive resources which can be used to produce commodities desired by a country's populace. Certain products will require a greater

will tend to export commodities which are intensive in its abundant factors, relative to other countries.<sup>123</sup> The United States is the most capital-abundant country in the world and factor proportions analysis would predict that "the United States will tend to export commodities that are intensive in her abundant factor, namely, capital, while importing commodities that could be produced at home only by the intensive utilization of her scarce factor of production, labor."<sup>124</sup>

Indeed, American export trade is principally in capital-intensive, high-technology goods.<sup>125</sup> Most of these goods are highly differentiated products which are purchased for a narrow, specific purpose.

However, the available evidence with Webb-Pomerene associations shows that those products in which it would be theoretically most beneficial for the United States to trade are also the products which manufacturers do not desire to market through horizontal combina-

---

amount of one factor than another. These certain products are termed "relatively intense" in this one factor. Production functions describe the methodology of commodity production.

<sup>123</sup> Stated somewhat less technically, each nation specializes in producing commodities which its physical conditions of production and raw materials favor. Trade occurs when these commodities are exchanged for other commodities which the country cannot favorably produce. Lancaster, *The Heckscher-Ohlin Trade Model: A Geometric Treatment*, 24 *ECONOMICS* 19, 28-39 (1957).

<sup>124</sup> HELLER, *supra* note 117, at 69. See generally *id.* at 64-71. See also Curry Thesis *supra* note 113, at 52-62. Some of Curry's arguments appear piecemeal in four locations. See Curry, *The Webb-Pomerene Law: A Continuing Controversy*, 27 *Q. REV. ECON. & BUS.* 1; Curry, *Economic Characteristics of Members of Webb-Pomerene Export Associations*, *OREGON BUS. REV.*, July 1967, at 1; Curry, *Economic Activities of Webb-Pomerene Export Trade Associations*, 26 *OREGON BUS. REV.*, Aug. 1967, at 1; 1967 *International Antitrust Hearings*, *supra* note 7, at 4 (statement of Robert L. Curry, Jr.).

It appears that labor is no longer as "scarce" a factor of production as it once was. The average annual percentage gains in unit labor costs—changes in the labor compensation involved in the production of one unit of output—has been relatively low for the United States over the period 1960-1973. Indeed, the percentage rise in this period was only one-half that of Japan. Bauer, *The Competitiveness of U.S. Exports*, *WORLD BUS. PERSPECTIVES*, No. 22 (Aug. 1974).

<sup>125</sup> The 1967 FTC Webb-Pomerene study noted:

The United States is still a major supplier of standardized raw materials. However, in recent years its exports have reflected the output of a technically advanced and diversified economy.

The fruits of technical change and research and development are increasingly likely to provide the basis for any comparative advantage we may maintain in international trade.

FTC 50-YEAR REVIEW, *supra* note 65, at 65-66. In 1918, only 31% of American exports were manufactured products compared to nearly 70% of American exports in 1967. *Id.* at 68. Even with the recent grain deals, the ratio of nonagricultural to agricultural exports was 75:22 in 1974. U.S. DEPT. OF COMMERCE, 56 *SURVEY OF CURRENT BUSINESS* S(23-24) (Pt. 1, Jan. 1976).

Indeed, the industries which have the best immediate export potential for the U.S. either produce high technology products or are themselves highly technologically based. See 1973 *International Antitrust Hearings*, *supra* note 7, at 104 (statement of Frederick B. Dent, Sec'y of Commerce). For a detailed program purporting to show the feasibility of exporting low technology goods, however, see *id.* at 194-202. In 1971, America exported \$8.4 billion more technology-intensive manufactured products, \$9.1 billion less nontechnology-intensive manufactured products, and \$3.3 less raw materials than it imported. In 1951-55, the respective numbers were +5.7, +1.8, and -2.1 billion. 1972 *International Antitrust Hearings*, *supra* note 7, at 53-55.



tions. None of the leading Webb-Pomerene-assisted products is a technically complex, differentiated product.<sup>126</sup> Differentiated product marketing techniques emphasize design, performance, characteristic brand differences, and after-sale services. These techniques are not well-performed by a horizontal combination that necessarily de-emphasizes product identity and pride.<sup>127</sup> Thus, marketing realities prevent a horizontal combination from optimizing trade in those products which international trade theory indicates are the products in which the United States may most beneficially trade.<sup>128</sup>

As we have seen, international trade theory suggests that horizontal restrictive practices are counterproductive in the long term. But the effects of restrictions in a market depend on the nature of the market. If market imperfections are severe enough, "certain deviations from the free-trade policy [may be] rational on purely economic grounds."<sup>129</sup>

Economists have pointed out that an additional restriction in an already imperfect market will not necessarily impair the market further. Termed the theory of second best, this view holds that "it is *not* true that a situation in which more, but not all, of the optimum conditions are fulfilled is necessarily, or even likely to be, superior to a situation in which fewer are fulfilled."<sup>130</sup> Nevertheless, it is necessary to

---

<sup>126</sup> FTC 50-YEAR REVIEW, *supra* note 65, at 51. See also 1967 *International Antitrust Hearings*, *supra* note 7, at 34-35 (statement of Willard Mueller, Dir. Bureau of Economics, FTC). But cf. 1972 *International Antitrust Hearings*, *supra* note 7, at 577-78, 581 (textile machinery). A Webb-Pomerene association of 22 textile machinery manufacturers was formed for the purpose of bidding on contracts which are too large or varied for any of the members to handle individually. The association allows the pooling of resources to the extent that it can fill the machine requirements of entire textile mills. Although the firms are not small, still no individual member could supply the requirements of an entire plant. 1973 *International Antitrust Hearings*, *supra* note 7, at 312, 344-48. The association members remain very competitive domestically. *Id.* at 348.

<sup>127</sup> For example, a Webb-Pomerene association sponsored by the National Association of Manufacturers organized in 1920 to export products of all types was a total failure. Note, *Ten Years' Operation of the Webb Law*, 19 AM. ECON. REV. 9, 11 (1929). Consider, however, the following statement by the National Ass'n of Manufacturers: "[In] industries where quality and service as well as price are important, competition factors often find export associations unworkable." 1972 *International Antitrust Hearings*, *supra* note 7, at 805.

One could conceive of a market in which price and nonprice competition coexist. Price fixing in such a situation could be beneficial to producers, but the existence of product differentiation ordinarily means that the market emphasizes nonprice competition. Larson Thesis, *supra* note 67, at 40. Cf. 1972 *International Antitrust Hearings*, *supra* note 7, at 479 (statement of Virgil V. Grant, Exec. V.P., Caterpillar Tractor Co.).

<sup>128</sup> See 1972 *International Antitrust Hearings*, *supra* note 7, at 793-94. Cf. *id.* at 69 (statement of Maurice Stans, Sec'y of Commerce).

<sup>129</sup> Haberler, *Some Problems in the Pure Theory of International Trade*, 60 ECON. J. 227 (1951); Curry Thesis, *supra* note 113, at 62-63. See also Hale & Hale, *supra* note 24, at 514-15; 1974 *International Antitrust Hearings*, *supra* note 7, at 70 (statement of Prof. Mestmäcker).

<sup>130</sup> Lipsey & Lancaster, *The General Theory of Second Best*, 24(1) REV. ECON. STUD., 12 (1956-57).

demonstrate that a restriction of international trade is justified. Indeed, "it is necessary to show that imperfections exist . . . and that they persistently operate in such a way as to weaken free trade."<sup>131</sup>

This line of inquiry can be usefully developed by exploring two questions. First, do there exist successful cartels exercising more economic power than American firms against which American firms cannot successfully compete?<sup>132</sup> Second, do the market distortions supposedly caused by group practices by others in foreign markets actually weaken free trade in a way that can only be counterattacked by an American horizontal group practice?<sup>133</sup>

A common argument against the importance of cartels in foreign markets is the greatly limited usage that the Webb-Pomerene Act has received.<sup>134</sup> Even the Webb-Pomerene associations are less than unanimous in their views on the extent and power of cartelization in world markets.<sup>135</sup> Data exist which show that cartelization is manifest in Eu-

---

<sup>131</sup> See note 129 *supra*. Cf. Curry Thesis, *supra* note 113, at 184-216. Indeed, Dudley Chapman, Asst. Chief, Foreign Commerce Section, Antitrust Division, Dept. of Justice, after reviewing the historical evidence on cartels, concluded: "[t]he foregoing examples reveal 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." Chapman, *Exports and Antitrust: Must Competition Stop at the Water's Edge?*, 6 VAND. J. TRANSNAT'L L. 399, 433 (1973). Thus, a need for any antitrust exemption in export trade must be affirmatively shown.

<sup>132</sup> See generally C. EDWARDS, *CARTELIZATION IN WESTERN EUROPE* 83-89 (1964) [hereinafter cited as EDWARDS].

Yet, since the Edwards study, no further investigation has occurred. Senator Inouye expressed the resulting concern directly:

With all of the people in government, it appears that we have very little, if any, information about the current activities of our competitors as far as foreign export cartels are concerned. In view of this lack of information, what is the basis for the oft repeated claim that antitrust laws inhibit American firms from competing effectively abroad?

*1973 International Antitrust Hearings, supra* note 7, at 392.

In the absence of such empirical data, our study will explore Senator Inouye's question on the basis of a theoretical analysis.

<sup>133</sup> Cf. Hale & Hale, *supra* note 24, at 517, 523. The evidence presented below as to the effect of cartelization in world markets must necessarily be only suggestive. So many forces affect international commerce that it is doubtful whether conclusive evidence of the quantitative effect of permitting combinations among exporters will ever appear. *Id.* at 517 n.82.

<sup>134</sup> Dr. Mueller, Director, Bureau of Economics, FTC, has estimated that only 2.4% of American exports are sold by Webb-Pomerene associations. *1967 International Antitrust Hearings, supra* note 7, at 58. If goods independently exported by firms belonging to Webb-Pomerene associations are included, the figure doubles. *Id.* at 181 (statement of Lawrence McQuade, Acting Ass't Sec. of Commerce).

In 1967, only \$600 million were actually exported by WPA's. Of this amount, about \$120 million was sold to the federal government and \$300 million was accounted for by the motion picture industry. *Id.* at 184. The 1973 Antitrust Hearings indicate that the percentage of Webb exports dropped to between 1 and 2%. *1973 International Antitrust Hearings, supra* note 7, at 311.

<sup>135</sup> In a 1969 survey, the question was asked whether cartels are still effective in each industry of the responding association and member firm; 73% of the associations and 64% of the firms

ropean areas to which Webb-Pomerene Associations export.<sup>136</sup> However, data on the types and degrees of persistent market restrictions which export trade associations meet are not available.<sup>137</sup>

An exhaustive 1967 study documented ninety-seven international cartels which existed some time between 1940 and 1967.<sup>138</sup> Of the cartels still suspected to be in operation, only a handful were dealing in the capital-intensive, high-technology, differentiated product which accounts for most of U.S. export trade.<sup>139</sup> Indeed, the great foreign commercial triumphs of recent years have been individual corporations exploiting the uniqueness of their differentiated products and services.<sup>140</sup>

---

thought effective cartels still existed in their industry. Wesolowski, *An Inquiry Into the Administration and Utilization of the Webb-Pomerene Act*, 4 INT'L LAW. 107, 117-18 (1969).

However, the evidence adduced at congressional hearings suggests that group bargaining units were useful in bargaining only for the sulphur and motion picture export associations. 1967 *International Antitrust Hearings*, *supra* note 7, at 35, 37-38, 54. Yet even the restrictions that the sulphur and motion picture export associations met may have arisen as a defensive "countervailing power" on the buyer's side of the market induced by strong American market power in the products. N.Y.U. Note, *supra* note 98, at 370 n.163; Curry Thesis, *supra* note 113, at 136-42, 157, 207-14.

Moreover, Curry's research showed that no association or firm officials indicated that "concerted association restrictions were required to cope with organized foreign competitors, as distinguished from organized customers." *Id.* at 214. In addition, foreign cartels have had a negligible effect on WPA disbanding. FTC 50-YEAR REVIEW, *supra* note 65, Table II-3, at 27.

<sup>136</sup> Curry Thesis, *supra* note 113, at 119-35; EDWARDS, *supra* note 132, at 10-11, *reprinted in 1964 International Antitrust Hearings*, *supra* note 7, at 493-94. Edwards' research has disclosed a long list of restrictions including: fixed selling prices; recommended selling prices; buying prices; fixed resale prices; recommended resale prices; discounts and rebates of volume and other varieties; other terms of sale; control of production; quotas; allocation of territories, customers, and types of goods; joint use of trademarks with commercial restrictions; refusals to deal; maintenance of a list of recognized traders; discrimination in the denial of customary terms to certain groups; and eligibility for discounts or terms based on trading functions. *Id.*

<sup>137</sup> Curry noted the reasons for the paucity of this data in his 1967 dissertation: "[t]he associations and member firms did not supply sufficient information through answered questionnaires and interviews to support a fuller discussion of these problems. Neither the Federal Trade Commission nor any other government agency collects such data." Curry Thesis, *supra* note 113, at 122 n.17.

<sup>138</sup> L. Seraphin, *International Cartels and the Impact of American Antitrust Law* 12-28 (1968) (unpublished manuscript on file in the Library of the Northwestern University School of Law).

<sup>139</sup> Technology-buying cartels seem to spring up only in the communist bloc and in less developed countries. 1972 *International Antitrust Hearings*, *supra* note 7, at 578.

*International* technology cartels are to be distinguished from *export* cartels which export technology. Export cartels are prevalent in such areas as machine tools, electronics, automotive goods, consumer products, motion pictures, and the consulting (engineering and construction) industry. 1973 *International Antitrust Hearings*, *supra* note 7, at 362.

<sup>140</sup> A partial list would include Volkswagen, Sony, Toyota, Volvo, Norelco, and Christian Dior. 1974 *International Antitrust Hearings*, *supra* note 7, at 175 (Kaufer Memorandum). Indeed, Dr. Werner Benisch of the Federal Association of German Industries felt that export cartels permit neither Germany nor America to export more goods: "[i]f we include [in the definition of

Further, whipsawing will also tend to disappear if American firms dominate their foreign counterparts in relative size. If American firms generally tend to dwarf foreign competitors, then foreign cartels could not afford to ignore a particular U.S. firm's correspondingly large proportion of the world supply in a specific product.<sup>141</sup> Indeed, American firms tend to be much larger than their foreign rivals. United States companies were, in 1966, on the average, five times larger than British or German companies and ten times larger than French companies.<sup>142</sup> Of the world's 50 largest companies, 24 are American. But more importantly, American companies account for 57% of the total sales, 53% of the assets, 52% of the employees, and 68% of the net income of the top 50 corporations.<sup>143</sup> Indeed, a major study has found that one of the reasons why European and Japanese governments allow export cartelization is to compete effectively with powerful American-based multinational companies.<sup>144</sup>

Yet let us assume that price fixing and sales quota cartels still exist in world markets in significant numbers.<sup>145</sup> An examination of the

---

export cartels] agreements on prices and market research and the like, then I would not foresee a great increase of productivity as a result of the existence of such export cartels." *1974 International Antitrust Hearings*, *supra* note 7, at 1006.

<sup>141</sup> Larson Thesis, *supra* note 67, at 99-107. For detailed information on economic concentration outside of the United States, see *Hearings on Economic Concentration Outside of the United States Pursuant to S. Res. 233 Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary*, 90th Cong., 2nd Sess., pt. 7 (1968).

Dr. Mueller, Dir., Bureau of Economics, FTC, has noted that the "great bulk" of American companies can take care of themselves in the foreign markets. *1967 International Antitrust Hearings*, *supra* note 7, at 48.

<sup>142</sup> Larson Thesis, *supra* note 67, at 100. A trend towards increased European concentration has been met by legislation in the Common Market. *1974 International Antitrust Hearings*, *supra* note 7, at 8, 13, 16.

As a rule, American firms are the largest in their respective field of activity. *Id.* at 647. For a listing of the largest American dominated companies in Germany, see *id.* at 697-99. It is interesting to note that of the 50 largest firms headquartered in Germany, 7 are American subsidiaries. *Id.* at 1021.

<sup>143</sup> *The Fifty Largest Industrial Companies in the World*, FORTUNE, Aug. 1975, at 163 [hereinafter cited as *Fifty Companies*]. In addition, of the 300 largest Western corporations in 1972, 170 were American, 20 were German, and 58 were from the rest of the EEC. Of the 25 largest, 17 were American, 2 German, and 5 belonged to the rest of the EEC. *1974 International Antitrust Hearings*, *supra* note 7, at 1020.

<sup>144</sup> U.S. TARIFF COMMISSION, 93RD CONG., 1ST SESS., IMPLICATIONS OF MULTINATIONAL FIRMS FOR WORLD TRADE AND INVESTMENT AND FOR U.S. TRADE AND LABOR 866 (Comm. Print 1973). See also *1967 International Antitrust Hearings*, *supra* note 7, at 18; *1974 International Antitrust Hearings*, *supra* note 7, at 28. *Cf. id.* at 1085.

<sup>145</sup> Kronstein concluded that: "between the two world wars the international agreements were open, whereas today there are hidden international market divisions based primarily on quota allocations." KRONSTEIN, *supra* note 109, at 129. Thus a discussion of the economics of beating a cartel is of more than academic interest even in the face of a paucity of evidence pointing to the

sources of a cartel's economic power makes one wonder why substantial American firms cannot beat foreign cartels.

Cartels operate by fixing prices, allocating territories and setting quotas.<sup>146</sup> The price levels in the various geographic markets become supracompetitive due to the fact that the cartel's product is distributed by a nonmarket-conscious allocation scheme. In addition, supracompetitive revenues depend on inelastic product demand.<sup>147</sup>

However, if the cartel has only a relatively small coverage of the product market, large buyers would be free to buy from American exporters who either beat the cartel price directly or sell in areas where the cartel has set a quota. Cartel theory, therefore, predicts that firms operating outside a cartel—including American firms—actually benefit from the supracompetitive price set by the cartel members.<sup>148</sup>

---

existence of profit-maximizing cartels. *Accord, 1964 International Antitrust Hearings, supra* note 7, at 19 (statement of Dr. Corwin Edwards).

Of course, isolated instances of price cartels do exist. For example, the quinine and quinidine cartel have been heavily documented. *See Hearings on Prices of Quinine and Quinidine Before the Subcomm. on Antitrust and Monopoly of the Sen. Comm. on the Judiciary, 90th Cong., 1st Sess., pt. 2* (1967).

<sup>146</sup> This discussion of cartel theory is patterned largely after Larson. Larson Thesis, *supra* note 67, at 117, 200. The most useful definition of the modern cartel is provided by Kronstein: "[t]herefore, the first characteristic of the modern cartel is the consent of the parties to isolate a special market from normal market discipline and to submit it to an artificial order. Secondly, this consent of the parties must induce parallel or complementary economic behavior that influences or regulates the market. All other matters can be coordinated between those poles but may also be subject to formal agreements." KRONSTEIN, *supra* note 109, at 40.

It should be remembered that the types of cartel restrictions most likely to injure independent American competitors are the ones most likely to be attacked under European antitrust laws. *See 1964 International Antitrust Hearings, supra* note 7, at 24-25 (statement of Corwin Edwards). However, it is doubtful that European laws will act against restrictions in third country markets if there is no effect in the EEC.

For a description of the restrictive business practice policies of the major trading nations, see ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT, GUIDE TO LEGISLATION ON RESTRICTIVE BUSINESS PRACTICES (1971), as well as note 99 *supra*.

<sup>147</sup> It is counterproductive to hold the price at supracompetitive levels if the total profits at that price are lower than at a competitively determined price. For artificially high profits, the demand must be inelastic. That is, if price is raised by a given percentage, the demand declines by a smaller percentage. When this occurs, total revenue—price times demand—rises.

In addition, if demand is unstable, the cartel cannot maintain any given price and output combination over the various demand cycles, causing individual members to lose their desire to cooperate. *See Cartels for Basic Raw Materials?*, BUS. IN BRIEF, No. 118, Oct. 1974, at 6.

<sup>148</sup> EDWARDS, *supra* note 132, at 5. Cartel theory has been confirmed by experience in at least four industries. FTC, REPORT ON INTERNATIONAL STEEL CARTELS 231-33 (1948) (steel); Larson Thesis, *supra* note 39, at 133-137 (copper); 1972 *International Antitrust Hearings, supra* note 7, at 861-63 (fertilizer); *id.* at 691 (phosphorous).

Of course, the cartel could attempt to deal with the outside supply by engaging in cut-throat competition. Interview with George DeNemesKeri-Kiss, European Economist, Economics Group, Chase Manhattan Bank (Nov. 19, 1975). However, dumping cannot continue indefinitely, and many nations now have antidumping codes which would tend to discourage an overt price

Still, if the product market coverage is high, the cartel becomes the primary source of supply. Thus, the supracompetitive price can be enforced by the mutual understanding that a firm buying from suppliers outside the cartel stands the risk of the cartel's supply being shut off. The dissenting firm, therefore, must rely on the cartel-beater to provide him with adequate and stable supply. To the extent that such reliable outside supply cannot be found, the cartel gains a stranglehold on the customer.<sup>149</sup>

But as the market coverage of a cartel increases, it also becomes more difficult for the cartel to retain conformity among its members.<sup>150</sup> Usually, a high coverage cartel will have a large number of members with differently perceived self-interests. There will be large cost differences among different cartel members. And manufacturers' cartels must deal with complicating factors of product differentiation and technological research and development.<sup>151</sup> The result of these differences is often secret price shadings by cartel members which are difficult for the cartel to police. Even OPEC, the strongest cartel in history, is experiencing these instabilities.<sup>152</sup>

Thus, even an assumed existence of effective foreign cartels cannot fully explain the difficulty American business claims it is meeting in its attempt to expand export markets. Perhaps Senator Adlai Stevenson is correct when he suggests that American business must face the unpleasant possibility that the reason export difficulties have been encountered may be that certain American product lines are both high cost and no longer at the forefront of world technology.<sup>153</sup>

---

war. See generally Fisher, *The Antidumping Law of the United States: A Legal and Economic Analysis*, 5 LAW & POL'Y INT'L BUS. 85 (1973); C. MACPHEE, RESTRICTIONS ON INTERNATIONAL TRADE IN STEEL 166-67 (1974).

<sup>149</sup> For a more detailed discussion of this mechanism, see C. MACPHEE, RESTRICTIONS ON INTERNATIONAL TRADE IN STEEL (1974). See also Kronstein, *supra* note 109, at 173-75.

<sup>150</sup> See generally Marbach, *Généralités sur la question des cartels at de la libre concurrence* in LES CARTELS ET LES ASSOCIATIONS PROFESSIONNELLES DE NOS JOURS 7 (H. Böckli ed. 1956); E. HEXNER, INTERNATIONAL CARTELS (1945); C. KINDLEBERGER, INTERNATIONAL ECONOMICS 274-79 (rev. ed. 1958). For a discussion of enforcement of the cartel understanding amongst cartel members under optimal conditions, see Kronstein, *supra* note 109, at 169-73; Posner, *Oligopoly and the Antitrust Laws: A Suggested Approach*, 21 STAN. L. REV. 1562, 1569-75 (1969).

<sup>151</sup> On the problem of cooperative effects in research and development, see Kronstein, *supra* note 109, at 43-76.

<sup>152</sup> See note 126 *supra*. But cf. *Government Oilmen v. OPEC*, N.Y. Times, Mar. 10, 1976, at 34, col. 1; 1974 *International Antitrust Hearings*, *supra* note 7, at 1309.

<sup>153</sup> See 1973 *International Antitrust Hearings*, *supra* note 7, at 86 (statement of Sen. Stevenson). See also P. PETERSON, THE UNITED STATES IN THE CHANGING WORLD ECONOMY (2 vols. 1971). It should be noted in this regard that in the crucial area of manufactured goods, the U.S. slipped from holding 25% of the world market in 1960 to 21% in 1970. 1972 *International Antitrust Hearings*, *supra* note 7, at 1.

It also seems clear that horizontal combinations are unnecessary to reduce exporting costs to competitive levels. Indeed, multinational corporations and other large companies do not need joint efforts to export economically. However, what of that group of firms—here termed “small business”—who are either too small to support the costs of exporting or whose export business is too minor to justify its cost? Are joint efforts necessary to reduce the costs of exporting to economically efficient levels?

For those small firms who decide they wish to export, private international trading firms such as export management companies seem to adequately fulfill small business' export needs. This can be seen by examining how these companies go about meeting the needs of small business.

Export management companies (EMC's) seem to assist small business in these areas as well and as cheaply as horizontal joint selling agencies.<sup>154</sup> Yet, EMC's do not draw to themselves undue economic power since successful EMC's do such a good job in developing overseas markets for their clients that they will eventually lose the clients to a direct market effort.<sup>155</sup> In addition, EMC's carry only complemen-

---

Professor Rostow presents sterner criticism:

Our people are simply not working as hard as their German, Japanese or Italian competitors. By and large, the management of our industries is failing in its responsibilities under the circumstances. As a result, in sector after sector, we are pricing ourselves out of the market.

*1972 International Antitrust Hearings, supra note 7, at 883.*

However, since 1972, America has been increasing exports at a much faster rate than our eleven largest competitors, “expanding our share of the group's trade from less than 18 percent to more than 20 percent.” *Fifty Companies, supra note 143, at 121.* Yet the increase is mainly in the Third World. Since 1967, the trade in manufactured goods with the industrialized countries has been \$24 billion in deficit while a surplus of \$38 billion was enjoyed with the developing countries.

*Id.*

Indeed, at variance with the commonly held theory that Japanese trade barriers are the major reason American exports to Japan have lagged so far behind Japanese exports to America, two reports by the American Embassy in Tokyo show that American businessmen are failing to take advantage of a large Japanese market for certain items. *1974 International Antitrust Hearings, supra note 7, at 1168-1299.*

<sup>154</sup> Although it may be marginally cheaper to export through a horizontal combination rather than through an EMC, the cost differential is not large enough to raise the end-user price. *1967 International Antitrust Hearings, supra note 7, at 117-19* (statement of Frank Goodhue, V.P., First National Bank of Chicago); *1972 International Antitrust Hearings, supra note 7, at 867* (letter from Corwin Edwards to Sen. Magnuson); FTC 50-YEAR REVIEW, *supra note 65, at 61.* For the view that EMC's present the most viable means of expanding exports of small and middle-sized businesses and a program for implementation, see *1973 International Antitrust Hearings, supra note 7, at 128-31* (statement of Donald Niewiaroski).

<sup>155</sup> *1972 International Antitrust Hearings, supra note 7, at 281-82* (letter from Bruce W. Rohrbacher to Sen. Inouye). See also Edgerton, *EMCs Help Small Firms Sell Goods on a Global Scale*, Chi. Tribune, Nov. 24, 1976, § 4, at 7, col. 2. Often what happens is the EMC builds up the export trade of a client to about \$1 million per year and then the client breaks off and starts exporting for

tary products; directly competing products are never carried by one EMC.<sup>156</sup> The 800 EMC's operating in the United States are responsible for about eight percent of American exports.<sup>157</sup>

There is a budding school of thought in the export management community that vertical integration along the lines of the Japanese trading companies should be allowed. The available economies of scale from horizontal combination in manufactured goods are already exploited by EMC's. However, the vast economies from vertical integration have not been available to American exporters.<sup>158</sup>

Pure vertical integration would allow marketing, transportation, banking, insurance, and production activities to be under the control of one economic entity. The well-known economies incident to elimination of middlemen and duplicative services might allow the entity to sell at a price generating normal profit levels, while below its competitor's cost. Theoretically, vertical integration could radically enhance comparative advantage in any given product.

The Japanese trading companies present a hybrid example of vertical integration.<sup>159</sup> Six major trading companies accounted for forty percent of Japan's total exports and up to seventy percent of the main export items produced. In 1972, the turnover (approximately equal to

---

itself. Various interviews conducted by the author at the National Foreign Trade Convention, New York, New York (Nov. 17-18, 1975) [hereinafter cited as EMC Interviews]. Indeed, the turnover in a ten-year period of an EMC's clients is about 70%. Interview with Gilbert Weinstein, V.P., N.Y. Chamber of Commerce, New York, New York (Nov. 19, 1975) [hereinafter cited as Weinstein Interview]. Mr. Weinstein also serves as the Executive Director of the Federation of Export Management Companies and of the National Association of Export Management Companies.

<sup>156</sup> This is not to say that goods from competing companies will not be carried. Company *X* and *Y* might both make coffee pots and air conditioners. The EMC might well sell *X*'s coffee pots and *Y*'s air conditioners. EMC Interviews, *supra* note 155.

<sup>157</sup> 1972 *International Antitrust Hearings*, *supra* note 7, at 136.

<sup>158</sup> See A U.S. Government Policy in Support of Exports, 8-11 (Sept. 1978) (report by a Special Task Force of the International Trade Club of Chicago on Export Expansion). There have been, apparently, no in-depth studies of the trading company concept and its compatibility with the American economic system. 1972 *International Antitrust Hearings*, *supra* note 7, at 282. However, the possibility of several long range studies is now being discussed both in the private and public sectors. Weinstein Interview, *supra* note 155.

<sup>159</sup> FORTUNE, Sept. 1970 at 126; Economic Department, Secretariat, Fair Trade Commission (Japan), *Report on the Investigation of General Trading Companies*, 20 ANTITRUST BULL. 171 (1975); 1964 *International Antitrust Hearings*, *supra* note 7, at 104 (statement of Arthur Dean). For a departure point into the literature on the Japanese antitrust laws, see Matsushita & Hildebrand, *Antimonopoly Law of Japan—Relating to International Business Transactions*, 4 CASE W. RES. J. INT'L L. 124 (1972) and authorities cited therein. For a valuable study of the character of corporate life in Japan, see K. YOSHITAKE, AN INTRODUCTION TO PUBLIC ENTERPRISE IN JAPAN (1973). Cf. W. DIEBOLD, THE UNITED STATES AND THE INDUSTRIAL WORLD: AMERICAN FOREIGN ECONOMIC POLICY IN THE 1970'S 54-57 (1972).



gross sales) of the six was 21 trillion yen (approximately 70 billion 1972 dollars) and the total value of exports handled was 3.7 trillion yen (approximately 12 billion 1972 dollars).<sup>160</sup>

By having marketing, transportation, banking, insurance, and production activities coordinated under one corporate umbrella, the six companies can take advantage of vertical economies. The economies potentially exploitable by integrating the entire production process from the importation of raw materials to the manufacturing and marketing of finished products would seem to be obvious.

But if vertical economies are so remarkable, one wonders why American firms are not being priced out of the market. Perhaps the reason is that the large American multinational firms normally can self-insure trade in manufactured goods as well as the trading companies while providing some integrative economies.<sup>161</sup> Perhaps the joint marketing of products by the trading company outlet is well-suited to the types of goods in which the Japanese primarily trade but would not well serve the products America primarily exports.<sup>162</sup>

---

<sup>160</sup> For some examples of Japanese cost cutting through vertical integration to end user prices below competitor's cost, see *1972 International Antitrust Hearings, supra* note 7, at 855-56. See also *1972 International Antitrust Hearings, supra* note 7, at 439. For a most insightful study in English of the operations of the six companies, see E. HADLEY, *ANTITRUST IN JAPAN* (1970).

<sup>161</sup> EMC Interviews *supra* note 155, *1972 International Antitrust Hearings, supra* note 7, at 836 (statement of Daniel Goldy). In addition, although Japanese export programs are more efficient than those of the United States, most of the measures used by Japan have analogs in America. Export financing, guarantees, and insurance coverage as practiced by Japan correspond to the activities of the Export-Import Bank and the Foreign Credit Insurance Association. The U.S. Department of Commerce's Office of International Trade Promotion performs export expansion functions similar to those of the Japan Export Trade Organization. Trezise, *U.S.-Japan Economic Relations*, in 1 WILLIAMS COMMISSION PAPER 183, 189 (1971).

In contrast, Germany provides its exporters little governmental assistance:

The German Government grants no export aid to German industry. The enterprises do not even receive the classic export assistance in the form of financial support for market surveys.

In the field of export promotion, too, the German Government declines to intervene even though the most important foreign competitors enjoy more favorable terms of interest through [their] Government financing instruments.

*1974 International Antitrust Hearings, supra* note 7, at 1002 (statement of Dr. Werner Benisch). Indeed, less than 3% of German export trade is carried on through export cartels. Timberg, *Export Agreements and Export Cartels*, 1974 FORDHAM CORP. L. INST. 25, 31.

<sup>162</sup> Robert Beshar, formerly the Director of the Bureau of International Commerce, Dept. of Commerce, has noted:

Now, other than the agricultural surplus, all [the other commodities that America exports] involve a lot of dickering with the customer. Those are custom sales for the most part. That kind of trade is not going to be sold through joint marketing efforts. And all these easy analogies to the Japanese who are, after all, exporting to us primarily sundries, just don't apply. You must understand that they are coming into our market with that middle range of consumer products and rather simple industrial equipment, which is essentially sold from a catalogue.

*A Suggested Analysis for Horizontal Restraints.* The preceding analysis has dealt with the question of whether the antitrust laws are injuring American export trade. The American antitrust laws that apply to horizontal restrictive business practices do not seem to affect adversely American export performance. Perhaps intuitively sharing this point of view, various Senators have exhorted the business community to disprove this general conclusion by specific example.<sup>163</sup> The response has been meager.<sup>164</sup> Indeed, there seem to be few examples

---

Those products are amenable to joint marketing or whatever fancy term you wish to apply to a combined effort. Most of our exports are not in that category.  
*1974 International Antitrust Hearings, supra note 7, at 1319.*

<sup>163</sup> Senator Hart, while the chairman of the Subcommittee on Antitrust and Monopoly, made his position quite clear in a statement before Senator Inouye's Subcommittee on Foreign Commerce and Tourism:

Many persons have alleged for many years that the antitrust laws somehow interfere with the exports of the United States and that these laws are so fuzzy as to present undue uncertainty to businessmen. The Subcommittee on Antitrust and Monopoly of the Judiciary Committee held extensive hearings just a few years ago on the international aspects of antitrust. Those hearings convinced me that the allegations were without substance and that if anything is needed it is more vigorous enforcement of our own antitrust laws and encouragement of other nations to continue their recent trends toward a more American-like policy on restrictive business practices.

*1972 International Antitrust Hearings, supra note 7, at 247. See also 1964 International Antitrust Hearings, supra note 7, at 1-16.* Senator Inouye had a similar position:

Competition is the keystone of the American free enterprise system. In the absence of convincing evidence that new legislation is needed to aid our exporters, the Congress would understandably be reluctant to tamper with our antitrust laws. Therefore, the burden is on the business community to present a cogent case that change is necessary and desirable.

*1973 International Antitrust Hearings, supra note 7, at 278.*

The reasons why businesses do not feel free to give specific examples appear most vociferously in the trade press. *See Sheridan, Is Antitrust Sinking the U.S. Trade Effort, reprinted in 121 CONG. REC. 19413 (1975).*

Four reasons for this silence, deriving from the Justice Department's refusal to give use immunity to information acquired from interviewed firms, are often given by the business community:

- 1) Because of the uncertainty in antitrust, companies are never certain whether they have committed an offense.
- 2) Many companies are under consent decrees and are afraid that actions they have taken under market conditions not foreseen at the time of the decree might now be interpreted as infringing the decree.
- 3) Some companies are now involved in antitrust suits.
- 4) Records of projects not entered into because of antitrust problems are usually not kept.

*See 1972 International Antitrust Hearings, supra note 7, at 51-52; 1973 International Antitrust Hearings, supra note 7, at 357.*

<sup>164</sup> The congressional hearings held since 1964 have developed only a handful of examples. The 1964 International Antitrust Hearings considered a list of 20 examples presented by William Persen, Vice President and Editor of Business International. However, the facts were so brief that one could not make a detailed antitrust analysis. *1964 International Antitrust Hearings, supra note 7, at 52-56.* Examples provided privately to the Justice Department were analyzed, and to some extent defused, by the well-known Comegys Memorandum. *1972 International Antitrust Hearings, supra note 7, at 807; 1974 International Antitrust Hearings, supra note 7, at 185.* The Commerce Department provided three sketchy examples. *1972 International Antitrust Hearings, supra note 7, at 116; 1973 International Antitrust Hearings, supra note 7, at 221.* The National Association of

where the antitrust laws are impeding the ability of American business to compete internationally on the horizontal level.

Principally, examples of such injury exist in the service industries, which feel they cannot combine in order to offer their service economically.<sup>165</sup> Although the service industries choose not to export jointly, industry spokesmen believe that they could export under the Webb-Pomerene umbrella; however, this position is not without dispute.<sup>166</sup> In response to criticism from the service industries, bills have been proposed in each of the last three Congresses to give export trade in services the benefit of a Webb-Pomerene exemption.<sup>167</sup>

---

Manufacturers developed 19 case studies. *1974 International Antitrust Hearings, supra* note 7, at 1432-37. Recently, an ad hoc antitrust study group of the President's Export Council developed 15 case examples. These examples were provided to the author in January 1976 and served as the groundwork for much of the thought going into this article. The examples later formed the basis of the now famous *Guide* of the Justice Department. See *GUIDE, supra* note 30. The *Justice Guide* is an important document which has become the starting point for any serious study of antitrust in the foreign commerce area.

<sup>165</sup> Of the examples that deal with horizontal combination in export trade, almost all deal with consortia for the export of services. Perhaps this focus on service industries is not surprising when one realizes that nearly 50% of the U.S. GNP is service-based and that most efforts to export goods will find joint action inappropriate because of product differentiation, high-level technology, and individualized services. *1973 International Antitrust Hearings, supra* note 7, at 208, 341.

An example in computer services is typical. A leading executive of a trade association of computer manufacturers pointed out the emerging Latin American market. However, none of the companies could afford entry individually. The executive concluded that: "joint operations among two or more of these companies for the same purpose would involve antitrust implications that automatically precluded such joint efforts." Japanese companies which could pool resources were seen as having an unfair advantage. *1972 International Antitrust Hearings, supra* note 7, at 375. A similar situation involving the establishment of a tele-communications system for an entire North African country. *1973 International Antitrust Hearings, supra* note 7, at 314.

<sup>166</sup> The Justice Department has noted that: "it has been doubtful whether firms could employ an export trade association to offer construction services and the like abroad." *1973 International Antitrust Hearings, supra* note 7, at 334-35.

Indeed, Justice blocked the registration of a Webb-Pomerene Association for construction services. In early 1967, the staff of the FTC advised the Commission that such an association should be permitted to register. This advice was given on the basis that blueprints, drawings, and plans or the machinery for installation at a construction project could be categorized as "goods, wares and merchandise" under the Act when construed in light of its legislative history. Justice, which in 1967 advocated the Webb-Pomerene repeal in the 1967 International Antitrust Hearings, did not wish to expand the coverage of the Act. Although the construction companies were exhorted to test the issue by formally registering as an association, the firms felt the risk of incurring a lawsuit by Justice was not worth the trouble. *1973 International Antitrust Hearings, supra* note 7, at 389-91, 435-36.

<sup>167</sup> S. 2754, 92nd Cong., 1st Sess., 117 CONG. REC. 37625 (1971); S. 1483, 93d Cong., 1st Sess., 119 CONG. REC. 11184 (1973); S. 1774, 93d Cong., 1st Sess., 119 CONG. REC. 14891 (1973); S. 1974, 94th Cong., 1st Sess., 121 CONG. REC. 19400 (1975). S. 1483 would have added "data, goodwill, insurance, technological know-how, services, facilities, or similar properties" to the Webb-Pomerene Act. S. 1774 would have defined export trade as:

solely trade or commerce in goods, wares, merchandise, architectural services, engineering

However, there is a strong argument that horizontal combinations of service companies in export trade are not violations of the Sherman Act. Indeed, the *International Economic Report of the President* for 1974 found it a "well settled" antitrust principle that a joint venture, even without Webb-Pomerene protection, will not be held illegal where "the size and risks of commercial and industrial projects are so great that one company cannot operate alone."<sup>168</sup>

This argument can best be articulated against a specific set of facts.<sup>169</sup> Joint bidding pools of overseas construction firms offer an important example.<sup>170</sup> The National Constructors Association (NCA), composed of American engineering-construction companies, has annually derived \$3.5 billion from overseas construction of oil refineries, petrochemical and chemical plants, and other similar facilities.<sup>171</sup> Yet NCA members are not allowed to engage in joint bidding; this has put American firms at a competitive disadvantage. It has not been uncommon for four or five American firms bidding independently to lose a bid to a single consolidated Japanese or Italian entity bidding on behalf of many firms.<sup>172</sup>

---

services, construction services, training services, financing services, or project or general management services exported, or in the course of being exported from the United States or any territory thereof to any foreign nation: but the words 'export trade' shall not be deemed to include (i) the production, manufacture, or selling for consumption of for resale, within the United States or any territory thereof, of such goods, wares, merchandise, or services, or any act in the course of such production, manufacture, or selling for consumption or resale or (ii) trade or commerce in patents, licences, trade secrets or know-how except such know-how as is incidental to the sale of such goods, wares, merchandise, or services.

S. 1973 makes the same exceptions from export trade as S. 1774 but offers a different definition of export trade:

exclusively trade or commerce in goods, products, merchandise, or architectural engineering, construction, training, financing, insurance or project or general management services or the licensing for distribution or exhibition of motion pictures or television films or tapes or similar services which are exported, or in the course of being exported, from the United States to any foreign nation.

<sup>168</sup> *International Economic Reports of the President (1974)*, reprinted in 5 TRADE REG. REP. (CCH) ¶ 50,262.

<sup>169</sup> For other examples of the application of antitrust principles to specific fact sets in the international antitrust area, see GUIDE, *supra* note 30.

<sup>170</sup> For an ancillary example dealing with consulting engineering firms, see *1973 International Antitrust Hearings*, *supra* note 7, at 120-124.

<sup>171</sup> *1973 International Antitrust Hearings*, *supra* note 7, at 110.

<sup>172</sup> These firms are often subsidized by their governments. Even when they are not, costs—the expenses of preparing the bid (bidding fees)—are spread over a number of individual companies in the bidding entity. Bidding fees can be substantial: \$250-\$300 thousand for a \$100 million project. *1973 International Antitrust Hearings*, *supra* note 7, at 110-11. See also *id.* at 113-20. Of course, these fees are lost if the contract is not let.

Subsidization operates through several mechanisms. Foreign governments give straight export subsidies, special rediscount rates, guarantees of currency convertibility, and protection against credit and political risks. In addition, some governments provide insurance insulating the

Yet the reason that these bids are lost may have nothing to do with adverse effects on antitrust. Many of the overseas contracts are let on a turnkey fixed-cost basis. That is, the plant is to be built from scratch to the point that the owners need only "turn the key" to start productive operation. This type of venture is a large one involving high risk, for all this must be done at the bid price. If unexpected costs from delays or other causes should occur, the construction consortium must bear the loss.

The amount of commerce involved in overseas construction projects is immense. NCA estimates its members could increase the volume of their projects by \$2 billion annually if they could engage in joint bidding. This increased volume would spread itself throughout the larger segment of the U.S. economy represented by the subcontractors.

The almost universal sentiment among the witnesses appearing in Congressional hearings is that such joint bidding in the overseas construction industry is feasible and desirable.<sup>173</sup> Indeed, the Justice De-

---

exporter from individual price increases during the term of the project if the exporter has to give a firm price in order to win the project. *1973 International Antitrust Hearings, supra* note 7, at 389, 414-15, 419.

<sup>173</sup> At least joint bidding is not among the hard core international antitrust violations of "predatory activities against American competitors, price fixing in domestic markets, and agreements with foreign firms or cartels to limit imports into the United States." *1973 International Antitrust Hearings, supra* note 7, at 243 (statement of Assistant Att'y Gen. Thomas E. Kauper).

Proposals to exempt joint bidding in overseas construction from the antitrust laws are not rejected out of hand by the Justice Department as have been proposals for across the board exemptions in export trade. These broader proposals were rejected for two basic reasons:

First, no showing has been made as to the need for allowing firms to combine for these broader purposes so as to improve this Nation's export position; second, we have determined that an absence of such showing of need, a broader grant of antitrust immunity may pose intolerable risks to the consumers of this Nation by threatening domestic competition and incentives for innovation, while at the same time impeding the competitive stance of American firms in international trade.

*1973 International Antitrust Hearings, supra* note 7, at 336; *1974 International Antitrust Hearings, supra* note 7, at 172-73 (statement of Assistant Att'y Gen. Thomas E. Kauper).

The Department of State gave a strong recommendation for expanding the Webb-Pomerene exemption to include services:

We are particularly interested in the extension of the Webb-Pomerene exemption to the service industry. We believe that with the U.S. becoming increasingly a service economy, there is a good deal to be gained in our . . . trade from the export of services. When you look at services such as contracting, architecture, design, engineering, and management, you realize that they are somewhat fragmented in the United States.

If these services can be put together, they can compete with other countries, where such services are not as fragmented as they are here.

Therefore, we are particularly anxious that this legislation move ahead because we believe there is a real opportunity for foreign exchange earnings and for the export of services in this field. We think that the opportunity for these industries to operate under Webb-Pomerene protection would be valuable and useful.

*1973 International Antitrust Hearings, supra* note 7, at 338-39.

The FTC has said:

partment cleared a Commerce Department promotion of the formation of construction consortia on a limited basis to bid on specific major projects totalling over \$3.5 billion in South America.<sup>174</sup>

The Justice Department has outlined a few requirements needed for a favorable Business Review letter.<sup>175</sup> In the Comegys Memorandum, two general requirements were detailed. First, participation in the consortium must not be arbitrarily barred to firms if membership is a practical prerequisite for competition for the project. Second, the activities of the consortium must not have a substantial impact on the domestic commerce of the United States. If it does, then domestic antitrust per se rules will apply. In a specific example dealing with overseas construction consortia, joint bidding was said to be permissible if the "effort does not adversely affect the competition of other American firms," bidding singly.<sup>176</sup> In the Kauper Memorandum, Justice supplemented its position indicating that "*bona fide* joint bids are permissible under the antitrust laws where there is a reasonable showing that each party to the joint bid could not singly bid for or perform the contract."<sup>177</sup> A transaction will be illegal only when a consortium is

---

Turning now to the question of services, the Commission agrees that the Webb Act should be amended to grant immunity for services as well as for goods. Our concern with respect to services is that the immunity be no broader than necessary to achieve the export objectives of the Webb Act.

*1973 International Antitrust Hearings, supra note 7, at 308.*

The Williams Commission's only specific criticism of the Webb-Pomerene Act was that service exports and construction consortia were precluded. COMMISSION ON INTERNATIONAL TRADE AND INVESTMENT POLICY, UNITED STATES INTERNATIONAL ECONOMIC POLICY IN AN INTERDEPENDENT WORLD 120 (1971).

<sup>174</sup> *1973 International Antitrust Hearings, supra note 7, at 147, 1317.* This clearance goes beyond an earlier 1970 clearance for overseas construction projects in Southeast Asia. There the members of the consortium were minor contractors with total domestic revenues of only \$31 million and international billings of \$2.55 million. Only one member had previously done business in Southeast Asia and that volume was negligible. *1974 International Antitrust Hearings, supra note 7, at 178-79.*

Robert Beshler, the former Director of the Bureau of International Commerce, Department of Commerce, has been perplexed about "where this notion has gotten created and magnified that there is any inhibition about going joint book on an offshore transaction." *1974 International Antitrust Hearings, supra note 7, at 1317.* He views "*Timken, National Lead* and those other foreign commerce cases" as dealing with rigging world markets, not as relating to joint offshore bids. *Id.* Nevertheless, to encourage the bidding, Commerce arranged for Justice to "come and sit along to monitor as much as they in their administrative scheme could manage, and then to advise these people if they were going to get into a dangerous area." *Id.* In this posture, Justice encouraged the bidding to proceed although no formal opinion was given. *Id.* at 1318.

<sup>175</sup> The Business Review procedure is described at 28 C.F.R. § 50.6 (1978). See also *1974 International Antitrust Hearings, supra note 7, at 178* (statement of Assistant Att'y Gen. Thomas E. Kauper).

<sup>176</sup> *1974 International Antitrust Hearings, supra note 7, at 188.*

<sup>177</sup> *Id.* at 173. A consortium that meets this test would not be considered an export cartel by the Germans:

proved to be a device for "suppressing individual [*sic*] competition which otherwise could or would have occurred, or for excluding competitors."<sup>178</sup> Indeed, no bidding consortium to sell to foreigners has been attacked by Justice or by private litigants in over twenty years.<sup>179</sup>

The literature in recent years has pursued the question of what substantive rule should obtain in the international realm: a *per se* rule or a rule of reason.<sup>180</sup> Agreement exists that a reasonableness test, as a matter of policy, might well be indicated in certain international situations where *per se* rules would apply domestically.<sup>181</sup> For example, the Department of Justice's *Guide on Antitrust and International Operations* suggests that the rule of reason might have a broader application in the international context because "(1) experience with adverse effects on competition is much more limited than in the domestic market, or (2) there are some special justifications not normally found in the domes-

---

If, however, the firms individually could not take the offer in its entirety—for example, if the offer is for the setting up of a complete steel mill, and you have to have firms doing the engineering, and firms doing the construction of buildings, and firms that supply the electronics equipment—then, of course, if no single firm can supply all of this, and the bid is for the whole project, the firms have to join together. But then, they are not really in competition and there is no question of setting up a cartel . . .

1974 *International Antitrust Hearings*, *supra* note 7, at 650-51 (statement of Dr. Kurt Markert).

In the EEC, a similar construction consortium has received a negative clearance because there was no effect within the EEC from the consortium. *Re the Rules of the Dutch Engineers and Contractors Association (D.E.C.A.)*, 4 *Comm. Mkt. L. Rept.* 50 (1965).

<sup>178</sup> 1974 *International Antitrust Hearings*, *supra* note 7, at 173.

<sup>179</sup> *Id.* at 173, 177. The basic question here is whether the consortium is a sham—whether the ventures could have proceeded independently. Whether the consortium is *bona fide* or a disguised suppression of competition must be determined in view of all the side agreements to the principle deal. *See* Remarks of Joel Davidow, Chief Foreign Commerce Section, Antitrust Division, Dep't of Justice, August 6, 1974) (transcript of discussion between Ad hoc Antitrust Study Committee of the President's Export Council and Representatives of Dep't of Justice and the FTC at the Commerce Dep't).

<sup>180</sup> Chapman, *Exports and Antitrust: Must Competition Stop at the Water's Edge?*, 6 *VAND. J. TRANSAT'L L.* 399, 439-45 (1973); Baker, *Antitrust and World Trade: Tempest in an International Teapot?*, 8 *CORN. INT'L L.J.* 16 (1974).

Chapman proposes two options under the rule of reason. First, a company may seek a business review letter which is given by Justice under a rule of reason analysis. *See* text accompanying notes 175-179, *supra*. Second, an administrative system whereby a body of precedent with legal effect could be developed similar to the negative clearance in the EEC is proposed. The body of jurisprudence would derive from publishing the rationales for decisions in business review-type clearance. This proposal seems only to compound the problems of the business review letter with the spectre of further bureaucracy and greater *a priori* control of business by government.

Baker would apply *per se* rules against restraints which operate to injure import competition into America or act as "bully-boy" tactics injuring the export opportunities of U.S. firms. If a restraint is directed only at a foreign market, the rule of reason would apply. Any spillover effects would be analyzed as ancillary restraints.

<sup>181</sup> *See, e.g.,* Rahl, *A Rejoinder*, 8 *CORN. INT'L L.J.* 42, 43 (1974); P. AREEDA, *ANTITRUST ANALYSIS* 68 (1967).

tic market.”<sup>182</sup> The rule of reason standard generally put forth for the international context follows domestic theory.

As a matter of law, if jurisdiction is shown and the facts make out a restraint which falls under per se rules domestically, what is to prevent a per se rule’s automatic application to the international conduct?<sup>183</sup> The only authorities dealing with this question are two cases which contain seemingly conflicting dicta. The Justice Department brought an action against the American manufacturers who controlled 80% of the export trade in coated abrasives. The defendant companies established abroad jointly-owned factories and obtained membership in a Webb-Pomerene association. Through the association the firms attempted to increase the sales of their foreign-manufactured abrasives by refraining from exporting coated abrasives produced in the United States. Although the arrangement was held illegal in *United States v. Minnesota Mining & Mfg. Co. (3M)*, Judge Wyzanski nevertheless staunchly maintained:

It is axiomatic that if over a sufficiently long period American enterprises, as a result of political or economic barriers, cannot export directly or indirectly from the United States to a particular foreign country at a profit, then any private action taken to secure or interfere solely with business in that area, whatever else it may do, does not restrain foreign commerce in that area in violation of the Sherman Act. For, the very hypothesis is that there is not and could not be any American foreign commerce in that area which could be restrained or monopolized.<sup>184</sup>

However, a Supreme Court decision handed down the following year appears to quarrel with Judge Wyzanski’s axiom. The subsidiaries of the Timken Roller Bearing Company had eliminated competition among themselves in England, France, and the United States by means of territorial allocation of the anti-friction bearing market. In *Timken Roller Bearing Co. v. United States*, the Supreme Court rejected a generalized reasonableness argument:

We also reject the suggestion 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. . . . This position ignores the fact that the provisions in the Sherman Act against restraints of foreign trade

---

<sup>182</sup> GUIDE, *supra* note 30, at 203.

<sup>183</sup> The difficulty of this question was noticed by Judge Leventhal in *Pacific Seafarers, Inc. v. Pacific Far East Line, Inc.*, 404 F.2d 804, 815 n.39 (D.C. Cir. 1968):

With this case in a purely jurisdictional posture we need not consider the question, in many ways more difficult, whether in terms of ruling on the merits of the validity of actions taken, the Sherman Act standards of reasonableness developed for interstate commerce should be applicable with full force to foreign transactions, and whether that issue is still open in light of *Timken Roller Bearing Co. v. United States*, 341 U.S. 593, 71 S. Ct. 971, 95 L.Ed. 1199 (1951).

<sup>184</sup> *United States v. Minnesota Mining & Mfg. Co.*, 92 F. Supp. 947, 958 (D. Mass. 1950).



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.<sup>185</sup>

*Timken* is seen as conflicting with *3M*—indeed suggesting precisely that impossibility of foreign market entry without a horizontal combination, which would be domestically per se unlawful, does not exempt the combination from the application of the per se rule internationally. However, the District Court in *Timken* explicitly found that competition *was possible* and *would have occurred* absent the long-standing restraint.<sup>186</sup> Although the profits for individual entry would have been smaller than those resulting from entry via the horizontal combination, still, American bearings *could have been* profitably exported to foreign markets without horizontal cooperation.

Thus, rather than conflicting with *3M*, *Timken* is fully consistent with it. Together they suggest that if, and only if, the cold legal, financial, and governmental facts are such as to make foreign market entry practically impossible, then a rule of reason analysis, rather than a blind application of a domestic per se rule, will obtain.

The mean struck between *3M* and *Timken* requires us to highlight a workable definition of economic impossibility. The basis for this definition is set forth in *3M* itself. Judge Wyzanski averred that to indicate economic impossibility, the evidence<sup>187</sup> must prove that defendants could not have profitably exported from the United States a substantial volume of their product to the foreign markets in question.<sup>188</sup> Practically speaking, economic impossibility will be reached where the long term costs of implementing the export trade will be greater than the projected foreign profit.

---

<sup>185</sup> *Timken Roller Bearing Co. v. United States*, 341 U.S. 593, 599 (1951).

<sup>186</sup> *United States v. Timken Roller Bearing Co.*, 83 F. Supp. 284, 317-18 (N.D. Ohio 1949).

<sup>187</sup> Judge Wyzanski would allow the relevant political and economic facts to be presented informally.

It is sufficient if the economic and political facts come from published sources recognized as authoritative, persuasive or reliable by the profession of economists or political scientists, and if the publications are presented at a time and in a manner which give the adverse party adequate opportunity to examine, to challenge, to rebut and to argue upon them.

*United States v. Minnesota Mining & Mfg. Co.*, 92 F. Supp. at 958.

<sup>188</sup> *Id.* at 959.

*Conclusion.* In general, then, and assuming the above, the Sherman Act does not seem to forbid those horizontal combinations which would be helpful to American export trade. Exemption of horizontal combinations from domestic Sherman Act standards on the ground that the injury falls only abroad would be a policy of doubtful wisdom. The validity of the subsumed premise—that the injury falls strictly abroad—is highly questionable.

#### VERTICAL RESTRICTIVE BUSINESS PRACTICES IN EXPORTING FROM THE UNITED STATES

To complete the study of the effect of the Sherman Act on export trade, the vertical arrangement of the export market must be briefly considered. Transactions requiring the development and expansion of export markets through foreign subsidiaries, joint ventures, or distributorships often will not restrain American export competition and thus will not make out a substantive antitrust violation.<sup>189</sup> In order to more conveniently describe those transactions which pose antitrust problems, vertical distribution agreements may be split into several analytical categories.

First, products from countries other than the United States can be sold and delivered abroad to foreign buyers. In a previously published article, this regime—there termed “foreign U.S. competition”—was shown to be outside the jurisdictional scope of the Sherman Act,<sup>190</sup> absent an unusual nexus with the United States.<sup>191</sup>

---

<sup>189</sup> See GUIDE, *supra* note 30, at 5-6.

<sup>190</sup> See Ongman, *supra* note 25.

<sup>191</sup> Suppose an American firm, manufacturing and locally incorporated in Germany, obtains requirements contracts from certain key German distributors thereby excluding a competing American exporter from an effective presence in the German market. Since the Sherman Act applies to transactions rather than parties, this situation should be no different from one involving a German firm which corners the key German distributors and thereby forecloses the German market to American exports. Cf. Rahl, *International Application of United States Antitrust Laws: Distribution Arrangements*, 1974 FORDHAM CORP. L. INST. 17, 19-20.

When the American firm corners the market, there is a spillover onto U.S. foreign commerce (competing U.S. exporters), but not onto domestic American consumers. Our general theory of subject matter jurisdiction would create a presumption against jurisdiction in this case. Ongman, *supra* note 25. First, the restraint occurs solely in a foreign country where the primary national interest to be served would seem to be competition for the benefit of foreign consumers rather than protection of American exporters. Germany is clearly the country which should attend to the interests of product competition in Germany. Second, there is no recognized territorial basis for jurisdiction. Since the restraint exists outside the United States, only objective territoriality could at all be relevant as a theoretical basis of jurisdiction. But the effect of the restraint impacts on U.S. *foreign* commerce; there is no immediate domestic territorial effect. Thus, the case for sustaining jurisdiction under an objective territoriality theory is weak.

If, however, there is a conspiracy between an American parent and its foreign subsidiary to

Secondly, American exporters may use branches or foreign subsidiaries to distribute for them abroad. Intra-corporate conspiracy is not cognizable under the Sherman Act.<sup>192</sup> Thus, distribution through branches is not within the substantive scope of the Act.

The intra-enterprise conspiracy doctrine does permit a subsidiary to conspire with its parent, especially when the parent and the subsidiary hold themselves out to the market place as competitors.<sup>193</sup> However, in most cases of distribution through foreign subsidiaries, the subsidiary will be acting merely as the parent's agent. Under these circumstances, no Sherman Act violation will exist.<sup>194</sup>

However, if the subsidiary holds itself out as the parent's competitor, or if the foreign distributor is independent of the American exporter, then there will be no bar to a finding of intra-enterprise conspiracy.<sup>195</sup> Here the distribution arrangements would be jurisdictionally covered because a foreign distribution system acquiring its products directly from an American exporter will still be "in" American foreign commerce.<sup>196</sup>

Thus, the substantive law applying to distribution practices need only be considered as applied to independent foreign distributors acquiring their products through a direct sale by an American exporter who ships his product from America. An analysis of the principal forms of distribution restraints is sketched below.

#### *Export Sales to Independent Foreign Distributors*

*Tying.* Domestically, tying arrangements are per se unlawful.<sup>197</sup> In the *Comegys Memorandum*,<sup>198</sup> and in the *Justice Department Guide*,<sup>199</sup> tying is said to be permissible if no American exporter is excluded and only foreign firms are affected by the tie. This view—that there is no Sherman Act violation simply because the people injured by

---

prevent an American competitor's exports from reaching the foreign market or if the foreign subsidiary is a monopolist in the foreign market, a violation might exist. See generally *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962).

<sup>192</sup> *Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd.*, 416 F.2d 71 (9th Cir. 1969).

<sup>193</sup> *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211, 215 (1951).

<sup>194</sup> Cf. Letter from Assistant Att'y Gen. Richard W. McLaren to Thomas J. O'Connell, General Counsel, Board of Governors of the Federal Reserve System (Feb. 22, 1971), reprinted in ANTITRUST & TRADE REG. REP. (BNA) No. 516, D1 (June 8, 1971).

<sup>195</sup> *Id.*

<sup>196</sup> Ongman, *supra* note 25. See also Rahl, *supra* note 191.

<sup>197</sup> *Northern Pacific Ry. Co. v. United States*, 356 U.S. 1 (1958).

<sup>198</sup> Memorandum of the Department of Justice Concerning Antitrust and Foreign Commerce, 5 Trade Reg. Rep. (CCH) ¶ 50,129.

<sup>199</sup> GUIDE, *supra* note 30, at 36-38.

the tie are foreigners—would be incorrect on the basis of this article's conclusion that the Sherman Act applies even when the injury runs only against foreigners.<sup>200</sup>

It is, however, possible to imagine a tying-like arrangement which would not be subject to a per se rule.<sup>201</sup> Suppose Alpha, an American company, purchases significant quantities of product *X* from Omega in Western Europe. Product *X* is equally available in Western Europe from at least six other companies. Alpha would like to export *Y* to Western Europe, but because of delivery costs Alpha cannot match the price offered by the European suppliers of *Y*. Alpha offers to switch its purchases of *X* from Omega to Delta in Western Europe if Delta agrees to purchase its requirements of *Y* from Alpha. Delta so agrees and begins buying *Y* from Alpha rather than from European sources. Alpha switches its purchases of *X* to Delta. This arrangement establishes the first American export presence in product *Y* in Western Europe by tying sales of *Y* to purchases of *X*.

Tying-like arrangements such as these fare harshly because "competition on the merits with respect to the tied product is inevitably curbed."<sup>202</sup> However, since there is no American competition in export of *Y*, there is no competition to curb.<sup>203</sup> Indeed an export presence is created where none existed before. Market entry without the tie is economically impossible. Hence, our analysis of the horizontal level of the export market above demonstrates that the restraint should be analyzed under the rule of reason.<sup>204</sup>

*Exclusive Distributorships.* Under the Sherman Act, an exclusive foreign distributorship, without more, is permissible.<sup>205</sup> However, if

---

<sup>200</sup> Indeed, in the *Guide*, the Justice Department acknowledged that the tying corporation was not justified "in doing what would otherwise be illegal under U.S. antitrust laws." *GUIDE, supra* note 30, at 36.

<sup>201</sup> This example appears as Case 15 in the list of cases submitted by the ad hoc committee on antitrust of the President's Export Council. Letter with attachments from Friedrich R. Crupe, Executive Secretary, President's Export Council to author (Jan. 28, 1976).

<sup>202</sup> *Northern Pacific Ry. Co. v. United States*, 356 U.S. 1, 6 (1958).

<sup>203</sup> Where American competition for export of the good or service exists, such a reciprocal arrangement could well be illegal. *Industria Siciliana Asfalti, Bitumi, S.p.A. v. Exxon Research and Engineering Co.*, 1977-1 Trade Cas. 70,775 (S.D.N.Y. 1977).

<sup>204</sup> See text accompanying notes 164-79 *supra*.

<sup>205</sup> If the seller is dominant or if the foreign distributors covered are of crucial importance for access to the foreign market illegality might be found. Otherwise, requirements contracts are probably legal. Rahl, *supra* note 191, at 19. See, e.g., *United States v. Imperial Chemical Industries, Ltd.*, 105 F. Supp. 215, 244 (S.D.N.Y. 1952) (court enjoined granting of exclusive distributorships as a means of restoring competition but refused to prohibit them generally); *United States v. Minnesota Mining & Mfg. Co.*, 92 F. Supp. 947, 952, 965 (D. Mass. 1950) (Webb-Pomerene associations have an exclusive foreign distributor).

A few words should be added on the putative application of other antitrust laws to require-

the foreign distributor is a competitor of the American exporter, substantial problems may arise.<sup>206</sup>

Suppose that substantial American and French manufacturers of products in a given industry desire to establish cross-exclusive limited-duration distributorships in the home country of the other with each buying from the other.<sup>207</sup> The pricing by the foreign distributor will be rationalized to fit into the price structure of the distributor's own products sold in its home country. The business judgment of each firm indicates that this arrangement will permit more sales in the home country of the distributor than could be enjoyed through independent export efforts. Most of the products of the two firms are complementary but a few are fully interchangeable in use.

This is a *prima facie* case of market allocation at least in the fully interchangeable product and perhaps in the complementary products depending on the degree of their mutual substitutability. The Sherman Act protects competition not competitors.<sup>208</sup> Therefore, while the quantum of commerce might well be increased by the scheme, the domestic *per se* rule on market allocation may be applicable. An "elaborate inquiry as to the precise harm [the cross-distributorships] have caused or the business excuse for their use" is immaterial to their legality.<sup>209</sup>

*Territorial Restrictions.* A common vertical restraint is a promise

---

ments contracts. Section 3 of the Clayton Act is used to test such agreements domestically. However, it is inapplicable to the international sphere since by its language it applies only to goods sold "for use, consumption or resale within the United States . . . or place under the jurisdiction of the United States." 15 U.S.C. § 14 (1976). Section 5 of the FTC Act would seem to be theoretically available and thus Clayton Act or even lower standards could be applied. However, it has never been used in this area. Rahl, *supra* note 191, at 19.

<sup>206</sup> For instance, problems may develop if a U.S. company appoints a foreign company who is a competitor in some markets as its distributor in a certain foreign country. The non-rationality of this business scheme taints the transaction with the suspicion of market allocation between the two companies in all of the world's markets. The same problem would arise if two U.S. companies would have a common sales agent without foreign competition. However, if two U.S. competing companies are in a small foreign market where there is not enough business to set up two separate distribution systems, the legality of a shared distributor is problematical. See generally Fugate, *International Distribution Agreements*, 43 ANTITRUST L.J. 540, 545-46 (1974).

<sup>207</sup> This example appears as Case 14 in the list of cases submitted by the ad hoc committee on antitrust of the President's Export Council to the Justice Department. Letter with attachments from Friedrich R. Crupe, Executive Secretary, President's Export Council to author (Jan. 28, 1976).

<sup>208</sup> See, e.g., *United States v. Minneosta Mining & Mfg. Co.*, 92 F. Supp. 947, 962 (D. Mass. 1950). In 3M, the court states, "[i]t is . . . significant that Congress has not said you may choke commerce here if you nourish it there." *Id.*

<sup>209</sup> *United States v. Topco Associates, Inc.*, 405 U.S. 596, 607 (1972), quoting *Northern Pacific Ry. Co. v. United States*, 356 U.S. 1, 5 (1968).

from a buyer that it will not sell in competition with the seller in certain markets. It is well-settled that a restraint upon resale by a foreign buyer to the United States would be a Sherman Act violation.<sup>210</sup> Restrictions on resale by a foreign distributor to a third country would, absent unusual spillover, be outside the jurisdiction of the Sherman Act.<sup>211</sup> Beyond these two guideposts, some recent cases have begun to flesh out the law.

These cases broadly deal with agreements not to export between domestic distributors. In *Todhunter-Mitchell & Co. Ltd. v. Anheuser-Busch, Inc.*,<sup>212</sup> the defendant restrained its Miami and New Orleans wholesalers from selling to the plaintiff in the Bahamas where the plaintiff would have resold in competition with defendant's exclusive Bahamian distributor. The agreement preventing the two wholesaler-dealers from selling to Todhunter-Mitchell in the Bahamas was held to be a violation of the Sherman Act.

In *Pacific Coast Agricultural Export Association v. Sunkist Growers, Inc.*,<sup>213</sup> Sunkist and its exclusive agent in Hong Kong were held liable for treble damages for refusing to sell citrus fruits to plaintiff, a Webb-Pomerene association. Since Sunkist knew that plaintiff intended to export to and sell in Hong Kong, in competition with the exclusive agent, Sunkist directly restrained export trade of an American competitor.

A recent case, *Continental T.V., Inc. v. GTE Sylvania, Inc.*,<sup>214</sup> has returned the analysis of vertical territorial restrictions to the rule of reason standard.<sup>215</sup> Consequently, this area of the law concerning re-

---

<sup>210</sup> See, e.g., *Sanib Corp. v. United Fruit Co.*, 135 F. Supp. 764 (S.D.N.Y.: 1955) (refusal to sell bananas produced abroad to a firm processing and then selling them in United States import trade held illegal).

<sup>211</sup> See Ongman, *supra* note 25. See also Rahl, *supra* note 191, at 23.

<sup>212</sup> 375 F. Supp. 610 (E.D. Pa. 1974), *findings partially amended* 383 F. Supp. 586 (E.D. Pa. 1974). A similar result obtained in a consent decree based partly upon allegations that a producer had obtained agreements from domestic distributors not to export its products. *United States v. Dymo Industries, Inc.*, 1967 Trade Cas. 72,102 (N.D. Cal. 1967) (consent decree).

<sup>213</sup> 1973-1 Trade Cas. 74,523 (N.D. Cal. 1973).

<sup>214</sup> *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977). In *GTE*, the Supreme Court recognized that per se rules were in essence a balancing test to form a net judgment on the utility of the practice when compared against the competitive norm:

Per se rules thus require the Court to make broad generalizations about the social utility of particular commercial practices. The probability that anticompetitive consequences will result from a practice and the severity of those consequences must be balanced against its pro-competitive consequences. Cases that do not fit the generalization may arise, but a per se rule reflects the judgment that such cases are not sufficiently common or important to justify the time and expense necessary to identify them.

*Id.* at 50 n.16.

<sup>215</sup> Prior to *GTE Sylvania*, vertical territorial restrictions were held to be per se illegal in *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967).

straint of domestic export opportunities will undoubtedly continue to develop new principles now that the per se rule no longer applies to vertical territorial restraints.

*Resale Price Maintenance.* The final area of interest in the field of vertical restraints is resale price maintenance. Resale price arrangements between Americans exporting from the United States and foreign distributors appear never to have been questioned.<sup>216</sup> Since the result of resale price maintenance in the foreign market will be supracompetitive prices, protection of American exporters would not seem to be needed. The supracompetitive price will aid their attempts to penetrate the market. Furthermore, the *GTE Sylvania* case has reaffirmed the prohibition against resale price maintenance.

#### SUMMARY AND CONCLUSION

The world of international trade is complex, esoteric, and sometimes arcane. Public barriers responding to macroeconomic principles intermesh with restraints understandable in microeconomic terms to form an open economy that cannot be well-described theoretically. The increased importance of the multinational corporation in the developed countries and of producer cartels in the Third World add to the perhaps insurmountable task of describing international trade by classical economic theory.

In this rich fabric of international economic reality, antitrust laws may be a relatively minor thread. Nevertheless, perhaps because of subservience to public economic issues in world trade, the effect of antitrust law on international trade might not present a wholly intractable problem. In light of today's business realities, the importance of direct export trade may also pale before joint manufacturing ventures abroad, the multinational corporation and the licensing of technology. Whether these forms of doing business abroad are impeded by antitrust law must await future study. Yet the analysis offered by this article should be broad enough to be useful in studying each of these business modes.

This article has limited itself to an analysis of the effects of American antitrust law on export trade. No one seems to doubt that when the effect of competition on the domestic economy is direct and unquestioned the substantive law developed domestically should apply.

The focus of debate has been on whether the costs to American

---

<sup>216</sup> Rahl, *supra* note 191, at 23.

business of applying domestic standards to horizontal restrictive business practices outweigh the benefits of a symmetric antitrust policy when the injury from the restrictive practice only falls in foreign markets. Is the fight against antitrust protectionism worth forcing American business to live with per se domestic rules in export trade? Would the application of per se rules impede American business' attempt to enter foreign markets competitively?

This article has offered a two-tiered answer. First, the premise that horizontal restrictive practices aimed abroad result in injuries which only fall abroad is faulty. Spillover and entry barrier effects often prevent containment of the injury to foreign markets.

Second, the wisdom of antitrust protectionism has been directly confronted. The costs of antitrust protectionism on international comity are high. Both in terms of the problem of leaving the United States open to charges of hypocrisy and double standards in its antitrust policy as well as in terms of the real threat of foreign retaliation, antitrust law should apply with equal force irrespective of the nationality of the persons injured so long as subject matter jurisdiction can be made out. If competition's appellation as the *summa bonum* of American trade is to be symmetric—applying with equal force both domestically and internationally—a parochial application of the Sherman Act to export trade may not be tolerated.

Antitrust protectionism does not make economic sense either. International trade theory shows that the products America does well in exporting cannot be successfully exported by a horizontal combination. Horizontal combinations are needed neither to reduce trade barriers nor to reduce the costs of exporting to competitive levels. Finally, in those few areas where horizontal cooperation truly is needed for successful market entry, the combination will be subject to rule of reason rather than per se standards.

Under our jurisdictional model, only independent foreign distribution systems buying goods from a company exporting from the United States will be within the jurisdictional scope of the Sherman Act. The article discusses the substantive law on various restrictive distribution practices: tying, exclusive distributorships, territorial restrictions, and resale price maintenance. Distribution arrangements in foreign markets are potentially an area of considerable antitrust activity despite the small number of decided cases. Yet the available guideposts indicate that distribution systems which meet most American companies' needs can be constructed without substantial American, although perhaps with substantial foreign, antitrust law risk.



On the basis of the available evidence, the Sherman Act does not substantially impede American export trade in goods and services. The theoretical arguments of this article predict that such evidence will not be found. At the very least, we should not respond to a discredited shepherd's cry of "wolf" until we are presented with some hard evidence of an adverse impact on American export trade.