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Melvin Schwechter

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*Melvin Schwechter**
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United States antitrust laws increasingly have affected the international activities of U.S. corporations. The business community maintains that these laws have hurt international operations. In this article, Messrs. Schwechter and Schepard consider five major areas of concern to American businessmen: potential antitrust attacks upon licensing agreements, use of the foreign sovereign compulsion doctrine as an antitrust defense, subject matter jurisdiction and discovery, application of the "rule of reason" to international joint ventures, and the multifaceted nature of antitrust enforcement. They then discuss the Justice Department's response to the business community and propose several recommendations that should help United States firms reduce the antitrust uncertainty they face in exporting and other international operations.

In recent years, there has been a continuing controversy between the nation's business community and its antitrust enforcement representatives regarding the effects of U.S. antitrust laws[1] on the interna-

* Associate, law offices of Robert M. Gottschalk P.C., New York; member, District of Columbia Bar; former Attorney-Advisor, U.S. Dep't of Commerce; B.J. Ed., 1968, Hebrew College; B.A., 1969, Brandeis University; M.A. in Regional Studies-Soviet Union, 1971, Harvard University; J.D. 1974, New York University.

** Partner, Coudert Freres, Paris, France; member, New York Bar; former Assistant General Counsel for Industry and Trade, U.S. Dep't of Commerce; B.A., 1964, City College of New York; J.D., 1967, New York University.

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[1] The statutes primarily involved are the Sherman Act, 15 U.S.C. §§ 1-7 (1976); the Clayton

tional operations of U.S. firms. Although its roots date back to the early part of this century,[2] the immediate cause of this controversy has been the rapidly expanding trade deficit which the United States has experienced during the last eight years. In 1971, this country registered its first trade deficit since 1893.[3] Since 1971, there have been only two trade surplus years.[4] In the last three years, the trade deficit has increased dramatically from nearly $5.9 billion in 1976, to $26.5 billion in 1977, to $28.5 billion in 1978.[5] Figures for the first nine months of 1979 indicate that a substantial yearly deficit is likely to continue.[6]

The deteriorating international trade position clearly presents a direct threat to the country's economic well-being. It has been, in part, responsible for a decline in the value of the dollar relative to certain other currencies, a steady rise in the price of most imports, disturbing rates of inflation, job loss in import competing industries, a slow rate of job increase in the export sector of the economy, and an increased Fed-

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Act, 15 U.S.C. § 12-27, 44 (Supp. I, 1977); § 5 of the Federal Trade Commission Act, 15 U.S.C. § 45 (1976); and the Webb-Pomerene Act, 15 U.S.C. §§ 61-65 (1976).

[2] A 1916 Federal Trade Commission Report to the Congress on Cooperation in American Export Trade, S. DOC. No. 426, 64th Cong., 1st Sess. 1 (1915), pointed out that in comparison to foreign traders in other nations, "doubt and fear as to legal restrictions prevent Americans from developing equally effective organizations for overseas business and that the foreign trade of our manufacturers and producers, particularly the smaller concerns, suffers in consequences." REPORT OF THE HOUSE COMM. ON THE JUDICIARY ON H.R. 17350, H.R. REP. No. 1118, 64th Cong., 1st Sess. 3 (1916). This report, which concerned the forerunner of the bill which became the Webb-Pomerene Act, stated that:

> There are many great lawyers who think there is nothing in existing laws to prevent American manufacturers and exporters from combining in whatever manner they please in foreign countries to dispose of their products; but other lawyers take the position that there is doubt about this power, and in order to absolutely clairfy the situation and in common fairness to our American exporters, we present this bill.

Id.

[3] For statistics for years up to and including 1970, see U.S. DEP'T OF COMMERCE, BUREAU OF THE CENSUS, HISTORICAL STATISTICS OF THE UNITED STATES BICENTENNIAL EDITION, Colonial Times to 1970, pt. 2, Series U-196, at 884-85 (1975). For Bureau of the Census statistics for the years 1971-1977, see U.S. DEP'T OF COMMERCE, INDUSTRY AND TRADE ADMINISTRATION, OVERSEAS BUSINESS REP. 78-21, UNITED STATES FOREIGN TRADE ANNUAL 1971-1977, 3 (1978). These balance of trade statistics are calculated on a Free-Along-Side basis.

[4] Balance of trade surpluses of approximately $1 billion and $11 billion were registered in 1973 and 1975 respectively. *Id.*

[5] *Id.* The 1978 figure can be found in U.S. DEP'T OF COMMERCE, BUREAU OF THE CENSUS, SUMMARY OF U.S. EXPORT AND IMPORT MERCHANDISE TRADE 5 (Jan. 1979).

[6] For the first nine months of 1979, the United States trade deficit totalled more than $18.05 billion on a Free-Along-Side basis. *Id.* (Sept. 1979). Effective with the January, 1979, statistics, the Bureau of the Census altered its method of calculating the monthly trade figures. Beginning in that month, adjusted export and import totals represent the sum of commodity components (*i.e.*, SITC section totals) adjusted for seasonal and working-day variations. In earlier periods, the monthly totals for exports and imports were adjusted independently of the components. For further details regarding the changed method of calculation, see U.S. DEP'T OF COMMERCE, BUREAU OF THE CENSUS, SUPPLEMENT TO THE JANUARY 1979 ISSUE OF REP. FT 900 (1979).

eral budget deficit.[7] Further deterioration in our international trade position could worsen these already disturbing trends.

For much of its history, the United States did not need to be especially concerned about its international trade position. Domestic supplies of energy and most other raw materials have, until recently, allowed our industrial expansion to proceed without substantial reliance on imports. Moreover, our large domestic market created little need for vigorous export efforts.

Significant increases in U.S. exports, when they did occur, were, in large part, based on two factors—strong foreign demand, as was the case after World War II, and the technological advantage U.S. industry held over its foreign competitors.[8] After World War II, however, Western European and Japanese industry was rebuilt, and firms in those countries now offer competitive alternatives to U.S. supplies of most manufactures. Furthermore, in many cases, the technological advantage which U.S. firms used to hold has been eroded,[9] and the nation's positive balance of trade in high technology goods is diminishing.[10] In short, U.S. firms no longer have an effective comparative advantage in the manufacture of many goods.

In light of this situation, it is timely to review the positions of the various parties to the controversy. Following this review, several suggestions for improving the antitrust climate in which U.S. firms conduct their international operations will be offered.

THE POSITION OF THE BUSINESS COMMUNITY

The U.S. business community's concerns regarding the effects of the antitrust laws on its international operations have been principally set forth in two documents—the *1974 Report of the National Association of Manufacturers on the International Implications of U.S. Antitrust Laws*[11] and the same year's *Final Report of the Antitrust Task Force on*

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7 SUBCOMM. ON INTERNATIONAL FINANCE, SENATE COMM. ON BANKING, HOUSING, AND URBAN AFFAIRS, 96TH CONG., 1ST SESS., REPORT ON U.S. EXPORT POLICY 1-2 (Comm. Print 1979) [hereinafter cited as STEVENSON REPORT]. This report's findings and recommendations were based on a year-long study of export policy by the Subcommittee which included extensive hearings on the subject.

8 *Id.* at 2, 6, 19.

9 *Id.* at 2, 8.

10 *Id.* at 20.

11 NAT'L ASS'N OF MANUFACTURERS, 1974 REPORT OF THE NATIONAL ASSOCIATION OF MANUFACTURERS ON THE INTERNATIONAL IMPLICATIONS OF U.S. ANTITRUST LAWS (1974) [hereinafter cited as NAM STUDY], *reprinted in Hearings on International Aspects of Antitrust Laws Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary*, 93d Cong., 1st & 2d Sess. 1416 (1973-1974) [hereinafter cited as *Hearings*].

International Trade and Investment of the U.S. Chamber of Commerce on U.S. Antitrust Laws and American Exports.[12]

These reports make several important allegations regarding what the business community perceives to be the effects of U.S. antitrust laws on its international operations. First, U.S. antitrust laws have injured the international competitiveness of U.S. firms, particularly in the area of foreign joint ventures. Foreign countries actively promote, or at least permit, the formation of consortia for the purpose of submitting a single bid on major foreign projects. U.S. firms seeking to engage in similar activities face uncertainty with respect to potential government as well as private antitrust actions. Second, the application of U.S. antitrust laws has presented particularly serious problems for small and medium-sized U.S. exporters in the areas of formation of export associations, joint ventures, and the conclusion of licensing agreements. Third, uncertainty regarding the antitrust implications of a proposed course of business conduct often results in U.S. firms deciding not to pursue potentially profitable business ventures abroad. Fourth, because of the relative restrictiveness of U.S. antitrust laws vis-a-vis similar statutes in other industrialized countries and the generally "adversary" posture existing between U.S. antitrust enforcement agencies and the American business community, U.S. efforts to improve the balance of trade are impeded and U.S. international competitiveness is adversely affected.

Since the publication of these two reports, the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary also investigated the international aspects of U.S. antitrust laws.[13] It heard from numerous witnesses, including the chairman of the Antitrust Task Force of the U.S. Chamber of Commerce.[14] While the aforementioned allegations were repeated in those hearings,[15] no concrete examples of how the antitrust laws have adversely affected the international operations of U.S. firms were provided. The Chamber of Commerce witness testified that specific examples were hard to identify because it is diffi-

12 U.S. CHAMBER OF COMMERCE, FINAL REPORT OF THE ANTITRUST TASK FORCE ON INTERNATIONAL TRADE AND INVESTMENT OF THE U.S. CHAMBER OF COMMERCE ON U.S. ANTITRUST LAWS AND AMERICAN EXPORTS (1974), *reprinted in Hearings, supra* note 11, at 163.

13 *Hearings*, note 11 *supra*.

14 *Id.* at 146-61 (remarks of James M. Nicholson).

15 *Id.* Mr. Nicholson testified that "the business community has an honest perception that the antitrust laws are barriers, are problems for them. And, therefore, there are problems." *Id.* at 155. However, it should also be noted that some of the other witnesses who appeared before the Subcommittee disagreed with the allegations of the Chamber and the National Association of Manufacturers. *See Hearings, supra* note 11, at 4, 129, and 1318 (remarks of E. Ernest Goldstein, Samuel Pisar, and Robert Beshar).

cult to isolate antitrust considerations as controlling in impeding the international operations of an ongoing business or in the failure to undertake a foreign business venture.[16] While he asserted that the Chamber's Antitrust Task Force was going to be reactivated to search for such examples, no further report was forthcoming.[17]

Recently, the Chamber has restated some of its earlier allegations and has recommended that when actions are taken under the antitrust laws, distinctions should be made between domestic and foreign transactions, with a less restrictive standard for the latter.[18] Several articles have appeared in the popular press which have suggested a reevaluation of U.S. antitrust laws and the way they have been enforced, in light of the changed international economic situation in which the United States finds itself.[19] Moreover, Senator Jacob Javits, a longtime observer of international economic issues and a member of the National Commission for the Review of Antitrust Laws and Procedures,[20] was sufficiently concerned about the effects of U.S. antitrust laws on the international trade of U.S. firms to have written to the commission's chairman, Assistant Attorney General Shenefield, urging the commission to consider a series of specific antitrust issues which may have an adverse impact upon such trade.[21] Increasing congressional interest in the subject has recently been evidenced by hearings held by a Senate subcommittee on proposed legislation to expand the Webb-Pomerene antitrust exemption and to create a new antitrust exemption for export trading companies.[22]

Perhaps most importantly, a recent study done under contract for the Bureau of Mines of the U.S. Department of the Interior on selected factors having an impact on the international competitiveness of the U.S. minerals industry found that representatives of that industry widely subscribe to the view that U.S. antitrust laws force them to operate, at home, and especially abroad, at a competitive disadvantage in

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16 *Id.* at 151.

17 *Id.* at 150.

18 U.S. CHAMBER OF COMMERCE, POLICIES AND PROGRAMS FOR EXPANDING U.S. EXPORTS, RECOMMENDATIONS OF THE CHAMBER OF COMMERCE OF THE UNITED STATES 15-16 (1979).

19 *See, e.g.*, Goldman & Wells, *Save the Business Baronies*, Wash. Post, Sept. 17, 1978, at B1, col. 5; Harman, *For an "America, Inc."*, NEWSWEEK, Mar. 12, 1979, at 20; *How Government Disincentives Discourage U.S. Export*, GOV'T EXECUTIVE, Sept. 1978, at 23-24.

20 *See* note 196 *infra*.

21 Letter from Senator Jacob J. Javits to John H. Shenefield, Chairman, National Commission for the Review of Antitrust Laws and Procedures (Aug. 25, 1978). For Chairman Shenefield's response refusing to recommend Commission consideration of the issues raised by Senator Javits, with the exception of the Webb-Pomerene Act, see note 138 *infra*.

22 *Hearings on S. 864, S. 1499, and S. 1663 Before the Subcomm. on International Finance of the Senate Comm. on Banking, Housing and Urban Affairs*, 96th Cong., 1st Sess. (1979).

comparison to their foreign counterparts.[23] While these representatives generally agreed that the extraterritorial application of U.S. antitrust laws presents no insurmountable barrier to the growth of the American non-fuel minerals industry, they argued that antitrust restrictions unduly hamper the effectiveness of their search for commodity supplies, particularly overseas, and that the restraints lack political and economic logic because they do not reflect other national priorities such as export promotion, reduction of the trade deficit, and the need to develop non-fuel mineral resources abroad.[24]

This report's findings and interviews conducted by the authors with businessmen and their antitrust counsel confirm that the business community continues to be concerned with the effects of the antitrust laws on its international operations, despite the acknowledged efforts of the Justice Department in the last several years to clarify the applicability of those laws to U.S. foreign commerce.[25] Following is a discussion of five areas of continuing major concern to the business community.

LICENSING U.S. TECHNOLOGY

In the licensing type of case, a U.S. firm grants a "know-how" license to a foreign firm, but attempts in the licensing agreement to prohibit the foreign firm from selling products manufactured under that license in the United States. Such a territorial restriction would likely be challenged by the Justice Department if the length of the restriction exceeded the time necessary for "reverse-engineering"[26] of the technology, unless the parties could justify the restriction as necessary to the technology-sharing agreement.[27] Such a standard is obviously subjective and in many cases it may not be possible to define the period precisely. Because of the difficulty in estimating such a period and the possibility of an antitrust attack on a restriction which the licensor be-

23 INTERNATIONAL TECHNICAL SERVICES, INC., EVALUATION OF SELECTED FACTORS IMPACTING ON THE INTERNATIONAL COMPETITIVENESS OF THE U.S. MINERALS INDUSTRY PREPARED FOR UNITED STATES DEPARTMENT OF THE INTERIOR BUREAU OF MINES 180 (1978) [hereinafter cited as BUREAU OF MINES REPORT].

24 *Id.* at 221, 223.

25 *See* text accompanying notes 168-79 *infra*.

26 In *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 476 (1974), the Supreme Court defined "reverse-engineering" as "starting with the known product and working backward to divine the process which aided in its development or manufacture. . . ." (citing National Tube Co. v. Eastern Tube Co., 3 Ohio C.C.R. (n.s.) 459, 462 (1902), *aff'd*, 69 Ohio St. 560, 70 N.E. 1127 (1903)).

27 U.S. DEP'T OF JUSTICE, ANTITRUST DIV., ANTITRUST GUIDE FOR INTERNATIONAL OPERATIONS 34 (rev. ed. Mar. 1, 1977), *reprinted in* [1977] ANTITRUST & TRADE REG. REP. (BNA) No. 799, at E-1, *and* [1977] 2 TRADE REG. REP. (CCH) No. 266, at 1 [hereinafter cited as ANTITRUST GUIDE].

lieves is within the reverse-engineering period, U.S. firms may, in such cases, simply refrain from entering into licensing agreements with foreign firms for fear that the licensee will use the license to compete with the U.S. firm in the U.S. market. Due to the reluctance by the American firm to grant the license, the prospective foreign licensee may well substitute a foreign licensor for the American firm when such an alternative exists or else, when it does not, a licensing agreement may very well simply not be concluded. This latter possibility then serves to encourage the potential foreign licensee to develop the technology in question independently.

Such developments, it is argued, could have several effects on the U.S. economy. First, the failure to conclude a licensing agreement means that the foreign licensee will not be making royalty payments to the U.S. licensor. Such payments would result in an improvement in the balance of payments position of the United States. Second, the failure to conclude a licensing agreement may result in a lost opportunity to increase U.S. exports of related capital equipment to the foreign licensee.[28] Finally, if such licensing agreements could contain exclusive grantback provisions,[29] U.S. firms would have the benefit of the most up-to-date technological developments occurring in other countries which are based on the licensed technology.

If a licensing agreement is entered into, and the territorial restriction in question is included, the licensor cannot be certain that the restriction will not be subject to an antitrust attack alleging that it is unreasonable. Even the *Antitrust Guide*[30] does not provide clear guidance on this point, and the guidance it does provide may not completely reflect the existing state of the law. As noted, the *Antitrust Guide* states that, unless otherwise justified, such a territorial restriction would likely be challenged if it exceeded the "reverse-engineering period."[31] However, several lower court opinions indicate that, in certain

28 SUBCOMMITTEE ON PATENT AND INFORMATION POLICY, ADVISORY COMMITTEE ON INDUSTRIAL INNOVATION, DRAFT REPORT ON PATENT POLICY 3 (1978). The Advisory Committee is convened by and reports to the Secretary of Commerce. *See also* Lovell, *Appraising Foreign Licensing Performance*, in NATIONAL INDUSTRIAL CONFERENCE BOARD, INC., STUDIES IN BUSINESS POLICY NO. 128, 49-54 (1969).

29 An exclusive grantback provision generally requires a licensee to grant back title or an exclusive license on any new patents or "know-how" it may obtain or develop related to the licensed technology rights. The Department of Justice has noted two factors which will influence its decision whether to challenge an exclusive grantback provision in a particular case. These factors are the scope of the licensee's obligation to grant back and the competitive relationship between the licensor and licensee. *See* ANTITRUST GUIDE, *supra* note 27, at 42-45.

30 *See* note 27 *supra*.

31 *Id.* at 34.

cases, the use of "know-how" by a licensee or joint venture may be restricted indefinitely for the "life" of the "know-how," *i.e.*, the period during which it retains its secrecy.[32]

Foreign Sovereign Compulsion Defense

The second area of concern involves the application of the doctrine of foreign sovereign compulsion to antitrust suits against allegedly anticompetitive practices of U.S. firms in their international operations. Under this doctrine, U.S. firms may have a complete defense to actions which would otherwise constitute antitrust violations, if such actions are compelled by an edict or decree of a foreign sovereign.[33] The business community's concerns regarding the application of this doctrine involve two basic issues—the degree of foreign compulsion required to invoke the defense, and restrictions on use of the defense.

As to the first concern, activities in a foreign country compelled by a validly issued decree or edict of that country's sovereign will normally meet the requirements of the defense.[34] However, anticompetitive activities implemented voluntarily by private parties which are merely aided or authorized by foreign laws, but not compelled by them, will not be exempted from the application of U.S. antitrust law.[35] Antitrust liability will similarly accrue where a foreign state delegates power to a private firm to undertake certain activities which it carries out in an anticompetitive manner.[36] Finally, the situation in which government officials "request" or informally encourage, but do not legally "compel," a U.S. firm to take certain anticompetitive actions will also probably result in a prosecutable antitrust violation.[37]

Questions have been raised as to whether that ought to be the case

32 Shin Nippon Koki Co. v. Irvin Industries, Inc., [1975] 1 Trade Cases ¶ 60,347 (N.Y. Sup. Ct. 1975); A. & E. Plastik Pak Co. v. Monsanto Co., 396 F.2d 710 (9th Cir. 1968). *See also* prepared remarks of Douglas E. Rosenthal, Chief, Foreign Commerce Section, Antitrust Division, U.S. Department of Justice, before the American Bar Association Section on Corporation Banking and Business Law National Institute on Worldwide Legal Challenges to U.S. Transnational Business 6 (Dec. 15, 1978).

33 In an international setting, the leading case is *Interamerican Refining Corp. v. Texaco Maracaibo, Inc.*, 307 F. Supp. 1291 (D. Del. 1970). In a domestic context, the doctrine of sovereign compulsion is based on the case of *Parker v. Brown*, 317 U.S. 341, 352 (1943), in which the Supreme Court stated that: "The state [California] in adopting and enforcing the . . . program made no contract or agreement and entered into no conspiracy in restraint of trade or to establish monopoly but, as sovereign, imposed the restraint as an act of government which the Sherman Act did not undertake to prohibit."

34 Interamerican Refining Corp. v. Texaco Maracaibo, Inc., 307 F. Supp. at 1297-98.

35 United States v. Sisal Sales Corp., 274 U.S. 268 (1927).

36 Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690 (1962).

37 United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940).

in some foreign trade and investment contexts. Foreign governments, particularly those in the developing countries, often expect foreign firms operating in their countries to undertake certain activities which, if done in the United States, might result in the commission of an antitrust violation. The undertaking of such activities, while not explicitly compelled by the foreign sovereign, may be an important part of the foreign government's economic policy, and are, in many cases, a condition of doing further business in the foreign country. The sovereign may also explicitly or implicitly menace a firm with threats of expropriation of its properties and operating "difficulties" if it fails to comply with the requested undertaking. These types of situations are particularly likely to arise in many of the lesser developed countries where the foreign government itself operates or directs key sectors of the country's economy and where governmental activities may not always be undertaken in strict accordance with procedures established by law.[38]

The problem may also arise in developed societies where the government and the private sector may prefer to avoid the formality and rigidity of legislation, and policy may be implemented through discussions and voluntary actions which domestic law permits, but does not require.[39] The present approach requiring a formal soverign act compelling anticompetitive activities in order to have a valid defense makes it difficult for U.S. firms to operate in certain foreign situations where they may be caught between conflicting sovereignties.

Operating difficulties are also caused by the divergence between the case law and the statements of the Justice Department in the *Antitrust Guide* regarding the restrictions involved in the application of the foreign sovereign compulsion doctrine. One of the leading cases in this area, *Interamerican Refining Corp. v. Texaco Maracaibo, Inc.*,[40] upheld the use of the foreign sovereign compulsion defense in a private treble damage antitrust action based on an alleged horizontal group boycott implemented within the United States.[41] The plaintiff charged that it was unable to obtain the Venezuelan crude oil it needed for its U.S.

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38 One respected commentator, a former Assistant Attorney General for Antitrust, has questioned the applicability of the general rule in at least one situation. He asks whether a casual suggestion by former President Amin of Uganda would more properly have been regarded as an "informal encouragement" or as a "command by the state as sovereign." Baker, *Antitrust Conflicts Between Friends: Canada and the United States in the Mid-70's*, 11 CORNELL INT'L L.J. 165, 178 n.68 (1978).

39 Stanford, *The Application of the Sherman Act to Conduct Outside the United States: A View From Abroad*, 11 CORNELL INT'L L.J. 195, 212 (1978).

40 307 F. Supp. 1291 (D. Del. 1970).

41 *Id.* at 1298-99.

refinery because defendants' suppliers refused to deal with it.[42] This refusal was based on an order of the Venezuelan Government forbidding sales by defendants to the plaintiff.[43] Refusing to conduct an inquiry into the validity of the order under Venezuelan laws, the court sustained defendant's position that its anticompetitive actions were compelled by Venezuela and hence it was not liable.[44]

The Department of Justice, for its part, construes the foreign sovereign compulsion defense quite narrowly and has expressly stated in the *Antitrust Guide* that to the extent its interpretation is inconsistent with the holding in *Interamerican*, it believes the holding in that case to be incorrect, and it will follow its own position in making enforcement decisions.[45] Specifically, the Antitrust Division places three restrictions on the exercise of the foreign sovereign compulsion defense.[46] First, it will not apply to acts done within the United States.[47] Second, the doctrine will not cover activities based on acts other than those of a truly sovereign entity acting within the scope of its powers under its laws. Third, the doctrine will not apply unless the affected company is being "reasonable" in doing what it felt it was compelled to do.

EXTRATERRITORIALITY

Subject Matter Jurisdiction

Related to the concerns posed by the application of the foreign sovereign compulsion doctrine are those more general ones involving the proper scope of subject matter jurisdiction under the antitrust laws over anticompetitive activities undertaken abroad. Early in this century, U.S. antitrust jurisdiction over acts occurring in foreign countries was limited by the decision in the case of *American Banana Co. v. United Fruit Co*.[48] In that case, it was alleged that the defendant was responsible for the Costa Rican Government's seizure of the plantations and railways of American Banana—a potential competitor—so that defendant could pursue anticompetitive activities.[49] The Supreme Court held that such acts were outside the scope of U.S. antitrust juris-

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42 *Id.* at 1294.

43 *Id.*

44 *Id.* at 1304.

45 ANTITRUST GUIDE, *supra* note 27, at 52.

46 *Id.* at 54-55.

47 The *Antitrust Guide* does not take a position as to the validity of the defense with respect to acts done in third countries, noting the dissent of Justice White in *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 at 439, 445-50 (1964).

48 213 U.S. 347 (1909).

49 *Id.* at 354.

diction.[50] Justice Holmes, speaking for the Court commented that, "[T]he general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done."[51] However, subsequent cases[52] have limited the effect of this holding to the facts on which it is based. Reflective of more recent judicial thinking on the question of the extraterritorial application of U.S. antitrust laws is the opinion of Judge Learned Hand in the now famous case of *United States v. Aluminum Co. of America*,[53] wherein the Sherman Act was held to apply to anticompetitive agreements reached abroad which were intended to affect U.S. imports and did actually affect them.[54] Based in part on this decision, the Justice Department has stated that "when foreign transactions have a substantial and foreseeable effect on U.S. commerce, they are subject to U.S. law regardless of where they take place."[55]

The application of such a subject matter jurisdictional scope—the "effects" doctrine—has caused concern in various foreign countries and among U.S. multinationals operating in such countries.[56] They have argued that U.S. antitrust enforcement activities often do not take sufficiently into account the antitrust policies or sensibilities of foreign governments and in fact may infringe on their sovereignty.[57] This is especially true in those industrialized societies, such as Canada[58] and

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50 *Id.* at 357.

51 *Id.* at 356.

52 *See, e.g.*, Timken Roller Bearing Co. v. United States, 341 U.S. 593 (1951); United States v. Nat'l Lead Co., 332 U.S. 319 (1947); United States v. Sisal Sales Corp., 274 U.S. 268 (1927); Thomsen v. Cayser, 243 U.S. 66 (1917); Pacific Seafarers, Inc. v. Pacific Far East Line, Inc., 404 F.2d 804 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1093 (1969); United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945).

53 148 F.2d 416 (2d Cir. 1945).

54 *Id.* at 444.

55 ANTITRUST GUIDE, *supra* note 27, at 6 (citing Steele v. Bulova Watch Co., 344 U.S. 280 (1952); United States v. Aluminum Co. of America, 148 F.2d at 444; and Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. at 704-05).

56 The U.S. non-fuel minerals industry views the extraterritorial application of U.S. antitrust laws as the single most counterproductive and severe restraint imposed by those laws on the industry's international competitiveness in the acquisition of materials and reserves. *See* BUREAU OF MINES REPORT, *supra* note 23, at 212. The "effects" doctrine by its very nature creates uncertainty in some foreign transactions because under it there is no certain way of delineating the geographic and functional outer boundaries of its reach. Prepared statement of Professor James A. Rahl before the Senate Comm. on Gov't Affairs on S. 1010, 96th Cong., 1st Sess. 6 (Oct. 31, 1979).

57 *See* United States v. Watchmakers of Switz. Information Center, Inc., [1963] TRADE CAS. ¶ 70,600 (S.D.N.Y. 1962), *order modified*, [1965] TRADE CAS. ¶ 71,352 (S.D.N.Y. 1965); United States v. Imperial Chem. Indus., Ltd., 100 F. Supp. 504 (S.D.N.Y. 1951), *final decree entered*, 105 F. Supp. 215 (S.D.N.Y. 1952).

58 A recent example of Canadian and U.S. multinational concern over U.S. attempts to enforce U.S. antitrust laws extraterritorially was discussed in the BUREAU OF MINES REPORT, *supra*

Great Britain,[59] which have antitrust laws of their own. Accordingly, the necessity of U.S. attempts at judicial enforcement of the antitrust laws extraterritorially has increasingly been questioned.[60]

The Justice Department has recognized these concerns and is trying to become more sensitive to jurisdictional questions and related

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note 23. It involved indictments against eight U.S. companies for conspiring to (1) restrict the amount of potash produced in the United States (2) stabilize and raise the price of potash produced and sold in the United States and (3) restrict exports and imports. The indictments resulted from certain actions of the provincial government of Saskatchewan in 1975 and 1976 to limit output from Canadian and U.S. producers operating in the province, and named various Saskatchewan politicians and companies as "unindicted co-conspirators." While charges were later dismissed, the incident resulted in: consternation among U.S. business executives and Canadian politicians because various Saskatchewan politicians and companies were named as "unindicted co-conspirators"; ambassadorial level discussions between U.S. and Canadian government officials; and the purchase by the provincial government of most of the U.S. owned operations within its territory. For further details regarding this matter, see BUREAU OF MINES REPORT, *supra* note 23, at 218-19.

59 The British have objected strenuously to recent indictments brought against three foreign owned shipping groups for fixing freight rates on container shipments in the North Atlantic liner trades between 1971 and 1975. (Four other companies and 13 executives were also indicted.) Nolo contendere pleas were entered and fines ranging from $50,000 to $1 million were imposed. *See* United States v. Atlantic Container Line, Ltd., Crim No. 79-00271 (D.D.C., *filed* June 1, 1979); United States v. Bates, Crim. No. 79-00272 (D.D.C., *filed* June 1, 1979).

In regard to these charges, British Trade Under Secretary Norman Tebbit recently told Parliament that,

> Shipping is an international activity, affecting the interests of both countries. Any questions that arise should therefore be dealt with jointly, and we consider it wrong in principle for the United States to exercise unilateral control over shipping between the two countries, in disregard of [British] economic interests and shipping policies.

British Threaten Retaliation Over Shipping Antitrust Judgments, ANTITRUST & TRADE REG. REP. (BNA) No. 922, at A-30 (1979). British Trade Secretary John Nott further noted that the activities upon which the indictments were based would not have been illegal in the United Kingdom.

Nott also warned of Britain's intention to reexamine its cooperation with the United States on antitrust questions and enforcement in the United Kingdom of the antitrust judgments of U.S. courts. Indeed, legislation was recently introduced in Parliament which reportedly would: (1) block enforcement in the United Kingdom of U.S. court judgments against British firms in certain antitrust cases, (2) block enforcement in the United Kingdom of multiple damage awards by U.S. courts, (3) allow British firms to recover in a British court the non-compensatory part of multiple damage awards assessed against them by U.S. courts unless the British victim was "ordinarily resident" in the U.S. at the relevant time, and (4) authorize British officials to stop British firms for being compelled by U.S. subpoenas or court orders to supply information and documents sought in U.S. antitrust investigations or by U.S. regulatory agencies. *See Protection from U.S. Law Sought*, Wash. Post, Nov. 1, 1979, at B-1, col. 1; *The British Answer*, The Economist, Nov. 3, 1979, at 64-66.

60 For example, the Director General of the Bureau of Commercial and Commodity Relations of Canada's Department of External Affairs has suggested that in cases where producing governments establish a manufacturing or resource marketing arrangement which is opposed by consumer governments, it is inappropriate for one of the governments involved in the conflict to attempt to solve it by invoking its law in its courts to adjudicate the legality of conduct in another jurisdiction. *See* Stanford, *supra* note 39, at 201. *See also* INTERNATIONAL LAW ASS'N, REPORT OF THE FIFTY-FIRST CONFERENCE HELD AT TOKYO 565-92 (1965), for a collection of diplomatic protests.

comity issues.[61] Antitrust Division Chief John Shenefield has noted that he fully recognizes that "unique factors are involved in the foreign commerce aspects of enforcement and I intend to ensure that we give them adequate consideration."[62] Moreover, meetings have been held between U.S. and foreign antitrust officials in attempts to ease the foreign distaste for U.S. prosecution of international cartel practices affecting U.S. commerce, particularly in cases where foreign governments themselves participate in or at least sanction such practices.[63] While these efforts have represented an attempt to improve the situation, they clearly have not been entirely successful.[64]

Added judicial sensitivity for jurisdictional questions has also recently been in evidence. The opinion in *Timberlane Lumber Co. v. Bank of America*[65] is probably the leading example. In that case, it was alleged that U.S. foreign commerce was directly and substantially affected by a conspiracy in which defendants and others, in the United States and Honduras, sought to prevent plaintiff, through its Honduras subsidiaries, from milling lumber in Honduras and exporting it to the United States—leaving control of the Honduran lumber export business in the hands of a few select individuals financed and controlled by the defendant. In its decision, the court set forth what it felt to be the proper tripartite approach to antitrust jurisdictional questions for allegedly anticompetitive actions occurring abroad.[66]

The court said that first one must inquire as to whether the alleged

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61 Associate Attorney General Michael Egan has stated that the Justice Department will take the following steps to try to accommodate foreign concerns over U.S. antitrust enforcement:

(i) consult with foreign governments which desire to explore means of accommodating conflicting national interests;
(ii) better understand the ways in which, and the extent to which, the techniques of extraterritorial enforcement offend foreign concepts of territorial sovereignty;
(iii) notify any foreign government at any time that an Antitrust Division official wishes to conduct investigative interviews or other official business within its territory; and
(iv) review existing arrangements for notification and consultation with foreign governments whose interests are affected in specific investigations.

Address by Michael J. Egan, Associate Attorney General, before the International Bar Association, Business Law Section 8-11 (Nov. 3, 1977).

62 Prepared remarks of John H. Shenefield before the American Bar Association 1978 Annual Meeting, Section of International Law 21 (Aug. 9, 1978) [hereinafter cited as Shenefield Speech].

63 *See Canadian and American Antitrust Officials Meet to Discuss Extraterritorial Enforcement*, ANTITRUST & TRADE REG. REP. (BNA), No. 829, at A-8, A-9 (1977); interview with John H. Shenefield in ANTITRUST & TRADE REG. REP. (BNA) No. 875 at AA-6, AA-7 (1978) [hereinafter cited as Shenefield Interview]; Stanford, *supra* note 39, at 207; prepared remarks of Donald L. Flexner, Deputy Assistant Attorney General, Antitrust Division, 1978 Fordham Corporate Law Institute 7-10 (Nov. 15, 1978).

64 *See* note 59 *supra*.

65 549 F.2d 597 (9th Cir. 1976).

66 *Id.* at 615.

restraint affected, or was intended to affect, the foreign commerce of the United States.[67] If so, one must look to see if it is of such a type and magnitude that results in cognizable injury to the plaintiff so as to constitute a violation of the Sherman Act.[68] Then, if these two prerequisites are satisfied, an inquiry must be made to see if as a matter of international comity and fairness the extraterritorial jurisdiction of the United States should be asserted to cover the alleged conduct.[69] Although the court's analysis did not result in its affirming the lower court's dismissal of the suit for, among other things, lack of subject matter jurisdiction,[70] its recognition of the necessity to take into account other nations' interests in deciding the proper scope of subject matter jurisdiction under the antitrust laws was most significant.[71]

The Ninth Circuit's balancing of competing interests approach in *Timberlane* was recently adopted by the Third Circuit as well in *Mannington Mills, Inc. v. Congoleum Corp.*[72] In that case, the court listed ten factors which it felt should be weighed in determining whether an exercise of jurisdiction is appropriate.[73] Further judicial developments addressing the *Timberlane* approach can probably be expected.

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67 *Id.* at 613, 615.

68 *Id.*

69 *Id.* at 614-15. This inquiry, as to comity, should take into account the following factors:

(i) the degree of conflict with foreign law or policy;
(ii) the nationality or allegiance of the parties and the locations or principal places of business of the corporations;
(iii) the extent to which enforcement by either state can be expected to achieve compliance;
(iv) the relative significance of effects on the United States as compared with those elsewhere;
(v) the extent to which there is explicit purpose to harm or affect American commerce;
(vi) the foreseeability of such effect; and
(vii) the relative importance to the violations charged of conduct within the United States as compared with conduct abroad.

Id. at 614.

70 *Id.* at 615.

71 *Id.* at 613-15.

72 595 F.2d 1287 (3d Cir. 1979).

73 *Id.* at 1297-98. The ten factors are:

1. Degree of conflict with foreign law or policy;
2. Nationality of the parties;
3. Relative importance of the alleged violation of conduct here compared to that abroad;
4. Availability of a remedy abroad and the pendency of litigation there;
5. Existence of intent to harm or affect American commerce and its foreseeability;
6. Possible effect upon foreign relations if the court exercises jurisdiction and grants relief;
7. If relief is granted, whether a party will be placed in the position of being forced to perform an act illegal in either country or be under conflicting requirements by both countries;
8. Whether the court can make its order effective;
9. Whether an order for relief would be acceptable in this country if made by the foreign nation under similar circumstances;
10. Whether a treaty with the affected nations has addressed the issue.

Id.

Discovery

Once the Justice Department decides that the exercise of U.S. antitrust jurisdiction over anticompetitive acts occurring abroad is proper, in order to prosecute its case successfully, it must often seek access to documents located in foreign countries.[74] Attempts to secure access to such documents present another potential source of friction in dealing with foreign countries.

This point is illustrated by the decision of the British Law Lords in the now famous international uranium cartel litigation involving the U.S. firm Westinghouse.[75] They held that an attempt to obtain testimony, in which the Antitrust Division of the U.S. Department of Justice was most interested, in Britain, from British subjects regarding an alleged international cartel to regulate the price and output of uranium and to limit competition, was not to be allowed because it constituted an attempted exercise of extraterritorial jurisdiction in matters with potential criminal implications, which in the view of the British Government was prejudicial to the sovereignty of the United Kingdom.[76] In their decision, the Lords specifically noted the United Kingdom's long-standing policy of non-cooperation with U.S. courts seeking to enforce U.S. antitrust laws overseas.[77] Problems have also occurred with respect to the Justice Department's attempts to secure information in Canada regarding the existence of an international uranium cartel,[78] and to obtain documents in foreign countries in connection with its international investigation of the oil industry.[79]

A further problem arises from the fact that some countries have enacted so called "blocking statutes"—legislation restricting the ability of U.S. enforcement agencies or courts to require the production of documents in U.S. proceedings from foreign corporations.[80] United

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74 *See* Note, *Discovery of Documents Located Abroad in U.S. Antitrust Litigation: Recent Developments in the Law Concerning the Foreign Illegality Excuse for Non-Production*, 14 VA. J. INT'L L. 747 (1974); Note, *Foreign Nondisclosure Laws and Domestic Discovery Orders in Antitrust Litigation*, 88 YALE L.J. 612 (1979).

75 *In re* Westinghouse Elec. Corp. Uranium Contract Litigation, [1978] 2 W.L.R. 81 (H.L. 1977). For a full discussion of this case and its history see Baker, *supra* note 38, at 187-89; Comment, *The International Uranium Cartel: Litigation and Legal Implications*, 14 TEX. INT'L L.J. 59, 97-100 (1979).

76 *In re* Westinghouse Elec. Corp. Uranium Contract Litigation, [1978] 2 W.L.R. at 96.

77 *Id.* at 94.

78 Shenefield Interview, *supra* note 63, at AA-6.

79 *Foreign Nations Object to Compliance With Justice Data Demands in Oil Probe*, ANTITRUST & TRADE REG. REP. (BNA) No. 918, at A-7 (1979).

80 Examples of such "blocking statutes" are as follows:

(1) Canada—Business Records Protection Act, [1947] Ont. Stat. c.10 (codified at ONT. REV. STAT. c.54 (1970)); Business Concerns Records Act, [1957-1958], Que. Stat. c. 42 (1958) (codi-

States corporations operating in such countries may be placed in the untenable position of either violating foreign statutes or disobeying a command of a U.S. governmental authority.[81] Exacerbating this problem is the fact that U.S. courts generally do not accept foreign illegality alone as an acceptable excuse for failure to comply with a subpoena when the court has personal jurisdiction over the person served.[82]

The Justice Department is well aware of foreign reactions to its attempts to discover documents located abroad, and in one case it was able to reach formal agreement with a foreign country regarding assistance to be rendered in antitrust investigations.[83] Moreover, as noted earlier,[84] the Justice Department has undertaken to notify foreign governments at any time that an Antitrust Division official wishes to conduct investigative interviews or other official business within its territory. Furthermore, the Antitrust Division has pledged to make every effort to keep requests for foreign evidence to the minimum necessary level, and to tailor what requests are made both to responsible standards of relevancy, as well as to meet particular difficulties of any

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fied at QUE. REV. STAT. c. 278 (1964)); Atomic Energy Control Act, 1970, CAN. REV. STAT. c. A-19 as implemented by the Uranium Information Security Regulations, STAT. O. R. 77-836, 111 Can. Gaz. pt. II, at 4619 (1977) (Replacing Uranium Information Security Regulations, STAT. O. & R. 76-644, 110 Can. Gaz., pt. II, at 2747 (1976); (2) Great Britain—Shipping Contracts and Commercial Documents Act of 1964 c. 87, modified by the Transfer of Functions (Shipping and Construction of Ships) Order 1965, ¶ 2, 1965 STAT. INST. No. 145, and Ministry of Aviation Supply (Dissolution) Order 1971, ¶ 2(1), 1971 STAT. INST. No. 719; (3) Australia—Foreign Proceedings (Prohibition of Certain Evidence) Act, 1976, No. 121 (Austl.), as amended by Foreign Proceedings (Prohibition of Certain Evidence) Amendment Act, 1976, No. 202 (Austl.), as implemented by Order of the Attorney General, Austl. Gov't Gaz. No. S. 214 (Nov. 29, 1976); (4) Netherlands—Sec. 39, Economic Competition Act of Nov. 14, 1958; (5) Switzerland—Cod. Pen. § 271-4 (Dec. 21, 1937) (as amended); and (6) South Africa—Sec. 30, Atomic Energy Act, 1967, No. 20, 15 Stat. Repub. So. Afr. 1045 (1977).

For a review of which of these blocking statutes was enacted in direct response to antitrust litigation in U.S. courts in order to prevent what was seen abroad as a U.S. invasion of the territorial integrity of other nations, see Note, *Foreign Nondisclosure Laws and Domestic Discovery Orders in Antitrust Litigation*, *supra* note 74, at 613 n.5.

81 Note, *Foreign Nondisclosure Laws and Domestic Discovery Orders in Antitrust Litigation*, *supra* note 74, at 612-13.

82 *See, e.g.*, United States v. Field, 532 F.2d 404 (5th Cir. 1976); United States v. First Nat'l City Bank, 396 F.2d 897 (2d Cir. 1968). Although foreign illegality alone will not absolve a party from complying with a subpoena, the Supreme Court, in *Societe Internationale v. Rogers*, 357 U.S. 197 (1958), a civil case, has indicated that where failure to comply with a discovery order is due to inability, and not to willfulness, bad faith or fault, the noncomplying party will not suffer the particularly harsh sanction of having its suit dismissed. *Id.* at 212. For a more complete discussion of this matter, see Note, *Foreign Nondisclosure Laws and Domestic Discovery Orders in Antitrust Litigation*, note 74 *supra*.

83 Agreement Relating to Mutual Cooperation Regarding Restrictive Business Practices, June 23, 1976, United States-Canada, 27 U.S.T. 1956, T.I.A.S. No. 8291.

84 *See* note 61 *supra*.

party.[85]

RULE OF REASON AND JOINT VENTURES

A fourth area of concern to the business community involves the uncertainty arising from the application of the "rule of reason" approach to antitrust analyses of overseas activities of U.S. firms,[86] particularly those related to international joint ventures. While the application of the "rule of reason" approach is less severe than the per se[87] application of the antitrust laws,[88] concerns are expressed that the "rule of reason" approach inherently gives rise to such uncertainty that the proposed transaction might not be concluded in any case.

This concern can be most prominently illustrated in the area of joint ventures and consortia established between U.S. firms for the purposes of joint selling or other operations abroad, or joint buying from foreign vendors,[89] or such ventures between U.S. and foreign firms formed in order to establish joint operations either in the United States

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85 Shenefield Speech, *supra* note 62, at 15-16. For example, voluntary instead of compulsory requests for information from abroad might be utilized where the foreign jurisdiction and parties are reciprocally cooperative. *Id.* at 16. Assistant Attorney General Shenefield is not sympathetic to mechanical application of non-disclosure laws, calling them confrontational, *id.*, and has indicated that, in appropriate cases, where a foreign firm which is the object of discovery has assets in the United States, the Justice Department will not be reluctant to use the leverage afforded by those assets in order to force the firm to cooperate in discovery. Shenefield Interview, *supra* note 63, at AA-6. When circumstances warrant, it will also ask the court to draw negative inferences with regard to evidence that is not provided, regardless of foreign "blocking statutes." Shenefield Speech, *supra* note 62, at 15.

86 Under the "rule of reason" approach, trade restraints are tested by a factual inquiry as to whether they will have any significantly adverse effect on competition, what the justification for them is, and whether that justification could be achieved in a less anticompetitive manner. Chicago Bd. of Trade v. United States, 246 U.S. 231 (1911). In the international context, the Department of Justice has indicated that the key inquiries under a rule of reason approach are as follows: (i) is the anticompetitive restraint ancillary to a lawful main purpose?; (ii) is the scope or duration of the restraint greater than necessary to achieve that purpose?; and (iii) is the restraint otherwise reasonable, either alone or in conjunction with other circumstances? *See* ANTITRUST GUIDE, *supra* note 27, at 3-4.

87 Under a per se approach, no inquiry is made as to the economic justification or reasonableness of a certain type of trade restraint, because the courts feel that such restraints have such a pernicious effect on competition as to make these inquiries not worth the effort. Northern Pac. Ry. Co. v. United States, 356 U.S. 1, 5 (1958). Some types of per se violations are: agreements among competitors to fix prices at which their offerings are sold; agreements among competitors to allocate territories or customers in order to lessen competition; collective refusals to deal; and certain types of tie-in arrangements.

88 The Department of Justice has stated that the rule of reason may have a somewhat broader application to international transactions where it is found that (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 domestic market. *See* ANTITRUST GUIDE, *supra* note 27, at 2-3, (citing K. BREWSTER, ANTITRUST AND AMERICAN BUSINESS ABROAD 79-84 (1958)).

89 *See* ANTITRUST GUIDE, *supra* note 27, at 1.

or abroad.[90] The specific concerns expressed are that the law in this area is uncertain, despite the rather straightforward and relatively reassuring discussion of the matter in the *Guide*,[91] and that the "potential entrant" theory sometimes relied on in such cases to show antitrust violations may be overly restrictive.

The basic problem is that the antitrust propriety of a joint venture will generally turn on the inherently uncertain "rule of reason" approach described above.[92] Under existing case law, such an approach must simultaneously take into account a whole host of factors, which do not focus on the ability of U.S. firms to meet foreign competition or the effect of the joint venture on the international trade position of the United States.[93] These issues, by their very nature, do not lend themselves to precise resolutions and are potentially confusing. Accordingly, firms may prefer to avoid risking the commencement of an antitrust action against them rather than to enter into some joint ventures, especially where sensitive diplomatic or political factors may be involved and the venture involves exchanges of know-how and other technology.[94]

Even if it is decided to proceed with the joint venture, U.S. antitrust law may inhibit the potential attractiveness and utility of such forms of enterprise in an international setting. The "potential entrant" theory is one such area. Under this theory, a company's joint venture or merger[95] with a large firm in a substantially concentrated market

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90 *Id.*

91 *Id.* at 19-32 (hypothetical cases C, D, and E).

92 United States v. Columbia Steel Co., 334 U.S. 995 (1948); United States v. Imperial Chem. Indus., Ltd., 100 F. Supp. 504, 557 (S.D.N.Y. 1951).

93 United States v. Penn-Olin Chem. Co., 378 U.S. 158, 176-77 (1964), *on appeal after remand*, 389 U.S. 308 (1967). Although that case involved a domestic joint venture, the factors discussed therein would likely apply to an international joint venture as well. At a minimum, the factors which must be considered are as follows:

> the number and power of the competitors in the relevant market; the background of their growth; the power of the joint ventures; the relationship of their lines of commerce; the competition existing between them and the power of each in dealing with the competitors of the other; the setting in which the joint venture was created; the reasons and necessities for its existence; the joint venture's line of commerce and the relationship thereof to that of its parents; the adaptability of its line of commerce to noncompetitive practices; the potential power of the joint venture in the relevant market; an appraisal of what the competition in the relevant market would have been if one of the joint venturers had entered it alone instead of through the joint venture; the effect, in the event of this occurrence, of the other joint venturer's potential competition; and such other factors as might indicate potential risk to competition in the relevant market.

Id. For a discussion of the antitrust factors involved in an international joint venture context, see ANTITRUST GUIDE, *supra* note 27, at 19-22 (hypothetical case C.).

94 *See* ANTITRUST GUIDE, *supra* note 27, at 28-32, for the Department of Justice's approach to joint ventures involving exchanges of know-how and other technology.

95 The Justice Department has indicated that it will look at the creation of a joint venture of

may constitute an antitrust violation if the foreign joint venture or merger partner at some future date might enter the market either de novo or through a "toehold" acquisition of a firm lacking a significant share of the relevant market.[96] In an international context, the problem with the application of this doctrine is that it may severely restrict the group from which U.S. firms can select an attractive foreign joint venture or merger partner,[97] especially if the doctrine is applied to situations where it is not absolutely clear that the foreign company is planning to enter the U.S. market on its own if it does not join forces with the U.S. firm in question.[98] This doctrine is of concern to foreign governments as well as to U.S. businesses. Foreign governments often cannot understand how a foreign company which has never entered, nor may not have any intention of entering the U.S. market, can be considered a competitor in that market merely because of its sales in its domestic market.[99]

The business community notes that these concerns regarding the establishment and operation of joint ventures are particularly important for U.S. firms under contemporary conditions of international trade and investment. Given the enormous size of the capital intensive projects now being undertaken by many of the world's underdeveloped nations in an attempt to modernize their societies, one firm often cannot afford or is unwilling to undertake a project on its own. A joint venture therefore becomes a necessary means of doing business. Furthermore, the foreign country may require, as a condition of the bid, that a local firm be made a joint venture partner. To the extent U.S. firms refrain from bidding on such overseas projects or from entering

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the more permanent variety as if it were a merger between parties in the field covered by the venture. *Id.* at 21.

96 *See* United States v. Falstaff Brewing Corp., 410 U.S. 526 (1973); BOC International Ltd. v. F.T.C., 567 F.2d 24 (2d Cir. 1977); *see also* United States v. Marine Bancorporation, 418 U.S. 602, 624 n.25 (1974). The effect of such a joint venture or merger under the "potential entrant" theory "may be substantially to lessen competition" within the meaning of § 7 of the Clayton Act, 15 U.S.C. § 18 (1976).

97 The question of potential entry was recently cited by the Department of Justice as one reason for opposing a proposed joint venture between General Electric and Hitachi to manufacture and sell television sets in the United States. *See* Department of Justice Press Release, Nov. 28, 1978; Letter from John H. Shenefield, Assistant Attorney General, Antitrust Division to James Bruce, Litigation and Antitrust Counsel, General Electric Company (Nov. 27, 1978).

98 At least one commentator has recommended that the potential competition doctrine be limited to situations in which the foreign company is clearly planning to enter the U.S. market if it does not merge with a U.S. firm. *See* Fugate, *The Department of Justice's Antitrust Guide for International Operations*, 17 VA. J. INT'L L. 645, 662 (1977). He also recommends that a court should give full consideration to economic factors that may favor the merger, as well as to potential competition factors that may argue against it. *Id.*

99 *Id.* at 661.

into a joint venture with a local firm because of any antitrust uncertainty surrounding joint ventures, U.S. economic interests are affected, not the least on account of the anticipated "flow-through" effect on U.S. exports when U.S. companies engage in business abroad.

THE MULTIFACETED NATURE OF ANTITRUST ENFORCEMENT

The International Trade Commission and Section 337 of the Tariff Act of 1930

The last major area of concern involves the difficulty U.S. firms face in dealing with the multifaceted nature of antitrust enforcement in the United States. Allegedly anticompetitive business transactions may be challenged by several potential litigants. These include private parties,[100] state attorneys general in the name of their states on behalf of natural persons residing in their states,[101] the Justice Department,[102] the Federal Trade Commission (FTC),[103] and in certain cases arising under section 337 of the Tariff Act of 1930, as amended,[104] the International Trade Commission (ITC). With respect to actions instituted by the federal government, officials at the Antitrust Division and the FTC often consult with each other regarding antitrust enforcement activities, thereby generally avoiding significant duplication resulting from overlapping jurisdiction.[105] The ITC, however, proceeds on a more independent basis.[106]

Under section 337, the ITC is authorized to investigate and take enforcement actions[107] against unfair methods of competition or unfair acts in the importation of articles if the effect or tendency of such methods or acts, is, inter alia, "to restrain or monopolize trade and com-

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100 15 U.S.C. § 15 (1976) provides that persons injured by violations of the antitrust laws may bring suit therefore in U.S. district court without respect to the amount in controversy and may recover three times the actual damages sustained and the cost of the suit, including a reasonable attorney's fee.

101 15 U.S.C. § 15c (1976).

102 28 U.S.C. §§ 515, 516 (1976).

103 15 U.S.C. § 45 (1976).

104 19 U.S.C. § 1337 (1976), *as amended by* Trade Agreements Act of July 26, 1979, Pub. L. No. 96-39, 125 CONG. REC. D1030 (daily ed. July 26, 1979).

105 For a discussion of this consultation process see Letter from John H. Shenefield, Assistant Attorney General, Antitrust Division, to Congressman Benjamin S. Rosenthal 1-2 (June 5, 1979).

106 *See* Griffin, *A Critique of the Justice Department's Antitrust Guide for International Operations*, 11 CORNELL INT'L L.J. 215, 217-19 (1978).

107 Under § 337, if a violation has taken place, the ITC may issue either an exclusion order or a cease and desist order. Violations of cease and desist orders are subject to a civil fine of not more than the greater of $10,000 or the domestic value of the articles entered or sold on such day in violation of the order.

merce in the United States."[108] Although section 337 has historically been applied almost exclusively in cases of imports involving alleged patent infringement,[109] actions by the ITC taken since enactment of the Trade Act of 1974[110] prompted, in part, by amendments to section 337 made by that Act,[111] and statements in the legislative history regarding those amendments,[112] indicate that it has sought to use its authority under section 337 to deal with antitrust type matters traditionally left to the Antitrust Division and the FTC. These include consideration of alleged violations similar to those which might be the basis of an action under sections 1 and 2 of the Sherman Act[113] and the anti-predatory pricing provisions of the Robinson-Patman Act.[114] It has even been suggested that sections 3[115] and 7[116] of the Clayton Act also fall within the scope of ITC activity under section 337.[117] However, as of July

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108 19 U.S.C. § 1337(3) (1976).

109 Prior to 1975, in only two cases did the ITC consider antitrust-type issues in the context of a § 337 action. In Watches, Watch Movements and Watch Parts, Investigation No. 337-19 (1966), boycott, price fixing, and discrimination charges were investigated. In Tractor Parts, Investigation No. 337-22 (1971), a conspiracy to prevent the importation of certain goods into the United States was considered.

110 88 Stat. 1978 (1975) (codified in scattered sections of 5, 19, 26, 31 U.S.C.).

111 Pub. L. No. 93-618, § 341, 88 Stat. 1978, 2053 (1975). These amendments included: (i) giving the ITC, instead of the President, final authority to determine whether a violation has occurred; (ii) providing for investigations of violations to begin under ITC initiative instead of waiting for the filing of a complaint; (iii) providing for the ITC to receive advice regarding alleged violations from other government agencies, specifically including the Department of Health, Education and Welfare, the Department of Justice, and the FTC; (iv) mandating that a final determination of a violation may be made only after an on-the-record hearing held in accordance with the provisions of the Administrative Procedures Act; (v) adding cease and desist orders as possible remedies for violations; (vi) mandating that the public health and welfare, competitive conditions in the U.S. economy, the production of like or directly competitive articles, and U.S. consumers be considered in determining whether or not to issue exclusion or cease and desist orders in cases of violations; and (vii) providing for Presidential override, for policy reasons, of an ITC determination.

112 S. REP. No. 1298, 93d Cong., 2d Sess. 196-97 (1974), states that "[t]he Committee believes that the public health and welfare and the assurance of competitive conditions in the United States economy must be the overriding considerations in the administration of this statute."

113 15 U.S.C. §§ 1, 2 (1976). *See, e.g.*, Certain Color Television Receiving Sets, Investigation No. 337-TA-23 (1976); Chicory Roots: Crude and Ground or Otherwise Prepared, Investigation No. 337-TA-27 (1976).

114 15 U.S.C. § 13a (1976). *See, e.g.*, the investigations cited in note 113, *supra*; Certain Above-Ground Swimming Pools, Investigation No. 337-TA-25 (1976); Certain Welded Stainless Steel Pipe and Tube, Investigation No. 337-TA-29 (1977).

115 15 U.S.C. § 14 (1976).

116 15 U.S.C. § 18 (1976).

117 *See, e.g.*, Klayman, *The United States International Trade Commission: Co-Equal of the FTC in Regulating Unfair Methods of Competition*, 10 LAW. AMERICAS 4, 19-21 (1978). The author is a former employee of the Office of the General Counsel at the ITC.

1979, no cases had yet been brought alleging the latter two types of violation.

A recent ITC Chairman set the tone for a more activist Commission by encouraging expanded ITC activity under section 337 into antitrust type matters,[118] arguing that such expanded activity is consistent with legislative intent and that the ITC need not be bound by precedents set by other regulatory bodies.[119] Rather, he asserted, the ITC is to "provide a new voice in the world of international antitrust law."[120] In at least one case, the Commission itself adopted a similar position by making clear that the provisions of section 337 are "in addition to any other provisions of law."[121]

This further fragmentation of antitrust enforcement efforts increases the uncertainty for U.S. businesses engaged in international trade as they are forced to try to understand and deal with possibly differing enforcement goals and intentions of three federal antitrust enforcement agencies, while potentially being simultaneously subject to the enforcement jurisdiction of each of them for essentially the same alleged illegal activity.[122] Additionally, such activities may be subject to antidumping and countervailing duty proceedings under the jurisdiction of the Commerce Department.[123] The uncertainty is further heightened since appeals of ITC decisions under section 337 must go to the Court of Customs and Patent Appeals,[124] a court without significant antitrust background or experience. In contrast, FTC cease and desist orders are appealable to the various U.S. Courts of Appeals, courts of general jurisdiction.[125] Justice Department civil antitrust actions are, of course, brought in the general jurisdiction U.S. District Courts, with appeals going to the U.S. Courts of Appeals or, in certain cases, directly to the U.S. Supreme Court.[126]

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118 Minchew, *United States International Trade Commission: Co-Equal of the FTC in Regulating Unfair Methods of Competition, Forward*, 10 LAW. AMERICAS 1, 1-3 (1978). As of July, 1979, eight cases alleging antitrust type unfair trade practices had been considered by the ITC since enactment of the Trade Act of 1974.

119 *Id.*

120 *Id.* at 1.

121 Certain Welded Stainless Steel Pipe and Tube, U.S.I.T.C. Pub. No. 863, at 14 (1978). *See also* 19 U.S.C. § 1337(a) (1976).

122 *See* Griffin, note 106 *supra*.

123 Antidumping and countervailing duty proceedings are governed by Title VII of the Paris Act of 1930, as amended, Title I, Trade Agreements Act of 1979, Pub. L. No. 96-39, 93 Stat. 150-93 (1979). Administration of these proceedings was shifted from the Treasury Dep't to the Commerce Dep't by Presidential Reorganization Plan No. 3 of 1979, 44 Fed. Reg. 69273 (1979).

124 19 U.S.C. § 1337(c) (1976).

125 15 U.S.C. § 45 (1976).

126 15 U.S.C. § 29 (1976). A direct appeal lies directly to the Supreme Court if, upon proper

The Justice Department has clearly recognized that a problem exists. Assistant Attorney General Shenefield has stated that,

> [W]e are becoming increasingly worried about the overlapping jurisdiction between ITC enforcement of section 337 and the traditional antitrust laws enforced by the Department of Justice, the Federal Trade Commission, and private antitrust plaintiffs.[127]

Accordingly, that Department has attempted to make its views known directly before the ITC.[128] For example, in April, 1976, the ITC investigated a matter involving certain stereophonic equipment, in which the complaints were similar to those involving antitrust violations.[129] Both the Department of Justice and the FTC urged the ITC to limit its section 337 jurisdiction to cases in which there was a link between the alleged unfair trade practice and foreign trade.[130] The ITC, however, asserted jurisdiction even though there was little evidence of a link between the allegedly anticompetitive actions of the importer and his foreign supplier.[131]

More recently, the Justice Department expressed opposition to the claims of Certain Welded Stainless Steel Pipe and Tube manufacturers in their section 337 action, pointing out that vigorous price competition is not an unfair trade practice.[132] It further argued that section 337 should be used against articles unfairly imported "only when other enforcement agencies such as the Department of Treasury, the Federal Trade Commission or the Department of Justice could not obtain in personam jurisdiction over the offending parties."[133] However, in this case, as well, the ITC did not agree. In an attempt to improve the situation and to coordinate its international competition advocacy efforts,

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application, the district court judge who adjudicated the case enters an order stating that immediate consideration of the appeal by the Supreme Court is of general public importance in the administration of justice.

127 Prepared remarks of John H. Shenefield, Assistant Attorney General, Antitrust Division, ALI-ABA Course of Study on International Antitrust Law, in Washington, D.C., 11 (May 26, 1978).

128 19 U.S.C. § 1337(b)(2) (1976) requires the ITC, during the course of each investigation under that section, to consult with and seek advice and information from the Department of Health, Education and Welfare, the Department of Justice, the FTC, and other appropriate departments and agencies.

129 In Certain Electronic Audio and Related Equipment, Investigation No. 337-TA-7 (1976), the question arose as to whether an importer of equipment who refused to deal with a discounter transshipper of such equipment violated § 337.

130 These positions were taken in letters filed in response to a request under § 337(b)(2).

131 For a more complete discussion of the matter, see Leonard & Foster, *The Metamorphosis of the U.S. International Trade Commission Under the Trade Act of 1974*, 16 VA. J. INT'L L. 719, 751-52 (1976).

132 Prepared remarks of John H. Shenefield, *supra* note 127, at 9.

133 Letter from Joe Sims, Deputy Assistant Attorney General for Antitrust, to Kenneth R. Mason, Secretary of the U.S. Int'l Trade Comm'n 2 (Jan. 13, 1978).

the Justice Department's Antitrust Division, has created a new position and appointed a Director of Trade Policy.

In section 337 actions, the Justice Department's role is not limited to making its views known before the ITC. As a result of amendments to the statute made by the Trade Act of 1974,[134] the President was given the opportunity to override, for policy reasons, an ITC determination under section 337. As part of the Executive Branch, the Justice Department advises the President with respect to such matters and accordingly, in cases where the ITC makes what Justice feels to be a determination having potentially anticompetitive effects, Justice will have a second chance to influence the outcome of the proceeding.[135] The fact that Justice has this further opportunity to affect the outcome of a section 337 action has the potential of limiting the ITC's role as yet another antitrust enforcement agency. If ITC activities under section 337 involving antitrust type practices result in what Justice feels to be anticompetitive consequences and Justice is successful in convincing the President that ITC's action should be overturned for policy reasons, it is likely that ITC activities of an antitrust nature will diminish.[136]

Although the Justice Department has expressed misgivings about the growing involvement of the ITC in matters traditionally left to other antitrust enforcement agencies,[137] it is important to note that Justice does not appear to be opposed in principle to the idea of yet another active antitrust enforcement agency. Rather, it opposes an antitrust enforcement role for the ITC which it would use to accomplish what Justice considers to be anticompetitive purposes and effects. As Assistant Attorney General Shenefield has noted, "If . . . the ITC chooses to use the authority Congress has granted it under Section 337 to promote competition, consistent with fair trade practices and existing antitrust and international law, I would welcome the ITC to the ranks of antitrust enforcers."[138]

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134 *See* note 111 *supra*.

135 28 U.S.C. §§ 501, 511 (1976).

136 Indeed, on April 22, 1978, President Carter did override the ITC's determination of a violation of § 337 in Certain Welded Stainless Steel Pipe and Tube, citing, inter alia, the need to avoid duplication and conflicts in the administration of the unfair trade practice laws of the United States. 43 Fed. Reg. 17,789 (1978).

137 *See* text accompanying notes 130-33 *supra*.

138 Letter from John H. Shenefield, Assistant Attorney General for Antitrust, to Senator Jacob Javits 9 (Sept. 27, 1978), *reprinted in* 125 CONG. REC. S 4708-10 (daily ed. April 25, 1979) [hereinafter cited as Shenefield Letter].

Anti-Boycott Enforcement

The question of the multifaceted nature of antitrust enforcement of illegal international trade activities has also arisen in connection with the U.S. government's judicial response to attempts by Arab League nations to force U.S. firms to comply with a boycott of Israel. This is exemplified by the position of the Department of Justice in its response to public comments on the proposed consent judgment which was filed in *United States v. Bechtel Corp.*[139]

The civil complaint in the subject action alleged that the defendants implemented a conspiracy in the United States to refuse to deal and to require others to refuse to deal with persons and firms which were blacklisted pursuant to the Arab Boycott of Israel as subcontractors on major construction projects in Arab League countries.[140] Nearly a year after the suit was instituted, a proposed consent judgment was reached,[141] and in accordance with the provisions of the Antitrust Procedures and Penalties Act,[142] a competitive impact statement was filed with the court by the Department of Justice.[143] The proposed consent judgment prohibited the defendants from continuing the conduct alleged in the complaint to be illegal,[144] from entering into agreements to refuse to deal with blacklisted persons and firms in the United States,[145] from refusing to recommend persons and firms as subcontractors on major construction projects in Arab League countries because such persons and firms are blacklisted,[146] and from maintaining or using blacklists in the United States in connection with major construction projects.[147] Public comments were solicited regarding the proposed judgment.[148]

Over a year later, the Justice Department filed its response to the comments received and asked for the court's approval of the proposed settlement.[149] The delay in filing the response was due to the fact that, in the interim, Congress carefully considered and enacted far-reaching anti-boycott legislation as part of the Export Administration Amend-

139 Civ. No. 76-99 (N.D. Cal., filed Jan. 16, 1976).
140 *See* the summary of the complaint in the introduction to the Proposed Consent Judgment, 42 Fed. Reg. 3716 (1977).
141 *Id.*
142 15 U.S.C. § 16(b) to (h) (1976).
143 42 Fed. Reg. 3718 (1977).
144 *Id.* at 3716.
145 *Id.*
146 *Id.*
147 *Id.*
148 *Id.*
149 43 Fed. Reg. 12953 (1978).

ments of 1977[150] which required the issuance by the Department of Commerce of detailed implementing regulations after a period of public comment.[151] The Justice Department's response noted that the 1977 Amendments represented an alternative governmental response to enforcement of the Sherman Act against restrictive trade practices relating to foreign boycotts and cited section 4A(a)(4) of the Export Administration Act of 1969, as amended by the 1977 Amendments[152] in support of the proposition.[153]

The response went on to emphasize the Justice Department's view that the proposed consent decree, "reflects the present enforcement policy of the Antitrust Division with respect to boycott related activities. Thus, the decree, rather than the 1977 Amendments and ensuing rules, constitutes the controlling factor in determining whether conduct runs afoul of the antitrust laws."[154] What makes this position especially difficult for U.S. business is the fact that in Justice's response it argued that the proposed consent decree prohibits "a plethora of boycott-implementing activities" authorized under the 1977 Amendments and the implementing regulations.[155] Thus, under Justice's response, businessmen would have to be concerned about differing enforcement goals and intentions of at least two administrative agencies in arranging business transactions with boycotting countries. When one also considers the

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150 50 U.S.C. § 2403-1a (Supp. I 1977).

151 *Id.*

152 *Id.* at § 2403-1a(a)(4). It provides that "[n]othing in this subsection may be construed to supersede or limit the operation of the antitrust . . . laws of the United States." The Export Administration Act of 1969, as amended, is codified at 50 U.S.C. App. §§ 2401-2413 (Supp. I 1977).

153 43 Fed. Reg. 12954 (1977).

154 *Id.* at 12956.

155 *Id.* at 12957 n.14. Commerce Department implementing regulations were issued at 43 Fed. Reg. 3508 (1978) and are codified in 15 C.F.R. § 369 (1979). The "boycott-implementing activities" permitted under the Commerce regulations but not under the proposed consent decree were described as:

> (1) compliance by a U.S. person with the import restrictions of a boycotting country as to goods and services from a boycotted country or provided by any business concern organized under the laws of the boycotted country or by nationals or residents of the boycotted country or prohibiting the shipment of goods to the boycotting country on a carrier of the boycotted country, or by a route other than that prescribed by the boycotting country or the recipient of the shipment, whether or not the U.S. person has received a specific request to comply;
> (2) compliance with export requirements of the boycotting country with respect to direct and indirect shipments or transshipments of exports to the boycotted country, or any business concern, national or resident thereof; and
> (3) compliance by a U.S. person resident in a foreign country or agreement by such person to comply with the laws of that country with respect to his activities exclusively therein governing imports of products for his own use into such country including the performance of contractual services within that country, even if the U.S. person who is a resident of a foreign country knows or has reason to know that particular laws are boycott related.

43 Fed. Reg. at 12957 n.14.

fact that provisions of the Internal Revenue Code deny certain tax benefits to firms participating in international boycott activities[156] thereby involving still another administrative agency (the Treasury Department) with a third set of criteria[157] in reviewing boycott-related activities, the uncertainty and difficulty faced by U.S. businesses in trading with boycotting countries becomes obvious.

The apparent conflict between the Department of Justice's response and the anti-boycott provisions of the Export Administration Amendments of 1977 and their implementing regulations, and the resultant inconsistent directives from two separate government agencies as to rules for doing business with certain Middle Eastern countries, were cited by Bechtel in objections it filed with the court to the entry of the proposed consent judgment.[158] However, the court rejected Bechtel's suggestion that the enactment of the 1977 Amendments limited the operation of the antitrust laws and required the pre-entry modification of the proposed judgement.[159] It noted the legislative history of the 1977 Amendments which indicated that enactment of that legislation was not intended to affect the antitrust laws.[160] Finally, the court argued that where harmonization was required, it would be more appropirate to direct such efforts to Congress than to a district court considering a proposed judgment under the strictures of the Antitrust Procedures and Penalties Act.[161]

Although the court's decision apparently did little to ease the busi-

156 I.R.C. §§ 908, 952, 995, 999.

157 The Treasury Department's Boycott Guidelines are found at 41 Fed. Reg. 49923 (1976), 42 Fed. Reg. 1092 (1977), 42 Fed. Reg. 41504 (1977), and 43 Fed. Reg. 3454 (1978). The major difference between Commerce's anti-boycott regulations and the Treasury Department's Guidelines is that Commerce's regulations allow compliance with local law or agreeing that a host country's laws will apply to a contract (as long as there is no specific reference to a country's boycott-related laws). Under Treasury's regulations, agreeing to comply generally with a country's laws may be considered an agreement to participate in a boycott, thereby leading to denial of a tax benefit. *See* 15 C.F.R. § 369.3(f) (1979); 43 Fed. Reg. 3463 (1977, Boycott Guidelines H-3 and H-4).

158 United States v. Bechtel Corp., Civ. No. 76-99, Memorandum of Decision (Jan. 5, 1979), *reprinted in* ANTITRUST & TRADE REG. REP. (BNA) No. 897, E-1 (1979).

159 *Id.* at E-3. The court noted that until the judgment is entered and implemented, no clear factual situation sufficient to bring into play the modification provisions of the proposed judgment would become apparent. The court held that a proceeding to modify may well involve considerations and evidentiary matters which would be beyond the scope of the application for the entry of the proposed judgment.

160 S. REP. NO. 95-104, 95th Cong., 1st Sess. 47 (1977).

161 United States v. Bechtel Corp., Memorandum of Decision, ANTITRUST & TRADE REG. REP. (BNA) No. 897, at E-3. Bechtel has filed an appeal with the Ninth Circuit Court of Appeals from the District Court's decision entering the consent judgement. *Appeal noted*, No. 79-4194 (9th Cir. March 5, 1979).

ness community's concerns regarding the lack of harmony between the consent judgment and the 1977 Amendments and implementing regulations, those concerns may have been allayed somewhat by the brief the Department of Justice filed in reply to Bechtel's motion objecting to the entry of the consent judgement.[162] In that brief, Justice conceded that the statement in its Response to the public comments on the proposed consent decree that the decree represents the "present enforcement policy of the Antitrust Division with respect to boycott related activities" "may be subject to misinterpretation" and seemed to describe the proposed decree as being limited to the specific facts of the case.[163] The brief further noted that "it would be inappropriate to . . . conclude that any single type of conduct prohibited by the decree would necessarily provide an independent basis for an antitrust prosecution standing by itself."[164] Finally, the reply brief stated that there is only one point in which the decree and Commerce's anti-boycott regulations are inconsistent.[165] That point was the use to which Bechtel and its subsidiaries could put a blacklist in procuring goods and services for major construction projects on behalf of an Arab client. The decree prohibits the use of such a blacklist.[166] Commerce's regulations permit U.S. subsidiaries resident in Arab League countries to use a blacklist in compliance with local law when procuring goods for incorporation into turnkey projects being built for Arab clients.[167]

THE JUSTICE DEPARTMENT'S RESPONSE

The Department of Justice has not only consistently rejected the premise that the operation of the antitrust laws represents an impediment to U.S. foreign trade in general and to expanded exports in particular,[168] but has also argued that these laws positively enhance the

162 Plaintiff's Reply Brief in Support of Its Motion for Entry of the Final Judgment, United States v. Bechtel Corp., Civ. No. 76-99 (N.D. Cal., filed Jan. 16, 1976).

163 *Id.* at 17 n.22.

164 Id. at 18 n.22. Assistant Attorney General Shenefield, in an interview, clarified this point by indicating that the case was sui generis and that Justice has "no desire to hold U.S. businesses up to some standard under the antitrust laws that is contradicted by congressional statute or even regulations issued under that statute." Shenefield Interview, *supra* note 63, at AA-6.

165 Plaintiff's Reply Brief in Support of Its Motion for Entry of the Final Judgment, United States v. Bechtel Corp., Civ. No. 76-99 (N.D. Cal., filed Jan. 16, 1976), at 15. *But see* note 155 *supra* for three potential conflicts between the consent decree and the Commerce Department's regulations.

166 42 Fed. Reg. 3717 (1977).

167 15 C.F.R. pt. 369 (1979).

168 *See, e.g.*, Letter from Assistant Attorney General Thomas E. Kauper to Arch N. Booth, President, U.S. Chamber of Commerce, *reprinted in Hearings, supra* note 11, at 172 [hereinafter

export opportunities of U.S. business.[169] Justice Department spokesmen point out that despite vast efforts, neither the NAM, nor the Chamber of Commerce, nor the Senate Subcommittee on Antitrust and Monopoly, nor other interested and capable parties have been able to bring forward concrete examples of harm resulting from the application of the antitrust laws to actions in U.S. foreign commerce.[170] With particular respect to exports, they further note that no joint venture or bidding arrangement involving American firms selling to foreigners has been the subject of either government prosecution or private litigation for over twenty years.[171] Moreover, the antitrust laws, it is argued, promote exports by protecting exporters against efforts to injure or limit their exports by anticompetitive conduct.[172]

Finally, Justice Department officials offer two explanations as to why the antitrust laws are perceived by the business community as presenting a problem for U.S. foreign trade.[173] First, they state that there are often a variety of reasons, totally unrelated to the antitrust laws, why a U.S. firm which has entered into joint venture negotiations may not wish to conclude the transaction.[174] To state openly the real reasons for not concluding the transaction may unnecessarily offend the foreign firm. In such case, the antitrust laws become a convenient excuse for not proceeding with the transaction. Second, it is argued that antitrust laws are a convenient excuse for poor export performance resulting in reality from a firm's unwillingness to devote sufficient resources and time to develop and understand foreign markets, or from U.S. industry's insufficient ability to obtain the aggressive support of U.S. commercial agencies to aid in overcoming non-tariff barriers to foreign markets.[175]

Apparently in an effort to substantiate its assertion that the antitrust laws are not an impediment to U.S. foreign trade, the Justice Department has undertaken several efforts in recent years to resolve any perceptions in the business community that the antitrust laws represent such an impediment. First, after publication of the Chamber of Com-

cited as Kauper Letter]; Shenefield Interview, *supra* note 63, at AA-3; Shenefield Letter, note 138 *supra*.

169 Prepared remarks of John H. Shenefield, Assistant Attorney General, Antitrust Division Before the National Governors Association/White House Seminar on International Trade 1 (June 6, 1979).

170 Shenefield Letter, *supra* note 138, at 3.

171 Kauper Letter, *supra* note 168, at 1.

172 Prepared remarks of John H. Shenefield, *supra* note 169, at 1.

173 Shenefield Letter, *supra* note 138, at 3-4.

174 *Id.*

175 *Id.*

merce's 1974 Report on "U.S. Antitrust Laws and American Exports",[176] former Assistant Attorney General for Antitrust, Thomas Kauper, in a letter to the Chamber's President, attempted to refute, point-by-point, the allegations made in that report.[177] Second, Justice Department representatives have met with some of the nation's leading businessmen to explain the application of the antitrust laws to the international operations of U.S. firms.[178] Most importantly, on January 26, 1977, it published an "Antitrust Guide for International Operations" containing fourteen hypothetical fact situations involving potential application of U.S. antitrust laws to various types of international business activities and detailed antitrust analyses of those hypotheticals.[179]

RECOMMENDATIONS

The preceding discussion has made one point abundantly clear—the business community and the nation's antitrust enforcers have very different perceptions as to the effect of U.S. antitrust laws on U.S. foreign trade and investment. The business community sees the application of U.S. antitrust laws as inhibiting its international operations. The Justice Department believes that those laws present no such impediment and in fact enhance the export opportunities of U.S. firms.

In this controversy, the business community has always been vulnerable to the charge that it has been unable to support its allegations with concrete examples of the detrimental effects that the antitrust laws have had.[180] It has indeed been hard to identify such examples because, as the U.S. Chamber of Commerce has noted,[181] it is difficult to confirm antitrust considerations as controlling in a decision not to undertake an international business venture or in impeding the international operations of an ongoing enterprise. While antitrust

176 *See* note 12 *supra.*

177 Kauper Letter, note 168 *supra.*

178 *See, e.g.*, remarks of Joel Davidow, then Chief, Foreign Commerce Section, Antitrust Division, U.S. Department of Justice, before the March 10, 1976, Meeting of the Advisory Committee on East-West Trade, *reprinted in* U.S. DEPARTMENT OF COMMERCE, ANTITRUST IN EAST-WEST TRADE (1976).

179 *See* note 27 *supra. The Bureau of Mines Report, supra* note 23, at 205, as well as recent discussions with leading members of the antitrust bar indicate that the *Antitrust Guide* seems useful to the business community as a nonbinding indication of the Antitrust Division's enforcement intentions. However, it should be noted that at least one commentator has criticized the *Antitrust Guide* for failing to explain adequately what it was and was not intended to be. Griffin, *supra* note 106, at 217. He states that this failing may mislead some readers and may result in their not comprehending the significance of the *Antitrust Guide*'s silence on some issues and very brief caveats in others. *Id.*

180 *See* text accompanying notes 15-17 *supra.*

181 *See* text accompanying note 16 *supra.*

considerations are probably *a* factor in such situations, they may not be *the* decisive factor. But a few such examples do exist.[182]

The Department of Justice, even though it has contended there has been little or no substance to the business community's allegations, has undertaken a concerted effort in recent years to try to eliminate that community's concerns with antitrust uncertainty over the application of the antitrust laws to U.S. foreign trade and investment. But as the first

182 In addition to those examples discussed at notes 58, 59, and 97, *supra*, the authors would note the following:

(i) Several years ago, Pratt and Whitney, a U.S. manufacturer of jet aircraft engines, was effectively prevented from entering into a joint venture with a British firm, Rolls Royce Ltd., to develop engines for executive jets after receiving informal Justice indications that such a venture would be prosecuted. A reworked proposal involving Pratt and Whitney's Canadian subsidiary was also thwarted by Justice because the great bulk of the output of the joint venture was to be exported from Canada to the United States. This position was taken despite the fact that the Canadian Government actively supported the joint venture and the Canadian Director of Investigation and Research did not see it as raising problems under the Combines Investigation Act, CAN. REV. STAT. c. C-23 (1970), as amended by Can. Stat. 1974-75-76, c. 76, a Canadian antitrust statute. *See* Prepared remarks of Robert J. Bertrand, Director of Investigation and Research Under the Combines Investigation Act and Ass't. Deputy Minister, Competition Policy, Canadian Department of Consumer and Corporate Affairs, Fordham Corporate Law Institute on International Antitrust 34 (Nov. 14, 1978). The inability of Pratt and Whitney to enter the Canadian joint venture has likely resulted in lost U.S. exports because foreign investments by U.S. firms such as those proposed in this case can often have a "flow-through" effect on U.S. exports. To the best of our knowledge, Pratt and Whitney has not gone ahead with development of those engines on its own.

(ii) In October 1977 the Antitrust Division brought a civil antitrust suit against the N.Y. Coffee and Sugar Exchange and its two committees which set the daily value—or spot price—of raw sugar. United States v. New York Coffee and Sugar Exchange, Inc., No. 77 Civ. 5038 (S.D.N.Y., *filed* 1977). That price apparently is used as a reference point for negotiation by private parties of standard contracts for the purchase and sale of sugar. Justice alleged that the daily price was set "arbitrarily" on the basis of consensus and collective judgment of a small number of competing firms without historical or technical bases, in violation of § 1 of the Sherman Act. In November, 1977, the exchange voluntarily stopped quoting a spot price. Consequently, millions of dollars of contracts for raw and refined cane sugar had to be renegotiated, resulting in major disruptions in the sugar trade. In addition, disruptions arose because of the dependence of the International Sugar Agreement on the quote to determine the quantities that member countries are allowed to export. Finally, since the N.Y. Exchange stopped quoting a spot price, the setting of world reference prices for sugar was transferred to three British merchant houses in London. Justice attorneys reportedly admitted that they were unaware of the complexities of the sugar trade at the time they filed the antitrust suit. A settlement has been reached in the litigation with a consent judgment permitting the exchange to quote a spot price for raw sugar based on a formula established in the judgment. *See Competitive Impact Statement filed by the Justice Department*, 43 Fed. Reg. 60345 (1978); Martin, *U.S. Suit Against Sugar Exchange Frustrates Traders and Bureaucrats*, Wall St. J., March 22, 1978, at 32, col. 2; Sullivan, *Antitrust Suit Triggers Sugar Contracts Furor*, Wash. Post, Feb. 1, 1978, at D13, col. 2-3.

(iii) The third example involved an attempt by the National Constructors Association to form an association under the Webb-Pomerene Act to compete against government assisted foreign consortia in the export of certain technology. The plan was not implemented when the Department of Justice opined that such exports do not fall within that Act's antitrust exemption. For further information regarding this matter, see note 211 *infra*.

part of this article has attempted to show, the business community's uncertainties in this area continue to exist. President Carter explicitly recognized this uncertainty in the area of international joint ventures in his National Export Policy Statement of September, 1978.[183]

These concerns and their relationship to the U.S. trade deficit, however, should not be overstated. As the *Bureau of Mines Report* has indicated, antitrust considerations are certainly not an insurmountable barrier to increased international trade and investment by U.S. firms.[184] Moreover, the antitrust laws are but one factor in a whole array of U.S. government laws and regulations which have an impact upon the ability of U.S. firms to compete in international markets.[185] Finally, the business community may be too ready to use its concerns as a basis for arguing that its international operations should be subject to a less restrictive antitrust standard than that which applies in domestic transactions.[186] Such an approach is neither mandated by the facts nor necessary to deal effectively with the problem. Rather, many of the business community's concerns can be effectively dealt with by taking certain steps to eliminate whatever antitrust uncertainty it now faces in exporting and other international operations. It is for this purpose that the following recommendations are offered for consideration.

Business Review Procedure

The first set of recommendations relates to the Justice Department's Business Review Procedure,[187] under which the Antitrust Division states, in writing, upon receipt of a request for such a statement, its present enforcement intention with respect to proposed business conduct. After receipt of such a request, which must describe the proposed conduct in detail, the Antitrust Division will usually commence an investigation into the matter. It will respond to the request in about six weeks in cases involving mergers and in somewhat more time in cases involving other types of proposed transactions.[188] A similar procedure

183 14 WEEKLY COMP. OF PRES. DOC. 1631, 1634 (1978).

184 *See* text accompanying notes 23-25 *supra*.

185 The Foreign Corrupt Practices Act, 15 U.S.C. §§ 78a, 78dd-1, 78dd-2, 78m, 78ff (Supp. I 1977), is an example of but one such law.

186 *See* text accompanying notes 15-22 *supra*; *see also* U.S. CHAMBER OF COMMERCE FINAL REPORT (proposing an exemption for American exporters and overseas contractors from U.S. antitrust laws insofar as their activities are limited to operations designed to increase the volume of American exports), note 12 *supra*.

187 28 C.F.R. § 50.6 (1978).

188 *Hearings, supra* note 11, at 1425 (citing Comegys, *Business Reviews by the Antitrust Division*, Conference Board Record 22-23, March 1974).

is used by the FTC.[189]

Despite the apparent attractiveness of such a procedure, the business community has not made as much use of it as one might expect. The Justice Department has acted on some 230 Business Review Procedure requests over the years,[190] or about twenty per year. More significantly for our purposes, between January 1, 1968, and September 1, 1979, only about twenty-seven such requests dealt with questions concerning the international operations of U.S. firms, and six of those dealt with the same transaction.[191] Justice Department spokesmen have indicated that constructive suggestions to increase use of the Business Review Procedure would be welcomed.[192]

While the business community, as a general matter, is undoubtedly apprehensive about giving an antitrust enforcement agency an opportunity to scrutinize a proposed transaction for fear of drawing attention to that activity, there appear to be at least two specific substantive reasons for lack of interest in the Business Review Procedure. The first problem involves the time taken by the Antitrust Division to respond to a Business Review Procedure request. United States firms engaging in international negotiations, often against foreign cartels which are able to make and execute business decisions rapidly cannot, if they wish to remain competitive, wait six weeks or more for a response to such a request from the Antitrust Division. The result is that possibly profitable business ventures may be abandoned or otherwise lost because of the uncertainty.[193] The time taken to respond to Business Review Procedure requests also may make U.S. companies less desirable as partners in joint ventures with foreign firms because in cases where the venture depends upon a favorable response to a Business Review Procedure request, they cannot commit themselves with the certainty and speed which the foreign firm may require.[194]

While the Justice Department, in certain cases, is prepared to work with requesting companies to provide them with a Business Review Procedure statement in an appropriate period of time so that business

189 16 C.F.R. § 1.1-1.4 (1978), *as amended* 44 Fed. Reg. 21624 (1979) and 44 Fed. Reg. 23515 (1979).

190 Prepared remarks of John H. Shenefield Before the ABA Section of Antitrust Law, National Institute on Preventive Antitrust 5 (May 31, 1979).

191 Review by one of the authors of Business Review Procedure requests on public file at the Antitrust Division, U.S. Department of Justice, Washington, D.C.

192 *See, e.g.*, remarks of Joe Sims, Deputy Assistant Attorney General at the 17th Annual Advanced Antitrust Law Seminar on International Trade and the Antitrust Laws, Practicing Law Institute, San Francisco, Cal., (Jan. 20, 1978).

193 BUREAU OF MINES REPORT, *supra* note 23, at 214.

194 *Id.*

opportunities will not be lost,[195] without a more consistently streamlined procedure, the business community has continued to perceive the usually extensive time involved in receiving a response to be a significant disincentive to making use of the Business Review Procedure.[196] In this light, if the Business Review Procedure is to be more widely used by U.S. businesses in their international dealings, some type of consistently more expeditious procedure is probably needed. President Carter explicitly recognized this point in his September 1978 National Export Policy Statement when he instructed the Justice Department "to give expedited treatment to requests by business firms for guidance on international antitrust issues under the Department's Business Review Program."[197]

In response to the President's directive, on December 6, 1978, the Justice Department announced a policy to expedite responses to Business Review Procedure requests concerning export-related activities.[198] It committed itself to answer such requests within 30 business days from the date the Antitrust Division receives all relevant data concerning the proposed transaction. Under the announced policy, an applicant seeking expedited treatment must indicate the manner in which the request is export-related and expedited treatment will apply only to those requests that the Division determines to be export-related. Assistant Attorney General Shenefield has announced that his goal is to accord this treatment to all standard Business Review Procedure requests.[199]

While a public commitment by the Justice Department to respond to export-related Business Review Procedure requests within a stated period of time is certainly a positive development, it is doubtful that the

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195 Shenefield Interview, *supra* note 63, at AA-4.

196 REPORT OF THE BUSINESS ADVISORY PANEL ON ANTITRUST EXPORT ISSUES (Jan. 10, 1979) [hereinafter cited as BUSINESS ADVISORY PANEL REPORT], *reprinted in* 2 REPORT TO THE PRESIDENT AND THE ATTORNEY GENERAL OF THE NATIONAL COMMISSION FOR THE REVIEW OF ANTITRUST LAWS AND PROCEDURES 295 (Jan. 22, 1979) [hereinafter cited as NATIONAL COMMISSION REPORT]. The National Commission for the Review of Antitrust Laws and Procedures was established by President Carter under Exec. Order No. 12022, 42 Fed. Reg. 61441 (1977), to study and make recommendations on (1) revision of procedural and substantive rules of law to expedite the resolution of complex antitrust cases and development of proposals for making remedies available in such cases more effective and (2) the desirability of retaining the various exemptions and immunities from the antitrust laws. The National Commission's membership was expanded from 15 to 22 members by Exec. Order No. 12052, 43 Fed. Reg. 15133 (1978). The eight member Business Advisory Panel on Antitrust Export Issues was established by President Carter on October 27, 1978 to assist the National Commission.

197 14 WEEKLY COMP. OF PRES. DOC. 1631, 1634 (1978).

198 Department of Justice Press Release (Dec. 6, 1978).

199 Prepared remarks of John H. Shenefield Before the ABA Section of Antitrust Law, National Institute on Preventive Antitrust 6 (May 31, 1979).

response time to which the Justice Department has committed itself will solve the problem described. Indeed, in the first six months that the new policy was in effect, the Justice Department received only one export-related Business Review Procedure request.[200]

As noted above,[201] in the past, the Antitrust Division has usually taken approximately thirty business days to respond to Business Review Procedure requests. The new policy, then, only commits the Justice Department to respond to such requests in the same time period it has usually taken for such processing. Without a more expeditious treatment of requests concerning export-related activities, the new policy is unlikely to result in significantly greater use of the Business Review Procedure. For this purpose, Justice should publicly commit itself to respond to Business Review Procedure requests within fifteen business days after all relevant documentation has been provided by the requestor. Moreover, the Justice Department should proceed as rapidly as possible to expand its new policy to include Business Review Procedure requests involving any type of proposed transaction. At a minimum, it should be expanded to include requests dealing with all types of proposed international trade and investment transactions.

Second, a statement made by the Antitrust Division pursuant to the Business Review Procedure declares the enforcement intention of the Division only as of the date of the letter. The regulations state that "the Division remains completely free to bring whatever action or proceeding it subsequently comes to believe is required by the public interest."[202] Although the regulations further state that the Division has never exercised its right to bring a criminal action where there has been a full and true disclosure at the time of presenting the request,[203] a company contemplating a proposed transaction can hardly be put fully at ease by a statement that the Antitrust Division has no present enforcement intention with respect thereto. Not only would the company not be insulated from future antitrust actions brought by the Justice Department,[204] the FTC, the ITC, or State Attorneys General, but, more importantly, the potential of private parties filing treble damage actions is not at all affected by an Antitrust Division statement that it has no present enforcement intention regarding the proposed course of

200 Prepared remarks of John H. Shenefield, *supra* note 169, at 8.

201 *See* text accompanying note 188 *supra*.

202 28 C.F.R. § 50.6 (1978).

203 *Id.* at § 50.6(9) (1978).

204 It should, however, be noted that absent a misstatement of facts or a dramatic change in circumstances, Justice is not likely to bring suits challenging actions which it previously stated it did not plan to challenge. *See* Shenefield Interview, *supra* note 63, at AA-4.

conduct.[205] Indeed, such actions are increasing as companies are realizing that they give them a potentially potent competitive weapon.[206]

In view of the fact that decisions to initiate private suits do not take into account considerations of public policy, and in order to increase antitrust certainty for the business community in its international operations, consideration should be given to removing the statutory right to a private antitrust action, or perhaps reducing possible damage awards from treble to single,[207] in cases where the Justice Department responds favorably to a request under a revised Business Review Procedure—provided, of course, that the company's actions remain within the parameters indicated in its request. Similarly, to deal with some of the business community's difficulties arising from the multifaceted nature of antitrust enforcement and the other antitrust uncertainties which they perceive, consideration should also be given to insulating a firm receiving a favorable response to a request under a revised Business Review Procedure from antitrust actions by all federal and state authorities—provided again that the firm's actions remain within the parameters indicated in its request.

While consideration should be given to applying these suggestions to all requests involving international trade and investment-related transactions, as a first step,[208] they might be applied only to requests regarding export-related transactions. If such application proves suc-

205 The problem of inadequate protection from the possibility of future public and private antitrust actions was specifically cited by the Business Advisory Panel on Antitrust Export Issues. *See* 2 NATIONAL COMMISSION REPORT, *supra* note 196, at 295.

206 While in 1960, only 228 private treble damage actions were filed in U.S. courts (Remarks of Professor Milton Handler, before the Association of the Bar of the City of New York, Dec. 1978, *reprinted in* ANTITRUST & TRADE REG. REP. (BNA) No. 892, F-1, F-24 (1978)), by 1977 the number had risen to 1,537. In 1978, 1,270 such actions were filed. ANTITRUST & TRADE REG. REP. (BNA) No. 901, A-20 (1979). Discussions with businessmen and antitrust counsel have disclosed that firms may now even be commencing private antitrust actions without realistically expecting a favorable decision on the merits, because they hope to reach an early settlement with defendants. Motivation for agreeing to an early settlement stems from the costly and time consuming aspects of defending against a private antitrust suit.

207 Assistant Attorney General Shenefield has reportedly considered proposing legislation to reduce potential private damage awards from treble to single, upon certification of the attorney general, in cases where corporations voluntarily confess to having participated in price-fixing conspiracies. *See Conspiracies and Confessions*, ANTITRUST & TRADE REG. REP. (BNA) No. 928, at A-25 (1979).

208 The authors recognize that these suggestions raise some potential problems, not the least of which may be to inhibit rapid processing of Business Review Procedure requests, in part, as a result of the likely necessity of providing other agencies and private parties the opportunity to be heard on the request in question since any ruling would be binding upon them. Because certain exporting activities are already protected by the antitrust exemption of the Webb-Pomerene Act, export-related transactions may raise the fewest problems. Consideration might also be given to the possibility of having two types of business review procedures. One would be an expedited

cessful, it might then be expanded to other international trade and investment transactions.

It should be stressed that these suggestions have not been offered with the goal of reducing vigorous enforcement of the antitrust laws either by public or private parties. Such laws represent an important national policy of promoting competition and strong and effective antitrust enforcement, including private treble damage actions to deter anticompetitive activities should clearly be supported. Rather, they will allow businesses to proceed expeditiously in their business negotiations with some sense of antitrust certainty regarding those transactions which are the subject of a favorable Business Review Procedure statement.

Webb-Pomerene Act

The next set of suggestions involves the Webb-Pomerene Act.[209] That Act provides an exemption from the Sherman Act and section 7 of the Clayton Act for activities of associations of United States firms engaged solely in "export trade."[210] Exports of services and other intangibles such as technology are not included within this definition.[211] To be eligible for the antitrust exemption, the Act requires that U.S. companies organized in associations refrain from artificially or intentionally enhancing or depressing U.S. domestic prices of commodities of the class exported by the association, or from substantially lessening competition in the United States, and prohibits restraints on the export trade of any domestic competitor of the association.[212]

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fifteen business day procedure under the present rules and another, longer procedure would have a binding effect on other agencies and private parties.

209 15 U.S.C. §§ 61-65 (1976).

210 *Id.* at §§ 62, 63. The Act defines, "export trade" as:

> trade or commerce in goods, wares, or merchandise exported, or in the course of being exported from the United States or any Territory thereof to any foreign nation; but the words "export trade" shall not be deemed to include the production, manufacture, or selling for consumption or for resale, within the United States or any Territory thereof, of such goods, wares, or merchandise, or any act in the course of such production, manufacture, or selling for consumption or for resale.

Id. at § 61.

211 In 1967, in response to a request from the FTC which was prompted by an application from the National Constructors Association to form a Webb-Pomerene Association to export technology consisting of know-how, blueprints, drawings, and construction plans, the Justice Department opined that such exports did not come within the Act's definition of "goods, wares or merchandise." Justice's opinion was based on an examination of the Act's legislative history and judicial interpretation of similar terms in other statutes. *See* GENERAL ACCOUNTING OFFICE, REPORT TO THE CONGRESS: CLARIFYING WEBB-POMERENE ACT NEEDED TO HELP INCREASE U.S. EXPORTS 12, 29-30 (No. B-172255) (Aug. 22, 1973).

212 15 U.S.C. §§ 62, 63 (1976).

Webb-Pomerene associations are made up of private U.S. firms which are prohibited, either individually or collectively, from agreeing with foreign producers about prices or market shares in international trade.[213] The Act provides investigative authority to detect associations whose activities exceed those permitted under the Act. For example, in order to receive the benefit of this exemption, the Act requires every Webb-Pomerene association to file with the FTC, within 30 days after its creation and annually thereafter, a verified written statement setting forth certain identifying information.[214] The Attorney General may also conduct an independent investigation when he believes the activities of the association go beyond the scope of the exemption, and if an antitrust violation is believed to exist, remedial action may be undertaken.[215] Such measures may be taken regardless of whether there has been any investigation, recommendation, or referral by the FTC.[216]

Since the Act was passed in 1918, there has been a slow, but fairly steady decline in the number of Webb-Pomerene associations registered with the FTC. The greatest number of registered associations—88—existed in 1919.[217] While some fluctuation has occurred over the last 15 years, the number of associations has remained fairly constant. As of October 30, 1978, 32 associations were still registered with the Federal Trade Commission.[218] The evidence of slow decline in use of the Act based on the number of registered associations is confirmed by

213 United States v. United States Alkali Export Ass'n, Inc., 86 F. Supp. 59 (S.D.N.Y. 1949). The court held that "international agreements between defendants allocating exclusive markets, assigning quotas in sundry markets, fixing prices on an international scale, and selling through joint agents are not those 'agreements in the course of export trade' which the Webb Act places beyond the reach of the Sherman Law." *Id.* at 70. Accordingly, activities of Webb-Pomerene associations are not comparable to the Organization of Petroleum Exporting Countries or certain other international producer cartels.

214 15 U.S.C. § 65 (1976). If the FTC has reason to believe that the association is operating beyond the scope of the limited exemption, it may investigate and recommend a readjustment of the business of the association to conform with the law. *Id.* If such recommendation is not followed, the FTC is to refer the matter to the Attorney General for appropriate action. *Id.*

215 United States Alkali Export Ass'n, Inc. v. United States, 325 U.S. 196 (1945).

216 *Id.* at 205.

217 Between 1921 and 1950, except for seven years during the Depression, registered associations numbered between 50 and 64. In 1950, the total fell to 49 and by 1960 it had dropped to 40. Further decreases occurred in the early 1960's. By 1965, registered associations numbered only 32. FEDERAL TRADE COMMISSION, WEBB-POMERENE ASSOCIATIONS: A 50 YEAR REVIEW, App. C-1 (Gov't Printing Office 1967) (staff report).

218 FEDERAL TRADE COMMISSION, WEBB-POMERNE ASSOCIATIONS: TEN YEARS LATER 6 (unpublished staff report submitted Nov. 1978). As of July, 1979, the FTC had not yet formally adopted the staff analysis. Accordingly, the views expressed in the analysis are those of the FTC staff and do not necessarily represent those of the FTC or any Commission member. It should be noted that not all registered associations have provided assistance to their members during the year of registration. For example, in 1960 only 26 out of the 40 registered associations reported

statistics on the percentage of U.S. exports accomplished through associations.[219]

Although Webb-Pomerene associations may never account for a large percentage of exports of U.S. manufacturers, certain types of firms have found a Webb-Pomerene association to be a useful vehicle for conducting their export operations.[220] Other firms and industries could also be expected to take advantage of the exemption in order to increase their exports if the Act's definition of "export trade" would be broadened to include services such as those related to architecture, engineering, construction, training, finance, insurance, and project or general management, as well as know-how incidental to the sale of goods, wares, merchandise or services. The fact that such exports are not presently included within the exemption can only be considered an anomaly, since there appears to be no logical basis for distinguishing

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providing some form of assistance to their members. As of October 30, 1978, 29 out of the 32 registered associations were active.

219 The highest percentage of U.S. exports assisted by Webb-Pomerene associations occurred in 1930 when 17.5% of U.S. exports were accomplished through such associations. By 1962, the percentage had fallen to 2.3 as Webb-Pomerene associations accounted for $499 million of total U.S. exports of $21.4 billion. The percentage rose to 3.5 in 1971, but by 1976 it had declined again to 1.5, as Webb-Pomerene associations directly or indirectly assisted $1.725 billion of total U.S. exports of $114 billion. *See* DEPARTMENT OF COMMERCE, FOREIGN BUSINESS PRACTICES—MATERIALS ON PRACTICAL ASPECTS OF EXPORTING, INTERNATIONAL LICENSING AND INVESTING 56 (1975); WEBB-POMERENE ASSOCIATIONS: A 50 YEAR REVIEW, *supra* note 217, at 36; WEBB-POMERENE ASSOCIATIONS: TEN YEARS LATER, *supra* note 218, at 15.

220 Firms most commonly benefitting from associations are those which deal in homogeneous or standardized products such as sulfur, potash, phosphate rock and plywood. *See* WEBB-POMERENE ASSOCIATIONS: A 50 YEAR REVIEW, *supra* note 217, at 49. Because of the general lack of differentiation in such fungible, non-trademarked type products, individual producers acting alone are hard-pressed to increase exports relative to their domestic competitors. On the other hand, manufacturers of highly differentiated trademarked products generally have little reason to join together in an association in which the competitive advantages gained by their products' consumer familiarity will be of little value. Successful Webb-Pomerene associations also exist in the textile machinery, machine tool, and motion picture fields. Finally, it should be noted that recently, interest has been increasing in using the export trade exemption to assist marketing among manufacturers or sellers of complementary products to meet increased foreign competition for large purchase orders and contracts, including turnkey construction products for entire manufacturing plants in the tire manufacturing and textile mill industries. Increased interest has also been shown in the possibility of using the exemption to form shippers' councils to negotiate with shipowners and shipping conferences on rates as well as other matters. *See* WEBB-POMERENE ASSOCIATIONS: TEN YEARS LATER, *supra* note 218, at 16.

The advantages which the Act provides member associations include: centralizing sales efforts; eliminating destructive competition by economically potent foreign buyers; supplying information to members; exploiting members' products abroad; improving product quality, acquiring added prestige in dealing with official or quasi-official buyers; and gaining access to new markets. *See Hearings Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary*, 84th Cong., 1st Sess., pt. 4, Foreign Trade, 1679 (1955) (testimony of Earl W. Kintner).

between goods and services.[221]

Such an exemption is needed to remove the antitrust uncertainty surrounding joint efforts by U.S. firms to export services.[222] It would clearly enable U.S. firms wishing to become engaged in major overseas projects, particularly in the construction and allied service industries, to submit a single joint bid, thereby lowering each company's cost per bid. Such costs, when bids are made on an individual firm basis, can occasionally reach several hundred thousand dollars per company. Smaller companies are often unable to support such marketing efforts alone. Even more importantly, such an expanded exemption would allow U.S. firms to deal more effectively with foreign state-controlled buying agencies[223] and to compete more efficaciously against foreign consortia,[224] by providing them with the clear legal assurance they need to join together to provide, at a competitive price, the variety and quantity of products and services so often demanded in connection with major foreign projects—a concept similar to that of the trading company which has been so usefully employed by the Japanese.[225] In recent

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221 *See* 1 NATIONAL COMMISSION REPORT, *supra* note 196, at 304; BUSINESS ADVISORY PANEL REPORT, *reprinted in* 2 NATIONAL COMMISSION REPORT, *supra* note 196, at 298. Both the Business Advisory Panel and the National Commission recommended that the Webb-Pomerene Act's antitrust exemption be expanded to include services. However, the National Commission's recommendation was coupled with a proposal to make the exemption contingent upon a showing of need, as well as a call for legislative reexamination of the necessity of an antitrust exemption for joint exporting activities. The Business Advisory Panel rejected a recommendation that the Webb-Pomerene exemption be made contingent upon a showing of particularized need. *See* 1 NATIONAL COMMISSION REPORT, *supra* note 196, at 302-04; 2 NATIONAL COMMISSION REPORT, *supra* note 196, at 297-98.

222 *See* GENERAL ACCOUNTING OFFICE, *supra* note 211, at 12.

223 *Hearings on S. 864, S. 1499 and S. 1663, supra* note 22, at 14 (statement of the National Association of Manufacturers).

224 The problem of competing against foreign consortia was a major reason for enactment of the Webb-Pomerene Act. 55 Cong. Rec. 7515 (1917); H.R. REP. No. 1056, 64th Cong. 3d Sess. (1917); H.R. REP. No. 50, 65th Cong., 1st Sess. 2-3 (1917). In United States v. Concentrated Phosphate Export Ass'n, Inc., 393 U.S. 199, 206 (1968), the Court stated that, in passing the act "Congress felt that American firms needed the power to form joint export associations in order to compete with foreign cartels." For a review of the stiff competition U.S. construction companies presently face from foreign government-sponsored consortia see the letter from Robert M. Gants, Vice President, Government Relations, National Constructors Association to Rufus Phillips, Chairman, Business Advisory Panel to the National Commission for the Review of Antitrust Laws and Procedures 2-3 (Dec. 1, 1978).

225 The *Stevenson Report*, *supra* note 7, at 24, suggests that the Webb-Pomerene antitrust exemption, even if it is expanded to include services, may not provide enough legal protection for the organization of firms on the trading company concept. That report advocates clear modification of antitrust law to permit formation of trading companies which would be able to organize the exporting efforts of small and inexperienced U.S. firms, to conduct marketing on a global basis, and to absorb exchange rate fluctuations, as the Korean and Japanese trading companies do. Indeed, Senator Stevenson has recently introduced a bill, S. 1663, 96th Cong., 1st Sess. (1979),

years, there have been several legislative proposals to add services to the Webb-Pomerene antitrust exemption.[226] None has been enacted.

Although the Justice Department supported one legislative proposal in 1973 to include services within the scope of the Webb-Pomerene exemption,[227] it has generally opposed any expansion of the exemption and recently has argued strongly for its repeal.[228] It opposes the amendment of the statute to include services within the exemption as being unnecessary because there have been no cases challenging practices which such an amended exemption would expressly permit, and because activities permitted by the exemption are "unlikely" to be objectionable from an antitrust standpoint.[229]

While such statements are somewhat reassuring, they are hardly sufficient, absent a statutory exemption, for the business community, to engage in joint exporting activities that may have anticompetitive consequences only in foreign markets, without fear of antitrust repercussions. One reason is that the Justice Department's view that the Sherman Act's proscriptions do not cover joint activities in the United States which have anticompetitive consequences only in foreign markets is not settled law and is not universally shared.[230] While firms engaging in joint exporting activities which have such consequences may not need to fear a Justice Department enforcement action, they would not be immune to an FTC enforcement action or private treble damage actions which might raise this question. The nature of antitrust litigation is such that if a suit is instituted—whether by an antitrust enforcement agency, or by a private plaintiff—the defendant will have a serious, expensive and long-term problem. Without a statutory

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which would expressly permit formation of such trading companies and provide an antitrust exemption for their activities.

226 S. 1744, 96th Cong., 1st Sess. (1979); S. 1499, 96th Cong., 1st Sess. (1979); S. 864, 96th Cong., 1st Sess. (1979); S. 2700, 95th Cong., 2d Sess. (1978); S. 1973, 94th Cong., 1st Sess. (1975); S. 1486, 93d Cong., 2d Sess. (1974); S. 1774, 93d Cong., 1st Sess. (1973); S. 1483, 93d Cong., 1st Sess. (1973); S. 4120, 92d Cong., 2d Sess. (1972); H.R. 5061, 96th Cong., 1st Sess. (1979); H.R. 11375, 95th Cong., 2d Sess. (1978); H.R. 9445, 95th Cong., 1st Sess. (1977).

227 S. 1774, 93d Cong., 1st Sess. (1973) was the proposal supported. *See* Kauper Letter in *Hearings, supra* note 11, at 176, 177.

228 *See, e.g.*, Shenefield Interview, *supra* note 63, at AA-3.

229 *Id. See also* ANTITRUST GUIDE, *supra* note 27, at 4; Prepared remarks of Ky P. Ewing, Jr., Deputy Assistant Attorney General for Antitrust, before the Subcomm. on Int'l Finance of the Senate Comm. on Banking, Housing, and Urban Affairs, Sept. 18, 1979, at 5-6. We note that the careful use by the Justice Department of the word "unlikely" is itself likely to create uncertainty in the minds of prudent antitrust counsel.

230 Rahl, *American Antitrust and Foreign Operations: What Is Covered?*, 8 CORNELL INT'L L.J. 1 (1974); Rahl, *A Rejoinder*, 8 CORNELL INT'L L.J. 42 (1974). *See also* Pfizer, Inc. v. Gov't of India, 434 U.S. 308 (1978); Todhunter Mitchell & Co. v. Anheuser-Busch, Inc., 375 F. Supp. 610 (E.D. Penn. 1974), *findings amended* 383 F. Supp. 586.

exemption, such risks and uncertainties could be expected to increase the reluctance of businessmen to engage in the joint exporting activities contemplated by the Webb-Pomerene Act. Also, removing such concerns with respect to exports of services, because they are not now covered, could be expected to stimulate such exports.

A second reason why the Justice Department's argument that the Webb-Pomerene Act is unnecessary, since it expressly permits only activities that are unobjectionable in any case, is insufficient is that case law indicates that the Webb-Pomerene exemption expressly permits certain specific joint activities by Webb-Pomerene associations.[231] These include a commitment by association members to use the export association as their exclusive foreign outlet, the refusal of the association to handle exports of U.S. competitors, determining quotas and prices at which each member should supply products to the export association, the fixing of resale prices at levels at which foreign distributors should sell the export association's products, and limiting foreign distribution to handling products of the export association's members.[232] Without a statutory exemption, businessmen may hesitate to engage in such export-related activities due to antitrust uncertainties.

The Justice Department has based its case for repeal of the Webb-Pomerene Act on two principal arguments. First, it contends that the Act provides a means by which firms, particularly in oligopolistic industries, engaging in joint exporting activities under the Act's protection may try to carry over such joint activity in their domestic operations.[233] This possibility of domestic anticompetitive spillover effects resulting from Webb-Pomerene association activities was also cited by the National Commission for the Review of Antitrust Laws and Procedures in its recently issued report[234] as an argument for re-

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

232 *Id.* at 965. The court did note that special circumstances indicating unfairness or oppression might render unlawful even these activities. *Id.*

233 *See* Shenefield Interview, *supra* note 63, at AA-3, wherein he states:

> It [the Act] leads, for instance, so easily to behavior with impacts inside this country, which is always one of the reasons antitrust lawyers are very concerned about it. Companies get in the habit of consulting one another on prices and production as to exports; it's a short distance from that to a more general agreement.

The chief of the Antitrust Division's foreign commerce section has reportedly stated that, in certain cases, domestic restraints resulting from Webb-Pomerene association activities are "virtually inevitable" and that the Justice Department is "itching to sue" a Webb-Pomerene association, but has been unable to obtain the necessary evidence. ANTITRUST & TRADE REG. REP. (BNA) No. 892, at 16-17 (1978).

234 The NATIONAL COMMISSION REPORT states that "the Act as drafted creates opportunities for significant anticompetitive spillover effects in domestic comerce." 1 NATIONAL COMMISSION REPORT, *supra* note 196, at 302. The Report described the most likely spillover effects as those related to the exchange, among domestic producers in oligopolistic markets, of export information

peal of the exemption. However, this approach fails to take sufficiently into account three key countervailing considerations.[235] First, hard evidence of domestic anti-competitive spillover effects resulting from Webb-Pomerene association activities has yet to be demonstrated. The fact that there have been only two suits brought by the Justice Department against Webb-Pomerene associations in the last twenty-five years[236] would seem to indicate that such effects have rarely been occurring. Second, even if such effects do occur, firms engaging in such anticompetitive activities would not be protected by the Act and accordingly would be subject to suit.[237] Third, the investigative and information gathering powers already provided by the Act[238] would seem to be sufficient to uncover any domestic anti-competitive spillover effects resulting from Webb-Pomerene association activities. Finally, even if Webb-Pomerene associations do provide a means for member firms to carry over their joint activities into the domestic sphere, they are not the only vehicle for implementing a conspiracy to restrain trade in the United States. Firms interested in engaging in such conspiracies hardly need the Webb-Pomerene umbrella to accomplish their objectives. It should be obvious that there are a whole host of other means by which a conspiracy may be organized.

The Justice Department's second principal argument for repeal of the Webb-Pomerene Act is that its existence is an embarrassment to the United States when it argues in international forums against government sponsored or approved cartel activity and seeks international approval of a code of business conduct based largely on American antitrust principles.[239] While the Department of Justice's efforts to negotiate a code of business conduct based largely on American antitrust principles should clearly be supported, international agreement on such

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on future prices, costs, and production. *Id.* at 299. The Report states that because the exchange of such information regarding foreign markets is permitted under the Webb-Pomerene Act, parallel pricing in domestic markets is facilitated and large oligopolists are enabled to coexist both at home and abroad. *Id.*

235 *See generally* 2 NATIONAL COMMISSION REPORT, *supra* note 196, at 296.

236 United States v. Concentrated Phosphate Export Ass'n, Inc., 393 U.S. 199 (1968), and United States v. Anthracite Export Ass'n, Civ. No. 9171 (M.D. Pa. *filed* Nov. 10, 1965). The latter suit was settled by consent decree in 1970. *See* 1970 Trade Cases ¶ 73,348.

237 The Act specifically excludes activities having anti-competitive effects on U.S. domestic commerce from the scope of the exemption. *See* 15 U.S.C. §§ 62, 63 (1976).

238 15 U.S.C. § 65 (1976).

239 Remarks of Joel Davidow, Director of Policy Planning, Antitrust Division, U.S. Department of Justice, to the Business Advisory Panel on Antitrust Export Issues (Dec. 1, 1978). Mr. Davidow's remarks are discussed in the Report of that Panel in 2 NATIONAL COMMISSION REPORT, *supra* note 196, at 296-97.

a code, if it is ever concluded, may take many years.[240] Until such an agreement is concluded, the unilateral requirement that U.S. companies compete abroad on an unequal basis against foreign firms whose countries allow joint exporting activities[241] probably exacerbates this country's already massive trade deficit.

Moreover, as the Business Advisory Panel on Antitrust Export Issues has noted,[242] the existence of the Webb-Pomerene Act is only one of many obstacles to the successful conclusion of negotiations on a code of business conduct. Furthermore, foreign governments realize that the terms of treaties concluded by the United States with foreign nations would control the activities of Webb-Pomerene associations. Accordingly, the unilateral repeal of the Webb-Pomerene Act is not likely to improve significantly the United States' ability to negotiate pro-competitive concessions from foreign nations.

The second suggestion regarding the Webb-Pomerene Act would attempt to minimize any perceived uncertainty in the business community as to the applicability of the statutory exemption by providing for some type of "advisory opinion" or "certification" by the agency responsible for administration and enforcement of the statute as to the legality of an association's planned activities at the time of registration of the export association. Such an opinion or certification could be based on a registration statement submitted by the association, describing in somewhat greater detail than is now required, the composition, organizational structure, and proposed activities of the association. In rendering its opinion, the appropriate agency would determine whether the association's organization and operations would likely result in substantially lessening competition, restraining the domestic or import trade of the United States, or substantially restraining exports by domestic firms that are not members of the association. When rendered, the opinion would grant, at least for a specified period of time, a complete exemption from both public and private actions under the antitrust laws, so long as the association's organization and operations conform to its registration statement as approved in the "advisory opin-

240 Assistant Attorney General John Shenefield has stated that he does not foresee the conclusion of major international agreements. Shenefield Interview, *supra* note 63, at AA-7.

241 The laws of this country's major trading partners provide an antitrust export exemption for activities by nationals of their countries similar to that permitted for U.S. firms under Webb-Pomerene. *See Hearings Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary*, 89th Cong., 1st Sess., pt. 2 (1965) (Antitrust Development and Regulations of Foreign Countries); OECD, GUIDE TO LEGISLATION ON RESTRICTIVE BUSINESS PRACTICES (3d ed. 1971); OECD, FINAL REPORT OF THE COMMITTEE OF EXPERTS ON RESTRICTIVE BUSINESS PRACTICES OF THE OECD ch. 1 (1974).

242 *See* 2 NATIONAL COMMISSION REPORT, *supra* note 196, at 296-97.

ion" or "certification." Such a procedure is similar to that suggested above[243] for the Department of Justice's Business Review Procedure, and would have some of the same advantages.

CONCLUSION

This article has discussed, in the context of the deteriorating international trade position of the United States, the problems the business community has encountered regarding its perceptions as to the uncertain application of the antitrust laws to its international operations. The response of the Justice Department to these claims has been stated. The recommendations represent an attempt to deal with the business community's concerns while leaving basic antitrust principles intact. Such efforts must be made if the United States is to encourage its firms to engage in international trade and investment while, at the same time, protecting the economic benefits of vigorous competition fostered by the antitrust laws.

243 *See* text accompanying notes 202-207 *supra*.