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SINCE the end of World War II the American government has been engaged in a world-wide campaign against international trade restrictions. The campaign originated under President Roosevelt and Secretary of State Hull after investigation had persuaded the administration that participation of leading American industries in international cartels had hampered domestic production of various strategic materials. The essence of the campaign has consisted in the propagation of the American antitrust doctrine throughout the world by education, diplomacy and judicial prosecution.[1]

I. EXTRATERRITORIAL EFFECT OF ANTITRUST LAWS

THE federal courts have supported the campaign against international trade barriers by giving a broad extraterritorial application to the anti-trust laws. The Sherman Act has been applied to international combines and to acts of American or foreign companies done outside the United States where they have restrained United States domestic or foreign trade. Business conduct aimed exclusively at foreign markets has been held in violation of the Sherman Act where it has indirectly hampered American export.[2] Foreign companies not engaged in business in the United States have been ordered to produce documents kept abroad where it was claimed that they related to restrictions affecting United States trade.[3] A foreign company was

GEORGE G. HOFF is Counsel of Paramount International Films, Inc. and Professor of Law at New York Law School.

[1] Exchange of letters between President Roosevelt, September 6, 1944 and Secretary of State Hull, September 11, 1944, 11 DEP'T STATE BULL. 254, 292 (1944); BERGE, CARTELS, CHALLENGE TO A FREE WORLD (1944); Berge, *Antitrust Enforcement in the War and Post War Period,* 12 GEO. WASH. L. R. 371, 373 (1944); STOCKING AND WATKINS, CARTELS OR COMPETITION? at 403 (1948); Timberg, *Restrictive Business Practices as an Appropriate Subject for United Nations Action,* 1 ANTITRUST BULLETIN 409 (1955); REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 101 (1955).

[2] U. S. v. General Electric Co. et al., 82 F. Supp. 753, 891 (D. N. J. 1949) (incandescent lamps); U. S. v. Minnesota Mining and Manufacturing Co. et al., 92 F. Supp. 947, 959, 963 (D. Mass. 1950); Timken Roller Bearing Co. v. U. S., 341 U. S. 593, 71 S. Ct. 971, 95 L. Ed. 1199 (1951).

[3] Emmerglich, *Antitrust Jurisdiction and the Production of Documents Located Abroad,* 11 RECORD 122, 124 (1956); Preliminary Report of the Special Committee on Antitrust Laws and Foreign Trade of The Association of the Bar of the City of New York, (chairman McAllister) *National Security and Foreign Policy in the Application of American Antitrust Laws to Commerce with Foreign Nations,* pp. 12, 13 (1957).

required to dispose of a foreign patent which was held to have been acquired for the purpose of circumventing American antitrust laws.[4]

The assumption by American courts of such broad powers over matters under the control of a foreign sovereign has been widely resented. Diplomatic protests have followed[5] and several foreign governments have taken measures designed to frustrate the orders of American courts.[6] The judicial and legislative conflict thus developed between this country and some friendly nations has attracted considerable attention in business and legal circles and the imposition of American antitrust laws on transnational trade restrictions has become a vigorously debated issue.[7]

[4] U. S. v. Imperial Chemical Industries Limited et al., 100 F. Supp. 504, 105 F. Supp. 215, 228, 229 (S. D. N. Y. 1951).

[5] Reportedly, diplomatic protests have been made by Canada, The Netherlands, Switzerland and Belgium. See Whitney, *Anti-trust Law and Foreign Commerce,* 11 RECORD 134, 138 (1956); Preliminary Report of the Special Committee on Antitrust Laws and Foreign Trade of the Association of the Bar of the City of New York, see *supra* note 3 at 12 ff.

[6] Reportedly, legislation to that effect was passed by the province of Ontario and The Netherlands while the British government forbade the removal of documents of British corporations. See Preliminary Report of the Special Committee of The Association of the Bar of the City of New York, see *supra* note 3, at 13. The order of the U. S. District Court that I. C. I. dispose of a patent acquired during the pendency of the lawsuit to prevent certain anticipated effects of the court's decision was disregarded by the Court of Appeals in England on the ground that it was an attempt to *"assert an extraterritorial jurisdiction which the courts of this country cannot recognize, notwithstanding . . . . comity."* However any conflict between the order of United States and British courts was denied on the ground of a saving clause in the judgment of the U. S. District Court. British Nylon Spinners Ld. v. Imperial Chemical Industries Ld., 1 Ch. 19, 24, 28 (1953).

[7] Hale and Hale, *Monopoly Abroad: The Antitrust Laws and Commerce in Foreign Areas,* 31 TEXAS L. R. 493 (1953); Timberg, *Antitrust and Foreign Trade,* 48 N. W. UNIV. L. R. 411 (1953); Haight, *International Law and Extraterritorial Application of the Antitrust Laws,* 63 YALE L. J. 639 (1954); Whitney, *Sources of Conflict between International Law and the Antitrust Laws,* 63 YALE L. J. 655 (1954); Carlston, *Antitrust Policy Abroad,* 49 NW. UNIV. L. R. 569 (1954); see, *supra* note 1, Timberg; Montague, *Limitations on What UN Can Do Successfully; The Proposed UN Program on Restrictive Business Practices,* 1 ANTITRUST BULLETIN 441 (1955); Carlston, *Foreign Economic Policy and the Antitrust Laws,* 40 MINN. L. R. 125 (1956); Timberg, *Extraterritorial Jurisdiction under the Sherman Act,* 11 RECORD 101 (1956); see *supra,* note 3, Emmerglich; see note 5, *supra;* Brewster, *Extraterritorial Effects of the U. S. Antitrust Laws: An Appraisal,* AMERICAN BAR ASSOCIATION PROCEEDINGS, Section of Antitrust Law, at the annual meeting New York and London July 13 and 25, 1957 at 65; Hansen, *The Enforcement of the United States Antitrust Laws By The Department of Justice To Protect Freedom of United States Foreign Trade,* AMERICAN BAR ASSOCIATION PROCEEDINGS, Section of Antitrust Law, at the annual meeting New York and London July 13 and 25, 1957 at 75; Dean, *Extraterritorial Effects of the U. S. Antitrust Laws: Advising the Client,* AMERICAN BAR ASSOCIATION PROCEEDINGS, Section of Antitrust Law, at the annual meeting New York and London July 13 and 25, 1957 at 88; Preliminary Report of Special Committee on Antitrust Laws and Foreign Trade of The Association of the Bar of the City of New York, see *supra* note 3.

The interests of American export trade in this conflict are, of course, prominent. Inseparable from the application of the antitrust laws to international trade is the future of American export trade associations which, under the Webb-Pomerene Act,[8] now enjoy an antitrust immunity of limited scope.

It is possible that the present controversy will calm itself and that many of the vexing problems of the present will be settled by the judicial process without legislative or executive intervention. A majority of the members of the Attorney General's National Committee appointed in 1953 to study the antitrust laws found no reason for intervention[9] and there are also other advocates of solution by judicial process.[10]

On the other hand, there has been considerable pressure for congressional action, although there is no agreement as to the objective which should be achieved.

A committee of the New York City Bar Association has suggested that the determination of the extraterritorial effect of antitrust laws be left to the judiciary and that Congress empower the executive to grant antitrust immunity in special cases of national interest.[11] No change in the Webb Act is proposed although, in effect, vesting an administrative agency with the power to grant special antitrust exemptions would carry further the policy of the Webb Act.

Spokesmen of American companies engaged in foreign commerce consider the present broad application of the antitrust laws in the international field to be a legal and diplomatic blunder. This group urges that the scope of our antitrust laws be restricted to events occurring within the territory of the United States.[12] Acceptance of this proposition would virtually eliminate the need for the Webb Act. At the same time, policy wise, it would justify a far reaching liberalization of the conditions and a broad extension of the scope of the antitrust immunity now enjoyed by Webb associations.

[8] The Export Trade Act, 1918, 40 STAT. 516, 5 U. S. C. §§ 61-65 (1957).

[9] THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS, see *supra* note 1 at 76, 98, 114.

[10] See *supra* note 7, Brewster at 74; see *supra,* note 7, Dean at 102.

[11] See *supra* note 3 at 25, Preliminary Report of the Special Committee on Antitrust Laws and Foreign Trade of The Association of the Bar of the City of New York.

[12] American Chamber of Commerce in London Inc., *The American Antitrust Laws and American Business Abroad,* p. 25 (1955); see also Subcommittee on Antitrust and Monopoly of the Committee of the Judiciary, U. S. Senate, Antitrust and Monopoly, Staff Memorandum, *Foreign Trade Conferences,* 84th Cong., 1st Sess. at 11 (1955); see *supra* note 5 at 139, Whitney.

A third group, represented by a minority of the Attorney General's Antitrust Committee, advocates the outright repeal of the Webb Act on the ground that it expresses a philosophy antithetic to that of the Sherman Act.[13]

A more moderate position is taken by those opponents of the Webb Act who propose that it be amended so as to limit antitrust immunity to associations of small exporters[14] or to associations which represent altogether only a fraction of an industry.[15]

In view of this conflict of ideas and business interests, it appears timely to review the conditions and scope of the antitrust immunity enjoyed by Webb export associations and to appraise the role of the Webb Act in solving a problem of conflict of laws.

II. CONDITIONS AND SCOPE OF ANTITRUST IMMUNITY

IT is the privilege of export trade associations which qualify under the Webb Act to restrain their own export trade and that of their members. However, Webb associations are not free to restrain the export trade of domestic competitors, nor are they free to restrain domestic trade within the United States, be it the trade of a member or of a competitor of the association.

The foregoing rule is the substance of Section 2 of the Webb Act[16] which reads as follows:

"Nothing contained in the Act entitled 'An Act to protect trade and commerce against unlawful restraints and monopolies', approved July second, eighteen hundred and ninety, shall be construed as declaring to be illegal an association entered into for the sole purpose of engaging in export trade and actually engaged solely in such ex-

[13] Rostow and some other members of the Attorney General's Committee stated that *"We should recognize that the Webb-Pomerene Act is an experiment which has failed and urge its repeal."*; see *supra* note 1, Report of the Attorney General's National Committee to Study the Antitrust Laws at 114. The repeal of the Webb Act was proposed in 1947 by some members of the *ad hoc* Committee on the Webb-Pomerene Act of the American Economic Association. See American Economic Association, *ad hoc* Committee on the Webb-Pomerene Act (chairman Mason), *Consensus Report on the Webb-Pomerene Law,* 37 AMER. ECON. REV. 848 at 860 ff (1947); and in 1955 by Timberg before a Senate Committee. See *Hearings Before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary,* Part 4 at 1602, 1624 (1956). For earlier similar proposals see Diamond, *The Webb-Pomerene Act and Export Trade Associations,* 44 COL. L. R. 805, 832 (1944).

[14] See *ad hoc* Committee on the Webb-Pomerene Act, *id.* note 13 at 857 ff. Bill introduced by Congressman Multer in 1950, H. R. 1950, 81st Cong., 1st Sess.; H. R. 1289, 83d Cong., 1st Sess.; H. R. 2018, 84th Cong., 1st Sess.

[15] See *supra* note 1, Stocking and Watkins, at 437.

[16] Substantially identical with 15 U. S. C. § 62 (1918) ch. 50, § 2, 40 STAT. 517.

port trade, or an agreement made or act done in the course of export trade by such association, provided such association, agreement, or act is not in restraint of trade within the United States, and is not in restraint of the export trade of any domestic competitor of such association: Provided, That such association does not, either in the United States or elsewhere, enter into any agreement, understanding, or conspiracy, or do any act which artificially or intentionally enhances or depresses prices within the United States of commodities of the class exported by such association, or which substantially lessens competition within the United States or otherwise restrains trade therein."

The awkward construction of this section, which contains two overlapping *provisos,* is the result of its legislative history. In the original bill, section 2 contained only one proviso reading as follows: *"provided such association, agreement or act is not in restraint of trade within the United States."* To this the House added a second clause reading: *"and does not restrain the export trade of the United States."*[17] The language of the second clause obviously was broader than was intended: prohibition of *any* restraint of export trade by an association would destroy the privilege granted by the immunity provision of the first part of section 2.

Upon the recommendation of the Senate Interstate Commerce Committee, this error of draftsmanship was corrected by changing the second clause of the first proviso so that it would prohibit only a restraint of the export trade of a domestic competitor of the association. In this way self restraints imposed by a Webb company on itself or its membership were made legal. At the same time a second *proviso* was added to the effect that export trade associations could not manipulate prices to domestic consumers and could not substantially lessen competition or otherwise restrain trade in the domestic market.[18]

The obvious intent of this second *proviso* was to tighten the limits of the antitrust exemption granted by the Act. However, one may question whether it accomplished this or any other purpose.

[17] See H. R. 16707, 64th Cong., 1st Sess. (1916), H. R. 17350, 64th Cong., 2d Sess. (1916). *Comp.* Temporary National Economic Committee, Monograph No. 6, *Export Price and Export Cartels (Webb-Pomerene Associations)* Part III. Report of the Federal Trade Commission, *The Operation of the Export Trade Act (Webb-Pomerene Law) 1918-1940* at 120 (1940).

[18] Report No. 1056 to accompany H. R. 17350, 64th Cong., 2d Sess., Senate Committee on Interstate Commerce (1917); see *supra,* note 17 at 121.

Since manipulation of domestic prices by an export trade association would probably be an undue restraint of domestic price competition, and since a substantial lessening of domestic competition by an export trade association is undoubtedly an unreasonable restraint of trade, this second *proviso* merely restates the general prohibition of restraint of domestic trade declared in the first clause of the first *proviso*. The only difference is that, while the first proviso is expressed as a requirement relative to the specific agreement or act in regard to which immunity is granted, the second *proviso* applies to all agreements and acts of a Webb company as a condition of continued antitrust immunity for the same or any other acts of the association. In other words, the first *proviso* defines the *scope* of activity in which a Webb company may engage free from Sherman Act consequences. The second *proviso* sets forth the *conditions* with which an export trade association must first comply if it is to qualify as an export association entitled to antitrust immunity.

Section 5 of the Act[19] makes the antitrust immunity of an export trade association dependent on the further condition that it file periodically with the Federal Trade Commission various data, such as the basic association agreement, the names and addresses of the association's members and officers, the location of its offices and any additional information relative to the conduct of its business that the Commission may require.

To summarize: Sections 2 and 5 of the Webb Act provide that in order to enjoy the privileges granted by the Act, export trade associations must comply with two kinds of requirements: those which set forth the conditions of antitrust immunity for the association and those which determine what acts are immune.

As a condition of qualification for the privileges of the Act, an association must meet the following requirements: *First,* it must have been formed for the sole purpose of engaging in export trade (Section 2, first sentence); *second,* it must actually be engaged solely in export trade (Section 2, first sentence); *third,* it must not restrain trade within the United States, including the requirement that it must not manipulate domestic prices (Section 2, second *proviso*); *fourth,* it must comply with the provisions relative to filing information with the Federal Trade Commission (Section 5).

In addition to complying with the foregoing conditions of ac-

[19] STAT. (1918), 15 U. S. C. § 65, ch. 50, § 5, 40 STAT. 517.

quiring the privileged status of a Webb company, an export association must meet the following requirements in regard to each agreement or act as to which it claims antitrust immunity: *First,* the agreement or act must have been made or done in the course of export trade (Section 2, first sentence); *second,* it must not restrain trade within the United States (Section 2, first *proviso,* first clause); *third,* it must not restrain the export trade of any domestic competitor of the association (Section 2, first *proviso,* second clause).

It appears that the prohibition against restraint of domestic trade is both a condition of qualification of the association under the Webb Act and a requirement for antitrust immunity for each act or agreement.

Further, there seems to be an overlapping between (a) the condition of qualification that an export trade association be engaged *solely* in export trade and (b) the restriction of the scope of protected agreements and acts to those made or done *in the course of export trade.* Common sense would suggest that if a company is engaged solely in export trade then all its acts are necessarily done in the course of export trade. In fact, however, these two parallel requirements serve different functions and their overlapping creates problems which will be discussed later.[20]

III. Obligatory, Immune and Permissible Acts

As a result of the provisions relative to the condition and scope of antitrust immunity, the activities of an export association display a complex legal structure. Some acts are *obligatory* if the association wishes to qualify for Webb Act privileges. Some agreements and acts are *immune* from antitrust consequences once the association has qualified although they are not obligatory. And other acts are *permissible* under the Webb law; that is to say, they do not deprive the association of Webb Act privileges although they may constitute an antitrust law violation.

The practical effect of the statutory provisions determining the conditions and scope of antitrust immunity and their judicial and administrative construction may be best examined by reviewing the various kinds of activity which concern an export trade association.

A. *Routine export transactions*—Routine transactions relative to the normal conduct of export trade are clearly within the Webb

[20] See pp. 150, 156, 159 below.

Act privilege. They are "permissible" in the sense that they do not disqualify an association under the Webb Act and they also are "immune" from antitrust consequences, although the question of antitrust immunity seldom arises.

These transactions include the sale and shipment of goods located in the United States to a purchaser abroad or to a domestic purchaser for resale abroad.[21] It is immaterial where the sale is made, where delivery in a legal sense takes place and where title passes.[22] Included, also, are the lease or licensing of goods located in the United States for transportation and use abroad, common in some machine industries and in the motion picture business. Probably includible in the same category are transactions that necessarily or normally accompany routine export business, such as the formation of foreign branches, the purchase or renting of premises or equipment, and the hiring of employees.

Initially, the Federal Trade Commission required that the goods exported be domestic products,[23] presumably on the ground that the purpose of the Webb Act was to promote the expansion of an export market for American products.[24] However, the statute contains no such requirement and according to the present position of the Commission, it is sufficient if any phase of the production or processing of the goods takes place in this country as long as the goods are physically exported from the United States or its territories to a foreign territory.[25] Mere inspection or repacking in United States territory probably would not suffice, but assembling of parts of complex machines might.

[21] Three methods of export sale were before the court and received judicial approval in the case of U. S. v. Minnesota Mining and Manufacturing Co. et al. see *supra* note 2 at 952, 966.

[22] According to a report, the Federal Trade Commission dismissed a charge made against an export association on the ground that the association did not itself export but sold its products through export commission houses. The Commission held that *"the consummation of a sale within the United States, if the product sold is intended for, is actually marked for, and enters into export trade, is in the course of export trade within the meaning of the Act."* See Notz, *Ten Years' Operation of the Webb Law*, 19 AM. EC. REV. 9, 17 (1929).

[23] See letter to a Committee of Silver Producers, released August 6, 1924 in answer to question 2. Reprinted in TNEC. See *supra*, note 17, at 125.

[24] The legislative material leaves no doubt that this was the principal objective of the Act. See F T C, *Report on Cooperation in American Export Trade* (1916) Part I at 8, 21, 370; Report of the House Committee on the Judiciary, H. R. REP. No. 1118, 64th Cong., 1st Sess. Reprinted in *Hearings before the House Committee on the Judiciary* in H. R. 16707 at 83. See *supra* note 18, Report of the Senate Committee on Interstate Commerce.

[25] Unpublished Opinion of F T C General Counsel, October 5, 1955.

The statutory definition of export trade covers all *"trade or commerce in goods . . . exported from the United States or any territory thereof to any foreign nation . . . ."*[26] Accordingly, the resale, lease, or sublease etc. abroad by a Webb association of goods exported from the United States are exempted from antitrust consequences despite the fact that such transactions are commonly considered to be foreign local business transactions, not American export trade.

Of course, an exemption cannot be broader than the laws from which the exemption is granted. Accordingly, from the point of view of antitrust immunity the effect of the Webb Act's failure to set a limit beyond which trade in exported goods ceases to qualify as American export trade merely assures Webb companies that their immunity extends the full length of the Sherman Act.

The privileged character of routine export transactions has never been questioned. What has been questioned was whether, in order to qualify under the Webb Act, an export trade association had actually to sell and ship goods abroad or whether it could restrict its activity to regulating the export trade of its members, as by alloting export orders among them or fixing export prices.

The Federal Trade Commission has consistently taken the position that regulatory measures relative to export trade carried on by association members are sufficient.[27] Indeed, no policy consideration appears to justify a distinction based on whether a Webb association itself conducts an export trade on behalf of its members or merely regulates the export trade of its members.[28]

B. *Participation in international cartels*—For a long time the most controversial issue concerning the antitrust immunity of Webb companies was whether they may participate in international cartels.

In its first official construction of the Webb Act the Federal Trade Commission gave a qualified affirmative answer to this question. In response to an inquiry by a group of silver producers the Commission declared that a *"cooperative relationship"* between a Webb association and foreign competitors reaching the same foreign market was lawful *"providing . . . the action of this organization did not reflect unlawfully upon domestic conditions."*[29]

[26] The Export Trade Act Sec. 1, par. 1; 40 STAT. 517, 15 U. S. C. § 61 (1) 1918).

[27] Silver letter, in answer to question 4, see note 23, *supra.* See also F. T. C., *Practice and Procedure under the Export Trade Act,* Foreign Trade Series No. 2, at 4 (1935).

[28] Contrary opinion was expressed by Diamond, see *supra* note 13 at 813.

[29] Silver letter, in answer to questions 1 and 3, see note 23, *supra.*

Subsequently, the Commission repeatedly sanctioned an American export association's joining an international cartel to divide foreign markets. It only objected to specific cartel provisions which tended to restrict the export trade of American companies, not members of the association, or domestic trade in general. In particular, the Commission objected to understandings designed to deter or prevent importation into the United States.[30] Provisions requiring the deduction from the export association's cartel quota of the amount of shipments made from the United States by non-members were repeatedly condemned on the ground that such a provision *"provided a motive for a policy"* of the export association to try to prevent export trade by non-members.[31]

Later, when the same issue was presented to the courts in the case of *United States* v. *United States Alkali Export Association, Inc. et al.*,[32] the District Court rejected the contention that the Webb Act created a *"preferred class"* of business organization which was free to enter into international agreements foreclosed to others by the Sherman Act.[33]

Judge *Kaufman* pointed out that the sponsors of the Webb bill constantly reassured Congress *"that the bill did not remove the sanctions of the antitrust laws as applied to our foreign trade"*[34] and, referring to Sections 4 and 5, that *"the Webb Act made what, at the time of its passage, were wide extensions in the extraterritorial effect of those laws designed to preserve competition."*[35] The Court concluded that *"international agreements . . . 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."*[36]

30 Recommendations for Phosphate Export Association, et al., 42 F. T. C. 555, 832, 836, 849 (1946).

31 The motive for such a restraining policy without actual restraint was held sufficient in the conclusion of investigation of Sulphur Export Corporation, et al. to condemn a cartel provision for the deduction of outsider shipments from the association's quota. 43 F. T. C. 820 at 960 (1947). For condemnation of similar and other restraining cartel provisions see Matter of Florida Hard Rock Phosphate Export Association et al., 40 F. T. C. 843, 859, 862, 866 (1945); Matter of Phosphate Export Association et al., 42 F. T. C. 555, 834, 835, 837, 839, 849 (1946); Matter of Export Screw Association of the United States et al., 43 F. T. C. 980, 1075, 1084 (1947).

32 86 F. Supp. 59 (S. D. N. Y. 1949).

33 *Id.* at 67.

34 *Id.* at 70.

35 *Id.* at 67.

36 *Id.* at 70.

The more lenient position taken by the Federal Trade Commission in its earlier recommendations was brushed aside by the statement that *"the Commission is not entrusted with enforcing the Sherman Act"* and *"administrative interpretation must fall when . . . in conflict with judicial decision."*[37]

The Federal Trade Commission naturally bowed to the judicial construction of the Webb Act. A few years ago, with reference to a price fixing arrangement between a Webb association and its chief foreign competitor, the Commission published a staff memorandum in which it echoed the *Alkali* decision by enunciating *"[t]hat insofar as an export association enters into restrictive agreements with foreign competitors, those agreements will not be considered in the course of export trade within the meaning of the Webb Act and their lawfulness will be determined according to traditional Sherman Act criteria, as would similar conduct by an individual exporter."*[38]

The publication of this memorandum is a significant step in recent efforts of the Federal Trade Commission to harmonize its construction of the Webb Act with that of other administrative agencies and departments concerned.

In this connection, an interesting question arises as to the legal sanctions applicable to a Webb company which joins an international cartel in violation of the Sherman Act.

According to pronouncements in the *Alkali* decision *"all privileges accorded under the Act are removed"* should an export association restrain the export trade of a domestic competitor[39] and similarly, *"all immunities afforded by the Act"* are *"withdrawn"* from associations that enter into any agreement which substantially lessens competition or otherwise restrains trade within the United States.[40] Thus, the Court treated both absence of restraint of a competitor's export trade and absence of restraint of domestic trade as conditions for qualification for Webb Act privileges. As shown earlier,[41] this is contrary to the literal meaning of the first clause of the first *proviso* of Section 2, pursuant to which a restraint of the export trade of a domestic competitor makes the export association liable only for the

[37] *Id.* at 71.

[38] F. T. C., Export Trade Association Bulletin No. 1-55, July 15, 1955, p. 5. Reprinted in CCH, TRADE REGULATION REPORTER ¶¶ 5335-99.

[39] See note 32, *supra,* at 67.

[40] *Id.* at 74.

[41] See p. 147 *supra.*

Sherman Act consequences of that particular act, without disqualifying it from antitrust immunity as to other of its acts made in the course of export trade.

If the treatment of this problem in the *Alkali* case were to be regarded as an authoritative construction of the Webb Act, the consequences would be serious. Assume, for instance, that under pressure from a foreign government or local trade group a Webb association were to join a foreign trade organization to which all foreign local distributors belong and which would allocate import quotas among its members. If ten years later an American court were to find that this amounted to participation in an international cartel dividing a foreign market, or that it had the effect of restraining the export trade of a domestic competitor, the association would not only face the antitrust consequences of that particular agreement but it would also lose antitrust immunity for all agreements and acts made by it throughout the world for the past ten years.

In the *Alkali* case it was inconsequential that the court regarded a restraint of the export trade of non-members as ground for disqualification under the Webb Act because it found that the *Alkali* cartel had also restrained domestic trade within the United States. Thus the pronouncements of the *Alkali* decision which deal with the extent of the loss of antitrust immunity are *obiter dicta*. It is submitted, however, that if the difference in the sentence construction of the two *provisos* of Section 2 is to be disregarded as a *"semantic nicety"*[42] and if restraints of domestic and export trade are to be accorded equal treatment, fairness requires that in both cases the sanction should not go beyond what is prescribed in the Sherman Act for the particular infringement. Otherwise, restraint of export trade by Webb associations would be visited with punitive consequences not prescribed by statute.

C. *Control of export by members*—The emphatic denial in the *Alkali* case that Webb companies are privileged in their relations with non-members raised the question of the extent to which a Webb association could regulate the export trade of its members in view of the possible indirect adverse effect of such regulation upon non-member competitors.

This question was dealt with in the decision of the case of

[42] Expression used by the Court in the *Alkali* decision in another context; see note 32, *supra*, at 80.

United States v. Minnesota Mining and Manufacturing Co.[43] handed down one year after the *Alkali* decision. This case concerned a Webb association through which was channeled all member export business. The association determined the export quotas of its members, fixed prices for the supply of products by the members to the association and prescribed resale prices to be charged by foreign distributors of the association.

The Court upheld all these commitments and practices. Judge *Wyzanski* admitted that they were not sanctioned by express congressional provision: *"Nonetheless these are all such normal features of any joint enterprise and usually so essential to its stability and to preventing its members from taking individual selfish advantage of the knowledge and opportunities that have come to them as a group that, absent special corcumstances revealing their unfairness or oppressive character in a particular setting, they are not outside the license granted by the Webb-Pomerene Act."*[44]

As to the possible restraining effect of the association's activity on non-members in export trade and on competition in domestic trade among association members, the Court considered it to be within Congressional approval of export trade associations. *"Now it may very well be that every successful export company does inevitably affect adversely the foreign commerce of those not in the joint enterprise and does bring the members of the enterprise so closely together as to affect adversely the members' competition in domestic commerce. Thus every export company may be a restraint. But if there are only these inevitable consequences an export association is not an unlawful restraint. The Webb-Pomerene Act is an expression of Congressional will that such a restraint shall be permitted. And the courts are required to give as ungrudging support to the policy of the Webb-Pomerene as to the policy of the Sherman Act. Statutory eclecticism is not a proper judicial function."*[45]

The Court included among the "normal" and "essential" features of Webb asssociations *"the firm commitment of members to use the unit as their exclusive foreign outlet"*.[46] Thus, exclusive export sales arrangements between an export association and its members have been declared to be *immune* from antitrust consequences. However, a refer-

[43] See *supra* note 2, U. S. v. Minnesota Mining and Manufacturing Co. et al.
[44] *Id.* at 965.
[45] *Ibid.*
[46] *Ibid.*

ence in the court's opinion[47] to the 1940 recommendation of the Federal Trade Commission to Pacific Forest Industries indicates Court approval only for commitments by Webb association members not to sell abroad *directly* and condemnation of member commitments not to sell to any domestic exporter.[48]

This distinction is highly artificial. Normally, the spirit and purpose of an arrangement making a Webb company the exclusive export channel of its members would be violated as much by export sales through a domestic dealer or broker as by direct exports.[49] The 1940 recommendations issued to Pacific Forest Industries are awaiting review by the Federal Trade Commission and it is hoped that the Commission will reverse itself despite court approval by *obiter dicta* in the *Minnesota Mining* decision.

Judge Wyzanski's liberal construction of the compass of the Webb Act privilege also accords in other respects with that of the Federal Trade Commission. As early as 1935 the Commission listed, with apparent approval, the following as among the reported functions of an export asssociation: *"Agreeing upon price for export, terms and sales policies in foreign markets, and adopting uniform forms of contracts. . . . Dividing the export business of the association among the members in predetermined proportions . . ."*[50]

It should be reiterated, however, that the antitrust immunity of restrictive measures among the members of an export association ceases if they become "unfair" or "oppressive" under particular circumstances.[51]

May an export association declare a boycott against a foreign market? Although this question has not been the subject of any Court decision or published opinion of the Federal Trade Commission, the right to declare a boycott would appear to follow from an association's right to determine member company sales policies in foreign markets. The association's right to determine sales policy must include the right to refuse to export unless the association's minimum

[47] *Ibid.*

[48] Recommendations to Pacific Forest Industries, made in 1940. Reprinted in the first footnote to the Report on Investigations in the Business of Florida Hard Rock Phosphate Export Association et al., 40 F. T. C. 843. The Matter of Pacific Forest Industries was reopened in 1946 but no new recommendations have been reported. See CCH TRADE REGULATION REPORTS, ¶¶ 5335-95.

[49] See *supra* note 7, Hale and Hale at 521.

[50] F. T. C. PRACTICE AND PROCEDURE UNDER THE EXPORT TRADE ACT at 5 (1935).

[51] See *supra* note 2, U. S. v. Minnesota Mining and Manufacturing Co. et al. at 965.

terms are met. Domestic competitors of the association usually will benefit from such a boycott, while the ultimate remedy of a particularly hard-hit member is withdrawal from the association.

D. *Manufacturing abroad*—Another question touched upon in the case of *Minnesota Mining* is whether a Webb association may own or operate manufacturing plants abroad.

The question was first raised and answered in the negative during Congressional debate on the bill.[52] It was presented again to the Federal Trade Commission in connection with an investigation of the business of *General Milk Co. Inc.*,[53] an export trade association engaged in the manufacture and sale of milk products abroad directly and through foreign subsidiary companies.

The Commission found that the association had engaged in these activities *"in good faith, as a normal and legitimate response to the imposition of obstacles in the path of the export trade from the United States and to changing commercial conditions brought about by factors beyond its control."*[54] The association argued that the statutory restriction of export association activities to export trade was based upon a differentiation between export trade and domestic trade and that the purpose of the restriction was merely to prohibit export associations from extending their activities to interstate, i.e. domestic, commerce. However, in view of the "well-settled policy" of the United States opposed to combinations in restraint of trade, the Commission was *"unwilling to place the stamp of administrative approval upon the association's ownership of foreign subsidiaries which are not engaged in any respect in the exportation of milk products from the United States."*[55]

In contrast to the almost apologetic attitude of the Commission, the Court in the *Minnesota Mining* decision went out of its way to condemn foreign manufacturing by an export trade association. Here the manufacturing plants were owned by foreign subsidiaries of an American holding company formed by members of an export association to act as agent for the association. It does not appear that the holding company was itself formed under the Webb Act. Instead

[52] CONG. REC. June 13, 1917, at 3840 fol., August 31, 1916 at 15811, September 23, 1917 at 8032.

[53] Investigations and recommendations relative to the business of *General Milk Co. Inc., et al.*, 44 F. T. C. 1355.

[54] *Id.* at 1410.

[55] *Id.* at 1411.

of simply declaring that the Webb Act was inapplicable to these facts, the Court declared: *"Nothing in the statute, nor in its legislative history, nor in the penumbra of its policy justifies or has any bearing upon the right of defendants to join in establishing and financing factories in foreign lands. Export of capital is not export trade."*[56]

Since the restriction of a Webb company's activity to export trade is a condition of qualification under the Webb Act,[57] manufacturing abroad by an export trade association appears to be neither "immune" from antitrust consequences nor "permissible".

The mere assembling of parts exported from the United States does not fall under this ban. Rather, it may be regarded as a legitimate incident of export sales covered by the antitrust immunity of a Webb association.[58]

E. *Trade abroad in foreign product*—Related to the question of manufacturing abroad is the question of whether a Webb company may sell abroad goods which have not been exported from the United States.

As indicated above,[59] as long as any phase of the production or processing of a merchandise takes place within United States territory and it is physically transported from the United States to a foreign country, the transaction qualifies as export trade. The question is whether a Webb association or its foreign branch may, in addition to such export trade, also sell abroad goods which do not meet these requirements.

Theoretically, the statutory restriction of the activity of an export association to "export trade" excludes trade abroad in non-American goods to the same extent that it excludes manufacturing abroad. However, there are strong practical reasons for permitting a Webb association to make *incidental* sales of foreign products normally distributed by its member companies. Without this privilege, the advantage of a Webb association in reducing distribution costs of its members may be lost without a resultant benefit to domestic competitors or consumers.

[56] See *supra* note 2, U. S. v. Minnesota Mining and Manufacturing Co. et al. at 963.

[57] See p. 146 *supra.*

[58] See *Hearings Before the Senate Committee on Interstate Commerce,* 1917 at 29. *Comp.* NOTZ AND HARVEY, AMERICAN FOREIGN TRADE at 179 (1921).

[59] See p. 148 *supra.*

The question of the permissibility of incidental sales abroad of foreign products by a Webb association was presented to the Federal Trade Commission a few years ago but was not conclusively determined.

The association in question operated in a single small foreign country and had been formed for the sole purpose of saving overhead expenses to its members which theretofore had maintained separate distribution facilities. In addition to distributing merchandise manufactured by its members in the United States the association distributed small quantities of a product manufactured in a foreign country and supplied to the association by one of its members.

Upon inquiry of the member company concerned, the staff of the Commission appeared to be prepared to declare that incidental distribution of a non-American exported product was in effect a *neutral* activity, neither prohibited by the Webb Act nor protected by antitrust immunity. However, after the matter had cleared with the Department of Justice the opinion of the Commission's general counsel stated merely that the association's activity in question *"would—be removed from the Webb-Pomerene Act's exemptions"*.[60]

This apparently stringent interpretation of the Webb Act was mitigated by the Commission's failure to advise the association either to discontinue the distribution of the foreign product or to withdraw from qualifying under the Webb Act. Thus, as a practical matter, trade in foreign manufactured goods exported from one foreign country to another foreign country was treated as a *"permissible"* though not *"immune"* activity of a Webb association. However, the wording of the opinion letter does not justify a generalization to this effect and the Commission may well take a different position if the question is raised in connection with the activity of a larger or more aggressive export association where repercussions on American competitors are more likely.

Accordingly, it would seem that trade abroad in goods which have not been exported from America is outside the scope of the antitrust immunity of a Webb company. The particular facts of each case will probably determine whether such trade will be tolerated as an innocuous extension of the company's export activity and as not destructive of its privileged status under the Webb Act.

F. *Domestic sale of goods acquired for export—"Selling for*

[60] Unpublished Opinion letter, October 5, 1955.

consumption or for resale, within the United States or any Territory thereof" is explicitly excluded from the statutory definition of export trade.[61]

However, under certain circumstances an export association may be unable to export or to resell for export merchandise acquired in good faith for export purposes. War, the imposition of an export embargo, the imposition by a foreign country of an import embargo, cancellation of an order for a product made according to specifications are some of the circumstances which may prevent consummation of an intended export sale. If the product is supplied by a non-member who refuses to take it back, the association may have no practical alternative but to resell the product in the domestic market.

It would seem that under such exceptional circumstances an export association should be free to do so. The domestic resale contract, of course, would not qualify as "export trade". However, as long as the resale in the domestic market remained an isolated transaction, the association would continue to qualify as engaged "solely" in export trade. Accordingly the domestic resale transaction should be regarded as made *"in the course of export trade"*, and thus be "immune" from antitrust consequences, except in the unlikely event that such resale results in an "unfair" or "oppressive" restraint of trade.[62]

G. *Use of earnings abroad*—A more practical problem is that of the extent to which an export association may engage in financial transactions abroad. In particular, are export associations limited in the use of blocked earnings?

"Export of capital is not export trade"[63] and, clearly, the same is also true of trade in the proceeds of export. The normal and safest procedure for an export association to follow is to distribute among its membership all earnings not required for association business. For Webb Act purposes it is irrelevant whether distribution of foreign earnings occurs within the United States or abroad.

If foreign exchange regulations prevent an export association from remitting its foreign earnings to the United States, the ques-

[61] See note 26, *supra*.

[62] See p. 153 *supra*. The problem resulting from cancellation of orders by foreign customers has been adverted to by Kirsch, *Foreign Trade Functions of Trade Associations: The Legal Aspects*, 76 U. PA. L. R. 891, 910 (1928).

[63] See *supra* note 2, U. S. v. Minnesota Mining and Manufacturing Co. et al. at 965.

tion arises as to whether the association is free to enter into financial transactions abroad for the ultimate purpose of converting its foreign earnings into American dollars.

Foreign governments which prohibit or restrict the transfer of money to the United States frequently permit or encourage the use of blocked funds for local production or construction. As a reward, they usually promise future repatriation of the invested capital or permit immediate remittance of additional blocked funds. Occasionally, a license to remit the dollar equivalent of blocked funds may be obtained on the basis of a three-cornered transaction which requires, as a first step, the sale of the association's blocked funds to a local exporter.

It would seem that if an association enters into one of these kinds of transaction for the sole purpose of collecting its foreign earnings, such transaction should qualify as made "in the course of export trade" and should be immune from antitrust consequences.

However, the ultimate effect of unblocking foreign earnings cannot be used as a pretext by Webb associations to acquire or operate factories abroad, nor to extend their activity to trade in a product not qualifying as an American export.

In between the two extremes of clearly permissible and clearly prohibited uses of a Webb association's foreign funds is an infinite variety of transactions of a less clearly defined nature. These include long term investments in real estate or local securities, loans for local production purposes and various forms of participation abroad in local or international business.

In fairness to export associations it is submitted that these transactions be regarded as "permissible" but not "immune" acts. The effect would be to restrict export associations to those uses of foreign funds which do not violate the antitrust laws of this country.

H. *Dealings with non-members*—The only provision in the Webb Act which concerns the relationship between an export association and non-members engaged in the trade of like products is the exclusion from antitrust immunity of agreements and acts which restrain the export trade of a domestic competitor. Recommendations of the Federal Trade Commission and the *Minnesota Mining* decision supply further guides as to the permissible area of activity in this respect.

Agreements between an export association and domestic competi-

tors regulating export prices and terms are clearly prohibited by the Sherman Act.[64] However, as already pointed out, agreements between an export association and its members are exempt from the antitrust law if they are essential to the conduct of association business and if, under the circumstances, they are not unfair or oppressive to non-members, notwithstanding their possibly adverse effect on domestic competitors. This immunity is based on the theory, expressed in the case of *Minnesota Mining,* that Congress impliedly approved the "inevitable" consequences of an export association.[65]

Is an export association free to purchase or to refuse to purchase merchandise from an outsider?

It can hardly be doubted that an export association may limit its export trade to the product supplied by its members. This is the prevailing practice, sanctioned by the *Minnesota Mining* decision.[66] Nevertheless, nothing in the Webb Act indicates that this practice is obligatory and that export associations are prohibited from using other sources of supply available in the free market.

A contrary construction would in effect read into the Webb Act a statutory boycott by export associations against non-member suppliers. This would restrain the export trade potential of the non-member, particularly where the association controls the established export channels of a certain product.

To construe the Webb Act to prohibit association purchases from non-members for the reason that otherwise non-member suppliers would reap the benefits of trade with the export association without sharing in the responsibilities of membership, is not convincing: Congress was concerned that non-members might be harmed by Webb associations and not that they might gain therefrom.

It would appear, therefore, that a Webb association should be free to purchase the product of non-members for resale abroad in the name and for the account of the association provided it does not thereby restrain the trade of non-member suppliers.

[64] It was so held by the Federal Trade Commission in the following cases: Matter of Sulphur Export Corporation et al., 43 F. T. C. 820, 974, 979 (1947); Matter of Export Screw Association of the United States, et al., 43 F. T. C. 980, 1080, 1084 (1947); Matter of Pipe Fittings and Valve Export Association et al., 45 F. T. C. 917, 1059, 1061 (1948); Matter of Carbon Black Export, Inc. et al., 46 F. T. C. 1245, 1409, 1417 (1949).

[65] See p. 153 *supra.*

[66] See *supra* note 2. U. S. v. Minnesota Mining and Manufacturing Co. et al. at 965.

It is clear, however, that an export association cannot act as export agent for non-members.[67] Otherwise, in practice, the association would determine the export terms and possibly also the export policy of a domestic competitor.

The right of an export association to boycott competitors by refusing to purchase from them does not include the right to organize a secondary boycott against a competitor by inducing a third party to deny its facilities or services to a non-member. This principle was applied by the Federal Trade Commission on various occasions with reference to the storing, processing and loading facilities of a private terminal,[68] to the services of a common carrier[69] and to the machinery needed for the production of the class of goods produced by the members of the association and exported by the association.[70] Even patent licenses which restricted the use of a patent to association members have been declared objectionable by the Federal Trade Commission.[71]

An export association is under no obligation to admit American competitors unless its own charter provides that membership is open to all qualified applicants.[72] The silence of the Webb Act on this question is deliberate. Despite some opposition, the Federal Trade Commission's preparatory report recommended and the sponsors of the Webb-Pomerene bill defended in Congress the right of export trade associations to limit their membership.[73] The court in the

[67] So stated by the Federal Trade Commission in the Matter of Phosphate Export Association, 42 F. T. C. 555, 849 (1946) and Sulphur Export Corporation et al., 43 F. T. C. 820, 979 (1947).

[68] Matter of Florida Hard Rock Phosphate Export Association et al., 40 F. T. C. 843, 860, 861, 866 (1945); Matter of Phosphate Export Association et al., 42 F. T. C. 555, 847, 850 (1946).

[69] *Ibid.*

[70] Matter of Export Screw Association of the United States, 43 F. T. C. 980, 1077, 1084 (1947).

[71] Matter of Phosphate Export Association, 42 F. T. C. 555, 841, 850 (1946).

[72] It is extremely doubtful whether non-Americans may be admitted to membership in an export trade association although the Act does not explicitly exclude foreigners from membership and the suggestion of an amendment to that effect was rejected during the debate in Congress. See CONG. REC. Aug. 31, 1916, at 15812 and CONG. REC. September 2, 1916, p. 15011. *Comp.* Notz and Harvey, *supra* note 59 at 177. For a definition of the term "American exporter" see FTC, Recommendations for the readjustment of the business of Pacific Forest Industries, an export trade association, 40 FTC 843 in footnote 1 at 844. A more detailed discussion of this problem is outside the scope of this study.

[73] Federal Trade Commission, *Report on Cooperation in American Export Trade* (1916) Part II at 380; Discussion in Senate on December 7, 1917, 56 CONG. REC. 69, 73; 53 CONG. 13539.

Minnesota Mining case did not hesitate to uphold the export association involved therein although its membership was restricted.[74]

It may be true that the best way to prevent complaints by outsiders is to offer them an opportunity to become "insiders". However, this device is neither necessary nor fool proof. A competitor may have a thousand good or bad reasons for not desiring to join an export association. It has the right to remain independent and yet not be restrained in its export trade by any combination of American exporters. Thus, if an association's conduct gives no ground for complaint by domestic competitors, it does not have to admit them to membership. In the contrary case the association's willingness to admit to membership all qualified applicants can be no defense to an action for antitrust infringement.

It is interesting to note in that connection that in 1948 a Committee on Cartels and Monopoly, appointed by the Twentieth Century Fund and headed by James M. Landis recommended the obligatory restriction of export trade associations to a fraction of the exporters in each industry. According to the recommendation of that Committee, the membership in each export association would be limited to firms representing in the aggregate not more than 25 percent of the total exports of a product.[75]

I. *Position of members*—The Webb Act contains no provision regarding the rights and duties of a member as between itself and the association or its fellow members. It would appear, therefore, that the members may regulate their internal matters as they please subject to the general limits of contractual freedom and of corporate law, if the association is incorporated.

In particular, it is permissible to set up various classes of membership.[76] If an exporter is not satisfied with the class of membership available to him, he may stay out of the association and compete with the association or with its members without interference by the association with its freedom to trade.[77]

[74] Although this is not explicitly stated in the court's opinion, it is indicated in the findings of facts by the absence of a contrary statement (see *supra* note 2, U. S. v. Minnesota Mining and Manufacturing Co. et al. at 951), and, further, in a reference to "the Government's view that it is unlawful for four-fifths of the American export trade to combine to export exclusively through one corporation *not available to others . . .*" (*Id.* at 964). The fact that membership in the export association in question was restricted to the actual members was confirmed to me by one of the attorneys participating in the litigation.

[75] See *supra* note 1, Stocking and Watkins at 437.

[76] See F T C, Practice and Procedure under the Export Trade Act at 4 (1935).

[77] See p. 161 *supra*.

The rights and duties of a member within the association are determined by the association's charter and by any agreement which the member may have been required to sign. In the event of unfair or discriminatory treatment by the board or by a majority of the members of the association, each member probably must look for a remedy to general corporate or contract law and to rules of equity.

In case of unfair treatment, the ultimate recourse of a member is withdrawal from the association, which right cannot be unreasonably restricted.

In the matter of *Phosphate Export Association*[78] the Federal Trade Commission objected to discrimination among members with regard to their right to withdraw or resign from the association. Similarly, the Commission objected to an association resolution which provided that, in the event of withdrawal, a former member's export trade was to continue to be handled by the association until expiration of a cartel agreement entered into by the association.[79]

The only judicial pronouncement regarding the right to withdraw from an export association is in the *Minnesota Mining* decision. The charter of the association in question provided that in the event of withdrawal within 25 years of the date of organization of the association, the withdrawing member had to agree not to compete with the association during the balance of the 25-year period, plus two years. After 25 years, withdrawal was permissible on two years' notice. Some thirteen years after the formation of the export association the initial 25-year period was extended by an additional ten years.[80]

The Court held these restrictions to be unreasonably long and not supported by the requirement of stability. Taking into account the fact that the export association had already functioned for some 21 years and that the Court's decree required a change in business conduct, the Court determined *"that hereafter a reasonable provision would be one which allowed a member to withdraw within 2 years of the effective date of the decree of this Court or at any time thereafter upon giving 1 year's written notice".*[81]

A single decision is a meager basis for speculating what may be in general the maximum period during which withdrawal from an

[78] Matter of Phosphate Export Association, 42 FTC 555 (1946).

[79] *Id.* at 837, 849.

[80] See *supra* note 2, U. S. v. Minnesota Mining and Manufacturing Co. et al. at 951-52.

[81] *Id.* at 966.

export association can be validly prohibited. The two opposed policy considerations of need of stability and desirability of freedom of action must be adjusted for each case. One may conjecture that an exclusion of effective withdrawal for an initial period of up to five years and thereafter a requirement of one year's notice of withdrawal has a good chance of being upheld. Restrictions of longer duration may be justified where association activity is limited to formulating policy and does not directly interfere with the export trade of its members.

J. *Filing of statements*—The only *obligatory* acts of an export association consist of the filing of statements with the Federal Trade Commission.

Pursuant to Section 5 of the Webb Act[82] *"every association which engages solely in export trade——shall"* file in regard to its organization and business an initial statement, periodic yearly statements, and further statements upon the Commission's request. There is no provision in the Act which would exempt from this requirement those associations which do not wish to qualify for antitrust immunity.

According to a literal construction of Section 5, the filing requirements apply even to those associations actually engaged solely in export trade which *cannot* qualify for antitrust immunity because they had not been *"entered into for the sole purpose of engaging in export trade"* or because they *"artificially enhance or depress domestic prices"*, etc. Were the Act literally applied, the only way to avoid the filing requirement and the $100 per diem penalty for non-compliance would be to extend the association's activity to some field outside export trade so that the association would no longer qualify as an *"export trade association"*. However, the Federal Trade Commission takes a practical approach to this matter and has never attempted to enforce the filing requirements against an association engaged in export trade where the association has not violated the antitrust laws and does not wish to qualify for Webb Act privileges.

As the result of a similar self-restraint, the Commission is satisfied if the initial statement is filed within 30 days after the commencement of operation of an export association, rather than 30 days after its "creation" as provided in Section 5; and it permits an export association to file the required annual statement within a reasonable time after the due date of January 1st.

[82] Substantially identical with STAT. 15 U. S. C. STAT. (1918) § 65, ch. 50, § 5, 40 STAT. 517.

IV. Conflict of Laws

Export trade is a transnational operation which affects the economy of both exporting and importing country. As is true with regard to any transnational operation, export trade creates problems of conflict of laws. It is not generally realized that the Webb Act presents an enlightened solution to the conflict of law problem of the extent to which domestic antitrust law is applicable to American export associations.

Before an American court can determine the law applicable to a transnational fact situation, it must first determine the intended territorial (or extraterritorial) scope of the domestic law in point. The Sherman Act, by its terms, is made applicable to American trade with foreign countries, but the Act does not indicate the limits of its application to the activity of export trade organizations. It is obvious that American interest in export trade gradually diminishes and somewhere reaches the vanishing point as such trade is removed ever farther from the domestic economy. Accordingly, the applicability of the Sherman Act to American export trade and to export trade associations raises problems quite apart from considerations of conflicting concepts of foreign law.

The problem is complicated by the fact that the selection of the applicable law to a transnational transaction is not made simply by determining that the facts are within the reach of American law, unless it is apparent that domestic law is intended to be fully applied notwithstanding the presence of foreign elements and foreign laws which also claim to control the facts. As a rule, where American concern in a transnational operation is shared with other countries having different laws, determination of the domestic law in point is followed by consideration of the question of whether domestic law should prevail or should defer to the conflicting internal law of a foreign country.

A cosmopolitan respect for concepts of social order and justice held by other nations and a desire to create a legal order for transnational business require an adjustment of conflicting internal laws. To quote Professor Yntema: "*. . . the legal order itself is decentralized among a plurality of sovereign or autonomous authorities, asserting jurisdiction each within a defined territory over activities that concern their respective subjects. As the pretensions of the corresponding local laws to control international or interstate commerce thus inevitably overlap, the legal order also involves integration of*

the diversity of the laws of which it is composed. The mode in which this adjustment is or should be effected is the concern of conflicts laws."[83]

Unfortunately, the use of the term "adjustment" in the above context is a euphemism because prevaling theory and practice require that the law applied to a conflict situation be the one or the other of the conflicting internal laws. No effort is made to find an intermediate solution by an adjustment of conflicting internal laws. A choice is simply made between them.

If the facts require consideration of domestic antitrust laws, the situation is further aggravated by the conflict of law rule which requires that courts apply domestic law to controversies which involve basic national public policy irrespective of the public policy of another country which may be equally or even more directly affected.

Since the principle of free competition is a basic national public policy, American courts give full effect to domestic antitrust laws within their territorial scope (whatever this may be) without attempting to adjust domestic law to conflicting foreign laws. Thus, in effect, the conflicts question is disregarded and the facts are adjudicated as if a question of the territorial scope of domestic antitrust laws were involved alone. The result is, in *Timberg's* telling phrase, that *"the winner takes all"*[84] and the "winner" is the country whose court takes jurisdiction of a case and has power to enforce its decision.

Some years ago I collected a few cases in which, contrary to the traditional, rigid rule of choice-of-law, American courts showed an inclination to compromise controversies involving conflicting laws. I urged a wider use of the adjustment approach, and I proposed that conflicting internal laws be viewed as parts of the total social background against which conflicting claims, or apparent "rights" based on internal laws, arise and must be settled.[85] More recently, adjust-

[83] Yntema, *The Historic Bases of Private International Law*, 2 AM. J. COMP. LAW 297 (1953).

[84] Timberg, *Extraterritorial Jurisdiction under the Sherman Act*, 2 RECORD 101, 118 (1956).

[85] *". . . . in an interstate or transnational set of facts it is necessary to take the municipal laws of the connected states for what they actually are: parts of the total social background against which the controversy arose and against which it has to be settled. Even the forum's municipal law is but a part of the social setting of the case. Whether and to what extent its rules should have the force of law for the case is a question of conflict of laws."* See Hoff, *Adjustment of Conflicting Rights*, 38 VIRGINIA L. R. 745, 751 (1952).

ment of conflicting statutory policies was advocated by Professor Katzenbach.[86]

It is, of course, easier to extoll the virtue of compromise than to find adequate standards for adjusting actual conflicts. This is particularly true in areas where there is a clash of such antithetical policies as freedom of competition and freedom to combine.

Nevertheless, exactly in the antitrust field, a serious effort in the direction of developing international compromise was made following World War II.

I am referring to the efforts initiated by the United States government which led in 1953 to the *Draft Articles of Agreement* prepared by an *ad hoc* committee of the United Nations.[87] This Draft provided for an international agency to investigate and make determinations with respect to restrictive business practices having harmful effects on the expansion of production or trade, and to recommend remedial measures in appropriate cases.[88]

The establishment and operation of such an agency probably would have produced international minimum antitrust standards which, in turn, could have been applied by American courts in peripheral areas of the territorial scope of domestic antitrust laws. In particular, such minimum standards could have influenced the determination by American courts of the lawfulness of business com-

[86] *"A new and imaginative technique of bifocal statutory interpretation is needed. Perhaps we could improve the process of adjusting statutory policies by regarding the foreign and local prescriptions as simply relevant facts in formulating preferences for common standards—a 'general jurisprudence' for the international community as a whole, reflecting what is shared and compromising what is not."* Katzenbach, *Conflicts on an Unruly Horse: Reciprocal Claims and Tolerances in Interstate and International Law,* 65 YALE L. J. 1087, 1157 (1956).

[87] These efforts go back to the exchange of correspondence between President Roosevelt and Cordell Hull in 1944, see note 1, *supra.* They led to a resolution of the Inter-American Conference on *Problems of War and Peace* at Mexico City in 1945, to seek an international agreement to prevent international restrictive business practices, which was followed in the same year by the State Department's *Proposals for Expansion of World Trade and Employment.* In 1946 the State Department published a Suggested Charter for an International Trade Organization on the ground of which the I. T. O. Charter of Havana was prepared in 1948. After the failure of I. T. O. a part of this Charter served as a basis for the U. N. *Draft Articles of Agreement* discussed in the text. See *supra* note 1, Stocking and Watkins at 287, 417; see *supra* note 1, REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE FOR THE STUDY OF ANTITRUST LAWS at 101 ff.; The *Draft Articles of Agreement* are discussed in Timberg, see *supra* note 1 at 410 ff.; see *supra* note 7 Montague at 443 ff.; *Hearings Before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary,* 84th Cong., 1st Sess. at 1553 ff., 1595 ff., 1675 ff., 1776 ff.; The *Draft Articles of Agreement* are reproduced at 1608 ff.

[88] Article 1 (2); Article 3 (6), (7) and (8).

binations primarily directed toward foreign markets and only indirectly affecting American domestic or export trade.[89] Such a development might have eliminated the need for special legislation for export trade associations and consequently could have justified a repeal of the Webb Act.

Actually, events took a different turn. The United States government rejected the Draft Articles because it feared, with justification, that the proposed Agreement might have been used by some foreign countries having no effective antitrust laws to harass this government without any obligation on the part of such countries to enforce minimum international antitrust standards. This has led, for the time being, to a collapse of all efforts toward the compromise of diverse national antitrust policies.

The foregoing development emphasizes the significance of the Webb Act as a contribution toward the integration of conflicting national laws. By relaxing domestic antitrust laws in a restricted area where foreign internal laws are more directly involved than domestic internal laws, the Webb Act has eliminated a potential conflict of laws in the very area where traditional conflict of laws rules have been utterly impotent and where a serious effort toward international cooperation recently collapsed. At the same time, and by the same token, the Webb Act serves the interest of our exporters by freeing them, under certain conditions, from a legal obstacle not encountered by their foreign competitors.

It is well known that national and regional trade barriers are still being raised throughout the greater part of the world and that American exporters are being confronted, in an increasing number of countries, with discriminatory taxes and import duties, import and currency restrictions and also with occasional government imposed sales terms. Diplomatic protection against such trade barriers is frequently unavailable and rarely is sufficient. To secure greater freedom of trade American exporters must rely, primarily, on their own strength, and they need the antitrust exemption of the Webb Act in order to consolidate their negotiating power. Furthermore, where the import restrictions are serious or the size or internal economic condition of a foreign country make individual operation uneconomical, American exporters may be unable to stay in a foreign market unless they can merge operations by organizing an export association.

[89] See *supra* note 1, Timberg at 434.

Thus, the reasons which led to the enactment of the Webb Act over forty years ago, are equally present in today's world.

In the *Minnesota Mining* case the court declared that *"if over a sufficiently long period American enterprises, as a result of political or economic barriers, cannot export directly or indirectly from the United States to a particular foreign country at a profit, then any private action taken to secure or interfere solely with business in that area, whatever else it may do, does not restrain foreign commerce in that area in violation of the Sherman Act. For, the very hypothesis is that there is not and could not be any American foreign commerce in that area which could be restrained or monopolized."*[90]

The correctness of the foregoing statement cannot be doubted. However, it has significant implications. It is unrealistic to suspend the antitrust laws after all attempts to secure a foreign market have failed, but to refuse to relax the antitrust laws in order to aid exporters to keep or secure a market so long as it remains open. Without the Webb Act, the American exporter would be in the position of one who is denied medical care until after he is dead.

[90] See *supra* note 2, U. S. v. Minnesota Mining and Manufacturing Co. et al. at 958.