

**Implications for the
Communications Industries
of Proposed Amendments
to the Webb-Pomerene Act**

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IMPLICATIONS FOR THE COMMUNICATIONS INDUSTRIES OF PROPOSED AMENDMENTS
TO THE WEBB-POMERENE ACT.

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EXECUTIVE SUMMARY

G. Michael Epperson, "Implications for the Communications Industries of Proposed Amendments to the Webb-Pomerene Act"

This paper evaluates a means of promoting export trade--proposed amendments of the Webb-Pomerene Act, which provides an exemption from the antitrust laws for certain export trading activities. The evaluation proceeds from a dual perspective: the applicability--in the abstract--of the new law to a sector of our economy, specifically the "communications" industries, and the perceptions of that sector concerning the usefulness of the proposed amendments to it.

The problem facing U.S. exporters is one of competitive disadvantage. Some American exporters feel the need to act in concert in order to combat foreign trade barriers. But the widespread perception is that such concerted conduct is prohibited by the U.S. antitrust laws. The Justice Department, however, asserts that the U.S. antitrust laws allow U.S. corporations to do most of what they say they need to do. Arguments on both sides of the question of whether the antitrust laws have a deterrent effect on export trade carry over into the question of whether the Webb-Pomerene Act should be amended and, if so, how.

The Webb-Pomerene Act, passed in 1918, carves an exemption out of the Sherman and Clayton Acts. However, the hope that this exemption would result in the formation of hundreds of Webb associations serving as joint selling agencies, especially for small firms, has not been realized. The questionable usefulness of the Webb Act and the shortsightedness of American industry have both been raised as issues.

As of July 9, 1981, six bills were pending in Congress that seek to amend

the antitrust laws in order to promote export trade. Congressional attention has focussed on two, alternative proposals. The Senate Bill, S. 734, comprises two titles. Title II, known as the Danforth Proposal, amends §§ 1-3 of the Webb-Pomerene Act to provide that the "export trade, export trade activities, and methods of operation of any association [or] . . . ETC [Export Trading Company] shall, when certified according to the prescribed procedures, be eligible for antitrust exemption."

The House bill, or Rodino/McClory Proposal, H.R. 2326, neither makes reference to, nor proposes amendment of, the Webb-Pomerene Act. Rather, it amends "the Sherman Act and Clayton Act to exclude from the application of such Acts certain conduct involving exports."

The question of whether American businessmen are significantly deterred by the perceived uncertainty of antitrust enforcement is necessarily preceded by the question of whether they feel they would benefit from combinations. Representatives of the "communications" industries contacted in the preparation of this paper typically raised either or both of two reservations to the usefulness of the proposed amendments: the "big business" reservation, and the "product differentiation" reservation.

According to the "big business" reservation, large communications firms perceive no need for combination. They already have highly developed overseas markets and marketing capacities. Moreover, they provide their own service and maintenance follow-up and thus claim the ability to develop and market their own "package deals." Their needs would, they claim, be ill-served by sharing essential functions with lesser firms.

The "product differentiation" reservation points out that most types of products produced by the communications manufacturers are specialized,

technically variable, and non-fungible. Indeed, the crux of competition for these high-technology firms is product differentiation. Since their products are, to a large extent, non-fungible, the argument goes, there is nothing to commend turning them over to a joint selling agency for export and sale.

While the frequency with which these reservations are heard lends them a certain practical legitimacy, neither is unassailable. The final section of this paper discusses what communications firms may be able to do better in combination--acting in concert under the protection of an antitrust immunity--than they can do alone. The conclusion of the paper is that the positive implications of the amendments may be much greater than they are perceived to be by the communications industries.

1. INTRODUCTION

Much is currently being made of the perceived failure of American industry to maintain a flow of export trade proportional to that maintained by our trading partners,¹ or even equal to the flow of imports into the United States. More than a matter of competitive pride, the relative passivity of United States industry with regard to export trade threatens to exacerbate already prominent economic problems.² Nor does it appear likely that the United States's trade difficulties will disappear on their own; indeed, a worsening of the United States trade picture has been predicted.³

Attention has accordingly turned to various means of promoting export trade. This paper will evaluate one of these means--a proposed amendment of the Webb-Pomerene Act, which provides an exemption from the antitrust laws for certain export trading activities.⁴ The evaluation proceeds from a dual perspective: the applicability--in the abstract--of the new law to a sector of our economy, and the perceptions of that sector concerning the usefulness of the proposed amendments to it.

That sector, the "communications" industries, was not chosen to incorporate the perspective of failing industry; indeed, the "communications" sector has consistently been cited as the outstanding exception to U.S. export deficiencies. Rather, it was chosen because of its importance.

Originally coined by Anthony Oettinger, the term "communications" sought to characterize the merging of computer and communications

technologies into a single stream of digital technologies.⁵ The term "communications" is here used in a broader sense: that sector of the economy which by its products or services either participates in the construction of communications-based systems or fundamentally bases its operations on the workings of such systems. Thus, the "communications" industries include more than the manufacturers of main frame computers and the telephone companies. They include more than the telecommunications industry, the electronics equipment industry, and the semiconductor industry, extending as well to makers of microprocessors, facsimile, fiber optics, and myriad constituent elements of the system by which information is created or transmitted.⁶ This system in turn acts as the foundation of a multifarious array of operations such as data processing, electronic transmission of news, collection and communication of commercial and financial data, coordination of missile and defense systems, management of corporate operations as well as of production lines, and many more.⁷

According to one study, the communications industries account for 45% of U.S. GNP.⁸ Moreover, it has been said that the future of U.S. exports depends on continued U.S. leadership in advanced technology--in domestic and foreign markets alike.⁹ It is therefore troubling to entertain the conclusion of this paper: that the positive implications of the proposed amendments may be much greater than they are perceived to be by the communications industries. Perhaps more troubling still is the apparent resistance on the part of these industries to the innovations in their methods of export trade, which would be made possible by the new law.

This perceived tendency to abstain from persistent, creative investigation of the potential uses of an antitrust exemption may be attributable to any of a number of factors. Foremost among these -- and discussed at some length in both the following and the final sections of this paper -- is the possibility that no real need is felt by U.S. communications firms for an antitrust immunity. This proposition -- that combination among firms has little utility for their export trade -- may turn out to be valid, yet it seems far from unassailable. In any case, it is the position taken by many of these firms that there is really very little they can do in combination that they cannot do better alone. Their reasons and a critical evaluation of them follow in part 4.

Another hypothesis to explain the lack of real interest by communications firms in an antitrust exemption is that American business is naive about exporting. Having been blessed with a massive and manipulable domestic market, the average American producer has been indulged his rugged individualism. He is now understandably reluctant to abandon past practices, but his reluctance may bear with it serious costs. Anecdotal wisdom has it that a U.S. manufacturer of blending machines, upon finding that the desirable Japanese market preferred blenders with round buttons, instead of the square ones it was offering, merely abandoned its project of exporting to Japan! Even if untrue, the anecdote portrays an attitude that may be symptomatic of a deeper underlying malaise -- a lack of moxie on the part of would-be exporters in the United States.

It may be that the genius the American competitor has shown for creating markets, as well as for responding to demand, will have to be

exercised anew as producers are constrained to look beyond our continental markets. The United States information industries place great significance on technological innovation, yet seem prepared to accept the traditional modalities and parameters of export trade.

2. THE PROBLEM: TRADE BARRIERS, THE NEED FOR COMBINATION, AND UNCERTAINTY ABOUT ANTITRUST ENFORCEMENT

Formulated simply, the problem facing U.S. exporters is one of competitive disadvantage. The composition of this disadvantage, however, is complex. According to U.S. industry, the U.S. antitrust laws constitute an important element. It is incontrovertible that these laws are more zealous in the protection of competition than those of our trading partners.¹⁰ The crux of the matter, however, is the question of the extent to which the competitive ideal may, consistently with U.S. antitrust law, be compromised in the pursuit of foreign export markets; the legality of combining **solely** for export purposes is a matter of great alleged uncertainty.¹¹

The alleged need for anticompetitive export practices constitutes a second important element of the U.S. disadvantage. Foreign barriers to trade, usually in the form of government action, either threaten the fact of, or raise the cost of U.S. access to a market. The inability to share costs or bargain in concert is cited by U.S. industry as a significant stumbling block to obtaining markets.¹²

That this inability to combine is not shared by would-be exporters from third world countries seeking the same market only makes matters worse.

In some cases, the problem may be merely a matter of cost. A single U.S. producer seeking to develop new markets abroad must sustain the costs of travel, interpreters, advertising, and entertainment, as well as the costs of researching foreign legal requirements.¹³ Once a contract is signed, she/he must bear the costs of transportation, communication, costs, tariffs, and taxes. A lone U.S. exporter competing for a European

market against a consortium of Japanese exporters who share costs and benefit from economies of scope and scale may find him/herself seriously underpriced.

Alternatively, the problem may be a matter of size. The inability of the U.S. company to combine with its competitor may deny all but the largest U.S. firms the opportunity to bid for large-scale foreign procurement contracts. Even so, the large U.S. firm may be outbid by a group of foreign competitors who have banded together to share the high costs of bid preparations.

It may well be, however, that the most common problem facing the U.S. exporter is foreign government action hindering the flow of goods and services into a foreign country. Despite the general denunciations by developed countries of anticompetitive practices,¹⁴ and the recent signing of the Tokyo Round Multilateral Trade Negotiations (MTN) agreements,¹⁵ a multitude of government-initiated or -supported barriers to trade remain.¹⁶ There are the direct, visible restraints on trade such as government-imposed tariffs, import quotas, and taxes.¹⁷ Such direct restraints are dwarfed, however, both in volume and in variety by myriad non-tariff barriers to trade,¹⁸ such as labeling requirements, special products standards,¹⁹ preferential government procurement,²⁰ industry subsidies, and legislation. A 1980 House Report²¹ contains a compelling summary of the export barriers facing the communications industries:

In four days of hearings, the Subcommittee on Government Information and Individual Rights of the Committee on Government Operations heard detailed accounts of existing barriers to the international flow of information. In dozens of submittals from major American businesses -- ranging from telecommunications and computer firms, to industrial corporations, to financial enterprises --

further evidence of existing and threatened barriers was brought to light.

The litany of barriers erected primarily for economic reasons is long. It includes the imposition of taxes or tariffs on the transfer of information internationally -- an almost inevitable consequence of which would be the monitoring of that information by the taxing authority. Pricing of telecommunications services by government monopolies at far above cost is another barrier which discourages entry of telecommunications dependent services into a particular nation's market. The imposition of inconsistent or narrowly interpreted technical standards upon both providers and users of telecommunications and data processing services results in another de facto barrier to the transfer of information or the offering of services from foreign locations. Requirements that "domestic" information and transactions be processed in the home country bars the effective use of modern computer and communications technologies, inhibits the flow of information, results in higher costs to consumers, and protects less efficient domestic industries and services. Perhaps the most blatant economic barrier to the flow of information internationally, however, is the flat denial of entry for a foreign enterprise into a particular nation's market.

Moreover, restrictions on the content of data transmission are emerging. Both the impulse for and consequences of such barriers go far beyond economic concerns. Restrictions on the transmission of information across national boundaries because of its content reflect a wide variety of social, cultural, and political concerns which intertwine with the economic considerations underlying most of the barriers outlined above.

The problem of governmentally subsidized industry is pervasive. More than one-third of the 50 largest industrial companies in Europe are wholly or partially owned or controlled by their national governments.²² Subsidized industries typically bear fewer costs than their U.S. counterparts, since research and development costs are borne by the government rather than the industry.²³ Nearly every U.S. trading partner has a government monopoly over Postal, Telegraph, and Telephone (PTT) operations. Even where PTT's have opened bidding on procurement, the large-scale or "package" nature of their contracts excludes most American producers, who are

unable to join together as do their foreign competitors.²⁴

In addition, the recent expansion of trade with nonmarket economy nations has raised new difficulties for the American exporter.²⁵ Contract negotiations with a state controlled, centrally planned economy are typically carried out between a U.S. firm and a foreign government trading agency.²⁶ The unitary position of the state trading agency allows it to play U.S. firms off against each other, often resulting in price distortion compared to what might be obtained under openly competitive conditions.²⁷ American firms are said to be prohibited under antitrust regulations from conferring, exchanging information, or comparing proposals which are offered to them separately.²⁸ The foreign state trading agency, on the other hand, is in a position to do all three.²⁹ Moreover, the state purchasing agency often exhibits a strong predilection for "package deals," requiring intra-industry coordination inconsistent with the U.S. antitrust laws.³⁰

Foreign legislation which restricts trade threatens to equal government subsidies as a nontariff barrier to trade,³¹ particularly in the communications sectors. Legislation directly or collaterally regulating the flow of information proliferates apace. In addition to the traditional barriers against flow of goods, barriers against transborder data flows present obstacles to trade in communications.³²

Several nations have identified U.S. dominance in the communications industries as a threat to national sovereignty and culture. In France, for example, much weight has been given to a finance ministry report which concluded that France's economic balance, social consensus, and national independence would be endangered were French data processing to be done via U.S. satellites.³³ As a result, the policy of the French government

is to hinder purchase or use of U.S. computer goods or facilities.³⁴

Others fear the economic implications of U.S. communications trade. The Canadian Department of Communications predicted that, at the current rate, data processing done in the U.S. would cause a loss of 23,000 jobs from the Canadian economy by 1985, and that the development of a real information industry in Canada was an essential requirement "for the future economic well-being of the nation."³⁵ Consequently, Canadian legislation has made it illegal for banks to store records or have data processed outside Canada.³⁶

Still other nations erect barriers to trade aimed at ensuring privacy of computerized data. For example, a number of European states have enacted data protection laws,³⁷ requiring that personal, and in some cases financial, data be stored, processed, and transmitted in the prescribed manner.³⁸ U.S. processors must conform to local procedures or face civil penalties. Moreover, a number of these laws contain provisions prohibiting the export of domestic data to countries which are deemed to afford that data less-than-equivalent protection.³⁹ Many European states perceive protection in the U.S. to be significantly weaker than in Europe;⁴⁰ consequently, U.S. firms relying on data banks or facilities located in the U.S. may be constrained to establish redundant facilities overseas.⁴¹

The roll call of barriers to trade, whether direct or indirect, subsidy or legislation, is compelling. It is hard to deny the adverse influence such barriers must have on U.S. attempts to export, particularly attempts by small and moderate-sized firms. The House Report quoted on pages 6-7 concluded that:

Barriers to the international flow of information injure the ability of U.S. enterprises to compete in foreign and international markets. Already America has suffered losses in potential exports. Rather than delivering services directly from the United States, for example, computer service firms have given way to barriers and established redundant data centers in foreign countries. Requirements that companies do most of their data processing within a host country have added expenses which increase costs to the consumer and reduce productivity and income. Beyond these direct adverse affects on exports and the balance of payments, these emerging barriers create inefficiencies, dampen innovation, and generally restrict the ability of U.S. enterprises to do business abroad.⁴²

A firm or industry faced with one or more trade barriers must either obtain effective recourse or succumb to a lessening of profit or to loss of access to the market. The recourse available, however, is quite limited.

Attempts by U.S. courts to export American antitrust laws along with American goods have met with determined resistance. A number of foreign states have enacted protective legislation to counteract the detrimental effects of extraterritorial application of U.S. antitrust laws.⁴³ The British Protection of Trading Interests Act,⁴⁴ for example, which grants the United Kingdom's secretary of state broad discretion to limit or prohibit enforcement of foreign antitrust judgments, was prompted by a U.S. antitrust case, Westinghouse Electric Corp. v. Rio Algom, LTD.⁴⁵

Westinghouse Electric brought an antitrust suit against an alleged international cartel of uranium producers, including two British corporations.⁴⁶ Great Britain found the U.S. order requiring production of British documents to constitute a threat to British sovereignty.⁴⁷ Consequently, the U.S. order was not enforced, and the anti-antitrust statute was passed.⁴⁸ U.S. exporters continue to face equivalent if not greater anticompetitive practices.

International conventions theoretically constitute an alternative means of reducing anticompetitive practices.⁴⁹ For example, the U.N. General

Assembly has recently adopted a resolution establishing guidelines for the development and implementation of an international antitrust code.⁵⁰ The U.N. convention is, however, non-binding and offers little recourse to U.S. exporters.⁵¹

U.S. exporters may be afforded greater recourse against government-initiated or -supported barriers to trade, but only in the long run. The Tokyo Round MTN Codes on nontariff barriers,⁵² coupled with the original GATT agreements,⁵³ provide at best a long-range framework for maintaining free trade. They do not constitute a specific weapon deployable by U.S. industry against foreign offenders.

Thus, it is not surprising that some American exporters feel the need to act in concert in order to combat foreign barriers to trade. Acting together, they could overcome obstacles of cost, size, or lack of bargaining power. The widespread perception is, however, that such concerted conduct is prohibited by the United States antitrust laws.⁵⁴

Many in the antitrust division of the Justice Department (Justice) disagree.⁵⁵ In fact, the complaint is heard that, "Antitrust has been taking a rap as bogeyman for the disappointing performance of American industry -- particularly when judged against the successes of some of its foreign competitors."⁵⁶ According to Justice, the United States antitrust laws allow U.S. corporations to do most of what they say they need to do. Justice "stress[es], whenever possible, that many joint export activities and other forms of international business cooperation are not prevented by our antitrust laws, since they produce no adverse effect on competitors and consumers in the U.S."⁵⁷

American business has found little solace in this position. Businessmen

frequently assert that even though the antitrust laws may permit certain combinations for export purposes, uncertainty about what is and what is not legal constitutes a significant deterrent to establishing such combinations.⁵⁸ Uncertainty is said to result from the ambiguity both of the antitrust laws and of the judicial interpretation of them.⁵⁹ The position of the risks flowing from this uncertainty in the calculus by which a transaction is approved or abandoned is prominent: "Very few international business opportunities are worth risking heavy fines, treble damages suits, forced divestiture, or prison sentences."⁶⁰

The National Association of Manufacturers has given the problem of uncertainty much attention.⁶¹ From a study done by it comes the following example:

The General Counsel of Company Number Eleven feels that the problem of uncertainty places severe limitations on U.S. international business. He was recently in a meeting where the international antitrust ramifications of a proposed transaction were being considered. Prior to that meeting, four antitrust law experts had been given a draft report prepared by a well-known research organization that had acquired considerable expertise in assembling and analyzing factual material relating to the industry in question, in the field of domestic antitrust. Each of the four experts agreed that most of the material assembled by the outside research organization was of little value. They then went on to express substantial disagreement among themselves not only as to what the law might be, but also as to how the parties might proceed to resolve these questions. With so much disagreement among recognized antitrust experts, the uncertainty problem can often present a most formidable obstacle to a corporate legal counsel faced with the responsibility of insuring that a foreign transaction does not violate U.S. antitrust statutes.⁶²

The uncertainty is even more pronounced for small businesses. One small businessman, upon returning from traveling abroad in search of new markets, was advised that he could not form a joint venture setting mutually agreed prices.⁶³ Later, he talked with antitrust lawyers experienced in

international trade:

They tell me there is very little risk of antitrust prosecution for a small firm in my industry, which is very competitive and nonconcentrated, in forming a joint venture for exports. This may be true. But you must understand the extent to which a small businessman, who cannot afford to retain and seek constant high-priced counsel, fears the antitrust laws and is inclined to stay as far away from possible exposure as he can, even if it means giving up business opportunities. There were people in the paper industry who were sent to jail as a result of criminal antitrust prosecution. One of the big paper companies has made a movie about the way a criminal antitrust prosecution can be based on circumstantial evidence which may not reflect what it appears to reflect. The main lesson, and I suspect others like me have learned it, is don't get involved; it is not worth the aggravation.⁶⁴

To complaints like these, the Justice Department responds in two ways. The first argument states that the uncertainty is not necessary.⁶⁵ For many years the antitrust division has offered firms its Business Review Procedure,⁶⁶ under which businesses can ask the antitrust division for a statement of its enforcement intentions with respect to proposed business conduct.⁶⁷ In 1978 this procedure was expedited to provide responses within 30 days of request.⁶⁸ Nonetheless, Justice complains, in two years it received only one request for business review.⁶⁹ Thus one Justice official concluded that, "Either businesses are simply failing to take advantage of the avenues available to remove antitrust uncertainty in their export dealings, or that uncertainty simply isn't there to the extent it is often claimed to be."⁷⁰

Justice buttresses this argument by pointing to two documents it has published precisely to remove such uncertainty: the "Antitrust Guide for International Operations,"⁷¹ and the "Antitrust Guide Concerning Research Joint Ventures."⁷² Each contains numerous hypothetical transactions analyzed in terms of antitrust enforcement potential.

A second line of argument put forth by Justice asserts that the antitrust laws do not prohibit needed transactions. This conclusion is drawn from the absence of proof on the part of American business that desired transactions are in fact deterred either because they are thought to violate the antitrust laws or because the reach of these laws is uncertain.⁷³ In support of this argument, the finding of the President's Report on Export Disincentives⁷⁴ is cited: despite extensive inquiries in the business community, "no specific instances were shown of [the antitrust] laws unduly restricting exports . . .; most of the complaints about the inhibiting effect of the antitrust laws on exports are either general observations or comments upon the uncertainty created by these laws."⁷⁵

To Justice's protestations, American business offers several responses. A major problem is the time involved.⁷⁶ Even 30 days is too long in many cases where the ability of an exporter to commit immediately is crucial.⁷⁷ Moreover, even if Justice approved a contemplated business transaction, the argument goes, a change in Justice Department staff might bring with it a change in legal opinion.⁷⁸ In addition, some American businessmen fear that, in publishing its review letter, Justice might unwittingly divulge confidential business information.⁷⁹

The Department of Commerce has estimated that there are 20,000 firms in America with exportable goods or services which are not presently engaging in export activities of any sort.⁸⁰ Not surprisingly, arguments on both sides of the question of whether the antitrust laws have a deterrent effect on export trade carry over into the question of whether the Webb-Pomerene Act should be amended, and, if so, how. Before turning to the various proposals to amend the Webb Act, however, the reader would profit from a review of the history of Webb and of the current practice of Webb associations.

3. WEBB-POMERENE: THE ACT AND PRESENT DAY ASSOCIATIONS

The Webb-Pomerene Act⁸¹ carves an exemption out of the Sherman and Clayton Acts. More specifically, §62 of Webb provides that nothing in Title 15 shall be deemed to make illegal "an association entered into for the sole purpose of engaging in export trade" or "an agreement made or act done in the course of export trade by such association."

The exemption is subject, however, to three qualifications. First, the association, agreement, or act may not be in restraint of trade within the United States. Second, the association agreement or act may not be in restraint of the export trade of any domestic competitor of such association. Finally, the association may not "either in the United States or elsewhere, enter into any agreement, understanding, or conspiracy, or do any act which artificially or intentionally depresses prices within the United States of commodities or the class exported by such association, or which substantially lessens competition within the United States or otherwise restrains trade therein."

Historical Background

Passed in 1918, the Webb-Pomerene Act sought to prevent a decline in the export trade that had been built up during World War I. Because other governments encouraged combinations, it was deemed appropriate that the United States should allow combinations among its exporters in order effectively to compete internationally. The legislative history of the Act is informative. In debate, Senator Pomerene stated:

The purpose of this bill is to secure the foreign market in order that our people here may have an opportunity to

meet foreign competitors -- the large cartels and combinations there on an equal footing.⁸²

In the House, Judge Webb said:

I for one am in favor of giving the American manufacturer an equal chance with the foreign manufacturer. I would not deprive him of any legitimate advantage in the world's race for trade. I would keep him within the provisions of the Sherman antitrust law wherever the American flag flies, but outside of that I would turn him loose and tell him, we permit you to do in foreign countries just what those foreign countries permit your competitors to do.⁸³

An important corollary to the notion that the objective of the Act was to promote trade by allowing U.S. business people to do what their foreign competitors were doing, is the notion that the need for the Act lay in the uncertainty about the extent of antitrust strictures on foreign trade. In this regard, Senator Pomerene stated:

Mr. President, there has been a serious dispute, and I think the Senator so understands, as to whether or not the Sherman antitrust law applies to contracts with relation to foreign business. One class of lawyers contend that it does not so apply, another that it does; and in any event there has been some doubt about it. One of the purposes of this act was to permit the formation of associations to deal exclusively in the foreign trade, and to relieve them, so far as the foreign trade was concerned, from the penalties of the Sherman law.⁸⁴

Both "stimuli" to Webb -- the uncertainty about antitrust proscriptions, and the position of competitive disadvantage because of international inequality of competition standards -- are still very much at issue today. So, too, has the basic purpose of Webb -- the enhancement of the ability of U.S. business to compete effectively abroad -- remained a salutary one. The history of Webb associations, however, casts doubt on the effectiveness both of the Act and of the uses to which American business people have put it.

An opinion letter issued by the FTC in 1924,⁸⁵ in suggesting the

legality of agreements between Webb associations and foreign producers, buttressed the common belief that Webb restricted the Sherman Act to operations doing exclusively domestic business. This expansive reading of the Webb exemption was rejected, however, in United States v. U.S. Alkali Export Association (Alkasso),⁸⁶ the first judicial interpretation of the Act. Alkasso executed a series of agreements with foreign alkali producers, dividing among them most of the world's markets. Certain areas were assigned as exclusive territories, others as joint territories, and quotas were established for each member.

In its complaint, the government characterized the agreements as a conspiracy in restraint of interstate and foreign commerce, and alleged that the conspiracy operated to restrain trade within the United States and substantially to lessen competition within the United States.

Alkasso admitted the execution of the agreements, leaving for the court only the questions of whether the agreements were illegal under the Sherman Act and, if so, whether they were exempt under Webb. The court held that:

Viewing the Webb Act in the light of contemporaneous interpretation of the antitrust laws, considering the import of the Act when read as a whole, and giving careful attention to the entire legislative history of its passage, the conclusion is irresistible that the Webb-Pomerene Act affords no right to export associations to engage on a world-wide scale in practices so antithetical to the American philosophy of free competition. The 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.⁸⁷

Alkasso appears to constitute the only judicial ruling on the scope of the Webb exemption. It establishes several types of conduct not exempted under the Act, including: division of world markets, price-fixing, domestic

price stabilization, and agreements with foreign cartels.

Importantly, the Alkasso case presented a polar example of transnational anticompetitive agreements. It involved several types of clear antitrust violation on a worldwide scale. The holding in Alkasso represents the application of Webb to the facts of the case; the court declined to generalize its holding beyond the facts before it. Consequently, whether the same result would be reached where transnational agreements involved less extreme anticompetitive effects, or where they produced no domestic restraint on trade, is unknown.

In United States v. Minnesota Mining and Mfg. Co.,⁸⁸ the court, per J. Wyzanski, suggested activities that would be permissible under Webb. In Minnesota Mining, nine domestic manufacturers of coated abrasives, comprising four-fifths of the export trade of their industry, agreed to form two companies. The first was an export company organized under the Webb-Pomerene Act. The second was the Durex Corporation, set up to establish jointly owned factories for the production of abrasives in England, Canada, and Germany. Thus, abrasives sold abroad were manufactured both in the country in which they were sold and in the United States.

As it became economically more feasible to sell abrasives manufactured in the foreign factories, exports from the United States were curtailed. The holding in Minnesota Mining was that it violated §1 of the Sherman Act for American manufacturers controlling four-fifths of the export trade of an industry to agree not to ship to particular areas but to do their business there through jointly owned foreign factories.⁸⁹

Consequently, the court did not have to reach the Webb issue, for that statute "is, by its first section limited to that sort of 'export trade'

which consist in 'commerce in goods . . . exported . . . from the United States . . . to any foreign nation.'"⁹⁰ The court's views on the export association were therefore dicta, opinion expressed by the court but not necessary to its holding. In this regard, the court went on to state that "The manufacturers' agreement to export only through the Export Company, while it would have been and will be lawful when standing in isolation, was unlawful when used in conjunction with the [Durex] program."⁹¹ Even "the recruitment of four-fifths of an industry into one export unit was foreseen by Congress."⁹²

The Court listed five export association activities which, without more, would not constitute a violation of the Sherman Act: requiring members to use the export association as their exclusive foreign outlet; refusing to handle the exports of domestic competitors; fixing quotas and prices for members' supplies to the association; fixing prices at which foreign distributors will resell; and requiring foreign distributors to handle only members' products.⁹³

The Exemption in Practice

The hope of Webb's sponsors that its exemption would result in the formation of hundreds of associations serving as joint selling agencies for small firms has not been realized. The FTC, in a study of Webb associations from 1918-1967, concluded that, "A half-century of experience with the Webb-Pomerene Act reveals that associations have not proven to be effective instruments either for the expansion of overall U.S. exports or for the expansion of exports by small firms."⁹⁴ A second FTC study, conducted 10 years later, concluded that Webb-assisted exports accounted for only 1.5%

of total U.S. exports.⁹⁵

Between 1918 and 1965, there were a total of 130 active associations registered with the FTC.⁹⁶ The 1967 FTC study revealed that successful export associations were usually characterized by a membership consisting of the leaders of an oligopolistic industry producing a homogeneous product.⁹⁷ Large firms accounted for nearly 80% of all Webb-assisted exports.⁹⁸

As of June 1978, 27 active Webb associations were registered with the FTC.⁹⁹ Membership in these associations varies from two to 67 member firms.¹⁰⁰ The great majority of the associations were incorporated, often under not-for-profit statutes.¹⁰¹ The 1978 Report divided the existing associations into two types: the full functioning, joint sales agency originally envisioned by Webb's sponsors; and a large number of associations which perform specialized functions.¹⁰²

A fully functioning association operates in its own name, handling all aspects of exporting and selling in foreign markets.¹⁰³ The costs of operation are borne proportionally by the members according to their participation, but the association functions as though the products were its own, often attaching its own label or trademark.¹⁰⁴ The association actively solicits and develops new markets, possibly through its own foreign sales offices. It arranges for advertising, financing, and shipping, and is responsible for complying with import and export requirements, tariffs, and licensing regulations.¹⁰⁵ Of the 14 such fully functioning associations extant in 1978, 12 helped allocate customers or markets among their members.¹⁰⁶ These same 12 associations also determined the prices at which members' products would be sold.¹⁰⁷

Specialized associations perform a wide variety of functions, such as

negotiating contracts and rates, market research, information and price exchange, and the monitoring of both U.S. and foreign legislation and regulation.¹⁰⁸ Exports "indirectly assisted" by these specialized function associations amounted to \$1,486,965,000.¹⁰⁹ The total volume of "directly assisted" exports was \$237,858,337.¹¹⁰

The results of the 1978 study regarding "Customers and Competitors" were particularly informative. Private cartels were listed as competitors by only 4 associations, and cooperatives or organized marketing groups by 3 more associations.¹¹¹ Seven associations, on the other hand, listed state trading agencies and quasi-public commercial companies among their principal competitors.¹¹² The study concluded that "public and private marketing power now appear to be of numerically equal competitive importance."¹¹³

Even broader governmental involvement was revealed in an analysis of the associations' most important customers.¹¹⁴ Nine associations sell to governments, four to state trading companies, and three more to all classes of customers, including government agencies.¹¹⁵

Among current Webb associations, the experience of the Motion Picture Export Association of America (MPEAA) provides a useful example. Most striking about the MPEAA's use of Webb is the defensive nature of its joint operations.¹¹⁶ MPEAA faces a panoply of protectionist measures against television and theatrical films,¹¹⁷ as well as myriad special taxes it sees as unfair or discriminatory in nature.¹¹⁸ It deals with a large number of exhibitor monopolies, as well as government monopolies in Eastern Europe and Third World states.¹¹⁹

According to Jack Valenti, president of MPEAA, the constant and kaleidoscopic change in barriers to trade masquerading as quotas, rules,

and regulations require of MPEAA an unrelenting vigil, as well as a frequent overseas presence and hands-on dealing.¹²⁰ The ability to act in concert stands foremost among MPEAA responses.

In the broad range of MPEAA responses to the problems thrust upon it, there are many approaches and methods which can be and are used and which do not require the antitrust immunity provided by Webb-Pomerene. But in almost every important area, the ultimate leverage of MPEAA is the ability jointly to withhold product. Without the threat of this potent bargaining weapon -- and in many cases it has actually had to be used in order to mount a successful defense -- the MPEAA negotiators would be in a strictly beggar position.

As a practical matter, this bargaining weapon would not be available without the umbrella of Webb-Pomerene.¹²¹

Moreover, "the indispensable value of Webb-Pomerene is its certainty. The rules of the Webb-Pomerene game do not change and MPEAA is able, without hesitancy, to move swiftly to meet challenges from governments and private cartels."¹²² Nor would the Business Review Procedure¹²³ of Justice provide a viable alternative to Webb; among other reasons,¹²⁴ Valenti cites the following:

If we had to rush to the Justice Department for clearance each time to confront challenges in more than 100 countries, our ability to surmount these challenges would be weakened, possibly squashed. Oftentimes we are able to move ahead of the imminent government edict or tactics by advising those authorities of the possible counter-moves of MPEAA. We have to know that we are able to countermove; we cannot surmise that Justice will approve our business review letter.¹²⁵

Often, it is the ability to negotiate jointly determined prices that is of great use. For example, the MPEAA television division has established minimum pricing agreements covering 42 countries as well as seven additional agreements relating to trading practices.¹²⁶ Valenti cites as "recent examples of the efficacy of negotiating as a group with foreign government monopolies":

- a 3-year agreement with a state monopoly, made in 1976 and providing increases of 80% on features and 100% on telefilm programs over the three years. Gross sales by the MPEAA companies went up more than 500% from their previous levels.
- a 2-year agreement with another government monopoly, made this year, which increased prices 100% in all categories over the two-year period. The same agreement also enabled the member companies to collect several millions of dollars in delinquent accounts which they were unable to collect individually.
- a 20-month agreement completed just this month with a third state broadcasting monopoly, providing another 25% increase in telefilm prices and ending a four-year embargo on feature sales to television with a 400% increase over our last sales.
- a 3-year deal with a fourth government monopoly, providing raises as high as 120% in some categories over the three years. Gross sales went up 300% from their previous levels.¹²⁷

By almost any test, the experience of the Motion Picture Export Association of America is a success story. Other Webb associations have not found the Act nearly so useful. The experiences of these less successful associations provide ammunition for those predisposed to shoot down the whole notion of an antitrust exemption.¹²⁸ Nor does the uninspiring number of Webb associations -- 31 in 1978 -- afford much support for the argument that an antitrust exemption is needed by American business. More than one purported autopsy of Webb has asserted that export trading associations are only useful for the export of fungible, homogeneous products.¹²⁹

Apologists for the Webb Act, on the other hand, claim that Webb associations have not abounded because American industry has not needed to ply foreign markets -- until recently.¹³⁰ A further argument points to the inefficiency of the original Webb Act in defusing uncertainty about anti-trust enforcement.¹³¹ These two assertions in combination form the fundament of the major proposal for legislative reform of Webb.

4. PROPOSALS FOR LEGISLATIVE REFORM OF THE WEBB-POMERENE ACT

As of July 9, 1981, six bills were pending in Congress that seek to amend the antitrust laws in order to promote export trade. Of these bills, congressional attention has focused on two, alternative proposals. The first, originating in the Senate, proposes to amend the Webb Act.¹³² The second, introduced in the House as an alternative to the Senate bill, seeks merely to clarify the reach of the Sherman and Clayton Acts.¹³³

Senate: the Danforth Proposal

Introduced March 18, 1981, a bill, S. 734, "To encourage exports by facilitating the formation and operation of export trading companies, export trading associations, and the expansion of export trade services generally," is a clean version of S. 144 introduced January 5. It is comprised of two titles, the second of which -- regarding antitrust immunity for export trade associations and export trading companies -- is known as the Danforth Proposal.

Title I, which is not the primary concern of this paper, may be the more controversial of the two titles. Pertaining to "Export Trading Companies," it seeks to increase exports of products and services by encouraging more efficient provision of export trade services to American producers and suppliers.¹³⁴ The vehicle is to be the Export Trading Company (ETC), defined as a U.S. company "organized and operated principally for the purposes of: (A) exporting goods and services produced in the United States; and (B) facilitating the exportation of goods and services produced in the United States by unaffiliated persons by providing one or more

export trade services."¹³⁵

Title I seeks to stimulate initiative from three sources: accelerated internal growth by existing U.S. export management or export trading companies; formation of independent ETC's fostered by major corporations with international trade experience; and investments by U.S. banking institutions in new or existing ETC's.¹³⁶ In regard to the last source of initiative, Section 105 of the bill would permit U.S. banks to make limited investments in ETC's.¹³⁷ In addition, the bill provides for support by the Economic Development Administration and the Small Business Administration for the formation and expansion of ETC's.¹³⁸ Section 107 of the bill authorizes and directs Eximbank to establish a guarantee program for commercial loans to U.S. exporters in certain cases.¹³⁹

Section 108 establishes in the Department of Commerce a pilot program of grants to small business manufacturing firms to help them absorb the first year costs of hiring a full-time export manager.¹⁴⁰ Finally, the Secretary of Commerce is directed to provide information and advice to interested persons and to facilitate contact between producers of exportable goods and services and firms offering export trade services.¹⁴¹

Title II (the Danforth Proposal), entitled "Export Trade Associations," amends §§1-3¹⁴² of the Webb-Pomerene Act. Among the "findings" set out at the beginning of the Title are the following:

- Exports are responsible for one out of every nine manufacturing jobs and for \$1 out of every \$7 of total goods produced in the U.S.;¹⁴³
- Exports will play a larger future role due to severe competition from foreign government-owned and subsidized commercial

entities;¹⁴⁴

• service-related industries create jobs for one out of every 10 Americans, and provide 65% of U.S. GNP.¹⁴⁵

Accordingly, Title II provides that the "export trade, export trade activities, and methods of operation of any association [or] . . . ETC shall, when certified according to the prescribed procedures, be eligible for anti-trust exemption."¹⁴⁶

"Export trade" is defined as "trade or commerce in goods, wares, merchandise, or services exported . . . from the U.S. . . . to any foreign nation."¹⁴⁷ The term "service" is defined as "intangible economic output, including, but not limited to -- (A) business, repair, and amusement services; . . . (C) financial, insurance, transport, informational, and any other data-based services, and communications services."¹⁴⁸

Eligibility for the antitrust exemption is conditioned on certification of the export trading association or export trading company by the Secretary of Commerce.¹⁴⁹ Certification is, in turn, dependent on the fulfillment of six conditions. The export trade, export trade activities, and methods of operation of the export trade association or ETC must:

- (1) serve to preserve or promote export trade;
- (2) result in neither a substantial lessening of competition or trade within the U.S. nor in a substantial restraint of the export trade of any competitor of such association or ETC;
- (3) not unreasonably enhance, stabilize, or depress prices within the U.S. of the goods or services of the class exported by such association or ETC;
- (4) not constitute unfair methods of competition against competitors;
- (5) not include any act which results in the sale for consumption or resale within the U.S. of the goods or services

exported by the association or ETC; and

(6) not constitute trade or commerce in the licensing of patents, technology, trademarks, or knowhow, except as incidental to the sale of goods or services exported by the association or ETC.¹³⁵

The Secretary of Commerce will review the application for certification of a company or association seeking exemption to ensure the fulfillment of the six conditions set out above. The application must contain a detailed description of the proposed export activities, including the goods or services to be exported and the methods of export trade, which may involve any agreements for pooling tangible or intangible resources, any territorial price-maintenance, and any membership or other restrictions to be imposed upon the members of the association or ETC.¹⁵¹ Under §8 of the Act, all information provided by the applicant is to remain confidential.¹⁵²

Section 4(b) requires the Secretary of Commerce to certify an association or ETC within 90 days after receiving the application, if the secretary determines, after consultation with the attorney general and the FTC, that the application fulfills the six §2 standards.¹⁵³ Section 4(b)(2) provides for an expedited certification procedure where deadlines for bidding or other circumstances make such a procedure appropriate.¹⁵⁴

Importantly, the secretary must also determine that the export trade activities or methods proposed by the applicant will serve a specified need in promoting the export trade of the goods or services described in the application for certification.¹⁵⁵

The certificate issued by the secretary designating approval must specify permissible activities and any terms or conditions the secretary deems necessary for compliance with the six §2 standards.¹⁵⁶ Section 4(d) permits the secretary to require certain modifications in the organization or operation

of trade associations or companies certified under Title II.¹⁵⁷

Any Webb association currently registered with the FTC may file, within 180 days of the enactment of the bill, with the secretary for automatic certification of their current export activities.¹⁵⁸ Alternatively, any currently registered association may elect, under §12, to continue to operate under standards in effect under Webb prior to enactment of Title II.¹⁵⁹

Section 4(e) authorizes the attorney general or the FTC to bring an action to invalidate, in whole or in part, a certification on the grounds that the trade, activities, or operations of a company or association fail to meet the substantive standards set out in §2.¹⁶⁰ No person other than the attorney general or the FTC, however, would have standing to bring such an action.¹⁶¹

Under §4(f), each association or ETC must comply with U.S. export control laws pertaining to the export or transshipment of goods on the Commodity Control List to controlled countries. The secretary may also, under §9, require an association or ETC to modify its operations to the extent they are or may become inconsistent with the United States' binding international obligations.¹⁶²

The secretary is to establish within the Department of Commerce an office to promote export trading activities under this act and to report annually to Congress.¹⁶³ The secretary is authorized to promulgate, in consultation with the attorney general and the FTC, such rules and regulations as are necessary to carry out the purposes of the Act.¹⁶⁴ In addition, within 90 days of the enactment of Title II, the secretary, after consultation with the attorney general and the FTC, is to publish proposed "guidelines" for purposes of determining whether export trade and export trade activities

meet the §2 standards.¹⁶⁵

Finally, Title II, §11, instructs the President, seven years after the Title is enacted, to appoint a task force to review the effect of the act on domestic competition and on U.S. international trade and to recommend continuation, revision, or termination of the Webb-Pomerene Act.

House: Rodino/McClory Proposal

Introduced on March 4, 1981, H.R. 2326, a bill "To amend the Sherman Act and the Clayton Act to exclude from the application of such Acts certain conduct involving exports," neither makes reference to, nor proposes amendment of, the Webb-Pomerene Act. Entitled the "Foreign Trade Antitrust Improvements Act of 1981," it proposes to add one section to each of the Title 15 acts.

A new section 7 of the Sherman Act would read: "This Act shall not apply to conduct involving trade or commerce with any foreign nation unless such conduct has a direct and substantial effect on trade or commerce within the United States or has the effect of excluding a domestic person from trade or commerce with such foreign nation."¹⁶⁶

Section 7 of the Clayton Act is to be supplemented with the following proviso: "This section shall not apply to joint ventures limited solely to export trading, in goods or services, from the United States to a foreign nation."¹⁶⁷

Status of the Bills

S. 734 was passed in the Senate on April 8, 1981, by a vote of 93-0. A bill

that is substantially similar to S. 734, H.R. 1648, is before the House. A replica of H.R. 2326 is before the Senate. While the Danforth Proposal has been passed by the Senate, its House counterpart (H.R. 1648) confronts opposition in the form of H.R. 2326. Both of these bills were sent before the House Judiciary Committee, chaired by Congressman Rodino. The ranking Republican on the Committee is Congressman McClory. H.R. 1648 was also in the House Foreign Affairs Committee, where hearings on it and several other bills have taken place before the Subcommittee on International Economic Policy, chaired by Congressman Bingham. As of January 6, 1982, little concrete action had been taken. The House Judiciary Committee, however, has tabled H.R. 1648, reintroducing instead on December 10, 1981, a clean bill (H.R. 5235), which represents a version of H.R. 2326 supplemented by provisions from other bills.

The Rodino/McClory alternative was introduced in opposition to the Danforth Proposal.¹⁶⁸ It seeks to reduce business uncertainty without the bureaucratic red-tape and complexity of the Danforth bill,¹⁶⁹ and does not propose to amend the Webb-Pomerene Act at all. However, because the Rodino/McClory bill now appears in a hybrid form, which may be drastically revised again, the analysis henceforth will focus primarily on the Danforth Proposal, which received the unanimous approval of the Senate.

5. RESPONSE TO THE BILLS

The following sections set out the various actors interested in the outcome of the debate over antitrust uncertainty, as well as establish the basic position of each actor in the debate.

Department of Justice

What has been the traditional position of the antitrust division of the Department of Justice is summed up as follows:

In general, American businesses don't require antitrust exemptions or clearance in joint exporting ventures, or any other joint activity, the sole purpose of which is to sell goods or services for consumption abroad. Accordingly, it has been the consistent position of the Department of Justice that the antitrust exemption found in the Webb-Pomerene Act of 1918 is unnecessary to provide protection for export associations, because in general the normal activities undertaken by such associations have as their exclusive focus markets abroad.¹⁷⁰

This general stance of the Justice Department has been set out in some detail above.¹⁷¹ The compromise position of the antitrust division is that the policy of antitrust exemption cannot be objected to where: (a) actual need for the exemption is shown;¹⁷² (b) export trade does not constitute trade or commerce in the licensing of patents, technology, trademarks, or knowhow; and (c)¹⁷³ the granting of the exemption will not unduly restrain competition in the U.S. or have an injurious effect on the American consumer.¹⁷⁴

The position of Justice with regard to actual need is reflected in S. 734 and H.R. 1648: in addition to the six substantive requirements of §2, the certification by the Secretary of Commerce of an applicant is, under

§4(b), dependent upon a finding that the activities and operations of the applicant will serve a specified need in promoting export trade. Moreover, the new first substantive standard of §2 -- that the activities of the applicant "serve to preserve or promote export trade" -- appears to buttress §4(b)'s response to the "need" concern of Justice.

Justice's second concern is mirrored in the new sixth substantive standard of §2: that export trade activities do not constitute trade or commerce in the licensing of patents, technology, trademarks, or knowhow, except as incidental to the export of goods or services.

Justice's third concern seems adequately reflected both in the §2 substantive requirements and in the §4(e) provisions allowing for the attorney general to bring suit to invalidate a certificate. Nor is Justice's concept of domestic restraint or injury stricter than that envisioned by Title II. As stated by Ky Ewing, Deputy Assistant Attorney General, Antitrust Division, Department of Justice:

We note that (S. 864 -- 1980 precursor of Title II) would require that a restraint of U.S. domestic trade be substantial before the exemption would disappear. The purpose of the proposal . . . is to bring the act into what we conceive to be the current state of antitrust law interpreted by the court.¹⁷⁵

The above statement constitutes an accurate reflection of Justice's attitude toward the bill. While not believing that antitrust uncertainty is legitimate or that the antitrust laws prohibit needed transactions, Justice can live with Title II because it does not ultimately lessen the standards for allowing an exemption, nor does it deprive Justice of its standing to sue.

Federal Trade Commission

The FTC, like Justice, questions whether the immunity is really necessary.¹⁷⁶ However, given that a bill like the Danforth Proposal will be enforced, the FTC supports the proposed transfer from the FTC to Commerce of the responsibility for administering Webb.¹⁷⁷ It also recommends that Commerce or another agency be assigned the lead role in promoting trade.¹⁷⁸ The FTC endorses as well the inclusion of services within the exemption.¹⁷⁹

The FTC points, nonetheless, to the limited nature of the immunity and to the importance of basing it on a showing of need.¹⁸⁰ Furthermore, the antitrust enforcement agencies should be given primary authority to develop the guidelines which outline the circumstances under which the antitrust immunity is to be afforded to export trade associations and companies.¹⁸¹

While the Danforth Proposal provides for the consultation by Commerce with Justice and the FTC in the development of these guidelines, the enforcement agencies are not expressly given the lead role.

Further reservations of the FTC center on the absence of clear delineation of the parties which may sue and the penalties for antitrust violations.¹⁸²

In the end, however, it appears that the FTC, like the Justice Department, views Title II with reluctant equanimity. The certification procedure, it is said, "might provide the means for balancing export trade associations' need for certainty against the need for antitrust enforcement to protect domestic trade."¹⁸³

Department of Commerce

Commerce has given its nearly unequivocal endorsement of the Danforth

Proposal.¹⁸⁴ Malcolm Baldrige, Secretary of Commerce, after setting out the infirmities of the U.S. competitive position,¹⁸⁵ and after pointing to the need for export specialists,¹⁸⁶ urged the adoption of a certification procedure "along the lines of Title II of H.R. 1648."¹⁸⁷

In his view, "the antitrust certification by Commerce, in effect a kind of antitrust preclearance, is an acceptable compromise of competing interests -- the one, to encourage U.S. companies to form ETC's and increase exports; and the other, to insure that antitrust enforcement can protect the domestic economy from potential anticompetitive spillover."¹⁸⁸

The "guiding purpose of H.R. 1648 (and S.144) is export promotion."¹⁸⁹ Nonetheless, "the bill recognizes that basic responsibility for anti-trust enforcement and expertise in antitrust law both lie in the anti-trust enforcement agencies. Consequently, it gives the Justice Department and the FTC an essential advisory role in the certification procedure. We believe it is important that the fundamental authority to enforce the antitrust law remain as it is today."¹⁹⁰

In sum, Baldrige asserts that Title II will reduce the uncertainty which U.S. firms face in competing abroad but asserts that the substantive antitrust standards are merely a codification of existing law.¹⁹¹

The Commerce Department has withheld its endorsement of H.R. 2326, preferring H.R. 1648.¹⁹² Commerce questions whether H.R. 2326 will in fact increase antitrust certainty and, if so, whether it will benefit only large multinational corporations.¹⁹³

Present Webb Associations

Associations currently registered with the FTC under the Webb Act have assumed a neutral posture in regard to both the Danforth Proposal and the Rodino/McClory alternative.¹⁹⁴ Neither bill is, of course, needed by these associations.¹⁹⁵ Nor will either bill necessarily affect the operations of current Webb associations.¹⁹⁶ S. 734, Section 207, allows current Webb associations to opt for the new certification procedure or to continue to operate under the standards in effect prior to enactment of the bill.¹⁹⁷ H.R. 2326 does not affect the Webb Act.¹⁹⁸

Present Webb associations are understandably unequivocal in their opposition to repeal of Webb, however.¹⁹⁹ Additionally, there was, for a time, significant objection to a mandatory certification requirement: many preferred not to alter their manner of doing business or to undergo the relatively time-consuming or costly certification procedure. Consequently, the option of §207 -- automatic certification for existing Webb associations -- was found to be attractive and served to defuse the antipathy of present Webb associations.²⁰⁰

Manufacturers

Manufacturers appear singularly united in their support of the Danforth Proposal. The National Association of Manufacturers (NAM) has been a strong supporter of the S. 734/H.R. 1648 amendment proposals.²⁰¹ The U.S. Chamber of Commerce is equally vocal in support of the proposal.²⁰² Finally, the Emergency Committee for American Trade (ECAT) is a firm supporter of these bills.²⁰³

Services Industries

Nearly every actor interested in the Webb amendments has expressed support for the inclusion of services within the Webb Act, if not for the certification procedures.²⁰⁴

The services industries have themselves given their general support to the Danforth Proposal. An example is the International Services Industry Committee of the U.S. Chamber of Commerce. This committee represents industries such as advertising, banking, air transportation, lodging, licensing, law, leasing, franchising, finance, health services, construction, computer services, engineering, consulting, communications, data transmission, shipping, tourism, and others.²⁰⁵ The committee decided that action to extend Webb Associations to service industries is "highly desirable."²⁰⁶

Similarly, ECAT has supported the inclusion of services within the antitrust immunity of Webb.²⁰⁷

Even NAM supports the inclusion of services, predicting that it will have "a favorable impact on exports of manufactured goods, since the disadvantages often suffered by U.S. exporters to the design of specifications by foreign engineering or construction firms would thus be largely neutralized. Moreover . . . the 'services' provision is particularly needed today in view of the dramatic increases in 'industrial cooperatives' and trading companies which cross national frontiers and are able to provide foreign buyers 'full service' packages within a relatively short period of time."²⁰⁸

6. IMPLICATIONS FOR THE COMMUNICATIONS INDUSTRIES OF THE PROPOSED AMENDMENTS TO THE WEBB-POMERENE ACT

An evaluation of the implications, positive or negative, of the proposals to amend the Webb-Pomerene Act must necessarily be of a counterfactual character. This result flows from the obvious fact that analysis must proceed without the benefit of actual experience under one of the proposed amendments. A counterfactual evaluation need not, however, be superficial; the lack of experience may be compensated by a detailed projection of circumstances within which the proposed amendment will operate. Yet the discussion which follows is more removed than it might be, more inquisitive than conclusive. This "inquisition" is in an important sense occasioned by a telling lack of anticipation on the part of various individuals and enterprises in the information industries.

More specifically, while there is general support for the Danforth Proposal, there is very little particularized support; the communications private sector seems conspicuously unable to point to a specific barrier to trade that will fall before the onslaught of trading companies or associations. Whether a problem actually exists is questionable since no one company contacted has anticipated benefits from any of the proposed amendments.

There is, of course, a very real problem on one level: the United States and its industry need to increase its export trade. On an abstract level, this problem is shared by the information industries, who articulate a desire for a greater participation in world markets. It is unclear, however, whether the alleged impediment of uncertainty of antitrust enforcement is anything more than illusory.

Ultimately, the question of whether American businessmen are significantly deterred by the perceived threat of antitrust enforcement is necessarily preceded by the question of whether they feel they would benefit from combinations. It is only where one or more companies find themselves confronted by foreign barriers to export trade which are susceptible to joint activities (i.e., the companies could combine usefully to overcome the perceived impediment to trade), that the question of uncertainty of antitrust enforcement arises. It is at this point in the analysis -- the specifics of the need to act in concert -- that the greatest doubt arises.

Representatives of the communications industries typically raise two reservations to the usefulness of the Danforth Proposal: the "big business" reservation, and the "product differentiation" reservation.

Large firms in the communications industries perceive that the Danforth Proposal will not have much if any utility for them.²⁰⁹ Many of these companies already have highly developed overseas markets and marketing capacities. Many large firms provide their own service and maintenance follow-up, and thus claim the ability to develop and market their own "package deals." These same firms do not lack for information or logistics. Their needs would, they claim, be ill-served by sharing essential functions with lesser firms. In short, they see no perceived need for combination.²¹⁰

Typically, the large firm which believes the antitrust exemption to be without utility expresses the opinion that the Danforth Proposal is aimed at promoting the export trade of small and medium-sized business. Yet the second reservation to the bill is heard from large and small firms alike.²¹¹ The "differentiated product" reservation points out that most types of products produced by the communications manufacturers are specialized,

technically variable, and non-fungible. Indeed, the crux of competition for these high-technology firms is product differentiation. Since their products are, to a large extent, non-fungible, the argument goes, there is nothing to commend turning them over to a joint selling agency for export and sale. For example, many communications companies have lengthy and complex product lines which, they feel, tend to exceed the comprehension of even their own dedicated sales force. These firms look askance at the notion of joining with firms having their own complex product lines, since they believe that doing so would reduce the effectiveness of their sales activities. Developing and maintaining effective marketing activities abroad in such a situation are seen to be an implausible goal.²¹²

The frequency with which these reservations are heard lends them a certain legitimacy. The "big business" objection in particular seems to withstand scrutiny. Even so, there are grounds for questioning each objection proffered.

One benefit of the ability to combine that may not be receiving enough attention is the ability to negotiate or bargain jointly, with the ability ultimately to withhold the product or service from the market. Much attention has focused on the economies of scale available to associations and ETCs, but few appear to have seen the significance of the type of joint bargaining which has been so useful to the Motion Picture Export Association of America in its foreign dealings.²¹³

There seems to be no reason why the bargaining benefit of an antitrust exemption for export combinations cannot apply to large as well as to small companies. Where two or three large U.S. firms compete in a foreign market, but are hindered by import quotas or domestic regulation, their genuine

commonality of interest might be promoted by an association for limited purposes.²¹⁴

The utility of combinations for purposes of bargaining turns, of course, on the type of industry at issue as well as on the level of regulation present in the market country. Where the U.S. exporter is faced with heavy regulation in his industry, or collateral but invidious regulation of some aspect of his product or service, he is much more likely to find the bargaining combination to be useful than where he is faced with an unencumbered free economy market.²¹⁵

The amount of regulation affecting the information industries is a matter of some dispute.²¹⁶ It is clear that many countries have legislation which, if enforced strictly, could exert an adverse influence on the flow of information and information goods.²¹⁷

To a great extent, the utility of an ETC or Webb association turns on its ability to respond specifically to the limited needs of those wishing to combine. The Webb association may be more suited to specialization than is the ETC; indeed, many of the Webb associations currently existing perform very specialized functions, whether limited or full-scale.

While the large multinational corporation may have little to gain from an unimaginative use of a Webb association in marketing its own products, should the need arise for a "package" including a product or service not offered by the multinational, a specialized Webb association may provide a better tailored response than does outright acquisition of a firm with the desired capabilities. This may be especially true where a foreign government is seeking to establish an integrated computer/communications system for its country.²¹⁸

Alternatively, the specialized Webb may be called for in a situation where the manufacturer's own distribution and service system would be ill-suited for immediate or even long-term adaption.²¹⁹ One example might be the sale of second-hand computers and computer equipment.²²⁰

The "product differentiation" objection, while frequently heard, commands less unanimous support than does the "big business" objection. In fact, some assert that high technology firms will derive as much²²¹ or more²²² benefit from the bill than the average firm.

The "product differentiation" objection fails to consider the potential of a trade association for specialized, context-specific functions. A trading company or association, if free from fear of antitrust enforcement, might put together "packages" of diverse but complementary products and services.²²³ In fact, according to one trade consultant, "a good trading company, which knows its technology well, can get the utmost mileage out of product differentiation."²²⁴ The ability of trade associations and companies to perform specific, specialized functions vitiates the "product differentiation" objection to the extent that opportunities for complementary goods and services call for joint planning and operation. The "big business" objection is vitiated as well, for in theory both large and small businesses can benefit from the opportunity to collude in bargaining with state agencies, or in bidding for government procurement contracts.

Government procurement constitutes an opportunity which particularly lends itself to the export trade association form of combination. Much of the market of any U.S. trading partner is likely to be its PTT monopoly, together with other government procurement of information goods or services. While great importance must be attached to the Tokyo Round MTN Government

Procurement Code,²²⁵ it will take some time before all U.S. trading partners have placed their procurement under the code. In addition, the threshold for procurement contracts is high: only contracts over \$195,000 are to be placed under the code. Finally, some countries are relaxing their PTT monopolies without placing them at the same time under the procurement code.

The result in all three cases is that open, regulated, reciprocal bidding is not guaranteed for much of the government procurement to be had in the next few years. Consequently, firms both large and small can benefit from the opportunity available under ETC's and associations to collude in their bidding for government contracts. The ETC or association could, by designating a single bidder, establish a better bargaining stance than could be obtained with each firm bidding against one another.²²⁶ Moreover, having a single U.S. bidder opens up the opportunity for stronger political support by the U.S. government for the award of contracts abroad.²²⁷ Alternatively, the predilection of many governments for package deals may be met by U.S. firms joining vertically to offer complementary services, irrespective of "product differentiation."

It is, therefore, not a foregone conclusion that the communications industries do not stand to benefit from the proposals to amend Webb because there is nothing to be gained from combination. It has not been established, however, that an actual need exists for joint activities; it is merely asserted that those representatives of the information industry contacted did not see a ready use for some of the theoretical usages of the antitrust immunity set out above. The fact may still be that there are very few circumstances abroad -- from the standpoint of the communications industries -- which call for a limited or fully functioning association of firms. The

issue of actual need to collude, act jointly, or combine, is here left open.

There is a distinction, however, between asking whether the information industries are impatiently waiting, needing to combine for export purposes, and asking whether information industries will, as a result of the publicity attendant upon and the Commerce promotion of the actual enactment of an amendment, realize some benefit from joint action. That is, the possibility that the Danforth Proposal does not respond specifically to a present, pressing, actual need on the part of American business is not a reason for eliminating it. If the effect of its enactment will be to promote trade, the bill should be passed. It may be that the Danforth Proposal is the entrepreneur's dream, and that export trade specialists unaffiliated with any producer of goods or services will set up, under the Webb exemption, an ETC or association to seek out foreign opportunities and to solicit members of the industry to combine in any way profitable.²²⁸

Nonetheless, the structure of the act is such that it will only promote trade if combination is useful; the issue left open above is ultimately to determine the success or infirmity of the bill.

Assuming, for the sake of argument, that combination will be useful to the communications industries in their pursuit of export trade, the Danforth Proposal constitutes a well drafted response to the uncertainty question. For as soon as need for combination exists, the evaluation of risks comes into play, and with it, the threat of antitrust enforcement.

While Justice claims that the uncertainty is unnecessary because the antitrust laws do not really proscribe the types of combinations designed solely for the purpose of export trade,²²⁹ this position is questionable, because perception substitutes for reality in the mind of the

planner of transactions. It is first questionable whether the state of antitrust law is really as full of bright line distinctions and consistencies as Justice portrays it to be. Second, the validity of Justice's position seems to be irrelevant from a practical point of view. The only way to relieve the uncertainty of the American business people is to convince them that they will not be sued. Justice is not the institution to convince them; sometimes heard is the saw: you don't ask the fox to guard the henhouse.²³⁰

Having provisionally decided that an antitrust exemption is needed to eliminate business uncertainty, on the whole the Danforth Proposal seems well engineered to achieve its goal. Much depends, however, on the administration of the bill by the agencies to which, in varying degrees, it is entrusted.

A major question centers on the strictness with which the "need" requirement for certification will be construed. While the ultimate granting of a certificate rests with the Secretary of Commerce, who is presumably disposed to construe the need provision liberally, he must consult with both Justice and the FTC, who have the bargaining weapon of standing to sue for revocation. If these enforcement agencies attempt to and succeed in construing the "need" provision strictly, the value of the certification procedure may be severely constricted. This is because of a refusal to certify export trade activities or methods on the grounds of lack of conflict with the antitrust laws (hence, no "need" for certification) is tantamount in many cases to the Business Review Procedure. While some have found these business review letters to be convenient and useful,²³¹ many impugn their trustworthiness and their usefulness for any other than a single, specific transaction.²³²

Another reservation pertains to the new sixth substantive standard of §2, which imposes a limitation on exports which are deemed to constitute transfer of technology, trademarks, or knowhow. No indication has been given of the level of enforcement intent. It is an area of particular concern to high technology exporters such as those in the information industries.²³³ While it seems unlikely that the standard will have much bite, it remains to be seen why Justice insisted on its inclusion in the substantive standards of the Danforth Proposal.

Finally, several questions pertain to Title I of the bill, perhaps due to the fact that the Export Trading Company Title has not been evaluated in this paper. However, ETC's have been included in the antitrust immunity of Title II. According to many, the most valuable portion of Title I is the bank investment provision. It is unclear, however, whether there is significant incentive for banks to invest in this type of export venture, where returns may not be forthcoming for some time.²³⁴

Notwithstanding all reservations about the Danforth Proposal, its inclusion of services within the antitrust exemption of the Webb-Pomerene Act could be a boon to current and future associations. Under the Webb Act as it now stands, service producers may not conjoin to export through a joint sales agency. Nor may they act in concert with exporters of manufactured goods. Under the Danforth Proposal, both forms of export participation would be allowed.²³⁵ The significance of this change in the law might well be enormous; the participation of services may be of great importance in the formation of bidding and/or construction consortia.²³⁶

As has been discussed above, many questions remain about the implications of the Danforth Proposal for the communications industries. It is

hoped that interested actors will delve deeply in order to determine at an early date the uses of, or infirmities in, the bill. The bill has a potential for significantly facilitating export trade, as well as for increasing the competitiveness of American business people abroad. These potential benefits should be examined objectively; neither inertia nor an aversion to "associations" should be allowed to prevail.

NOTES

¹ To Increase Exports By Encouraging Formation of Export Trading Companies and Trade Associations: Hearings on S. 864, S. 149, S. 1663, and S. 1744 before the Subcommittee on Intl. Finance of the Senate Committee on Banking, Housing, and Urban Affairs, 96th Cong., 1st Sess. 3 (Sept. 17, 1979) [hereinafter cited as Hearings] (statement of Luther H. Hodges, Jr., Undersecretary, Dept. of Commerce). In 1978, the year in which the proposed amendment was conceived, the United States trade deficit stood at greater than \$30 billion. Id. In absolute terms, U.S. exports comprise a larger share than any other single country. J. Granger, Technology and International Relations 48 (1979) [hereinafter cited as Granger]. Because U.S. GNP is so much larger than that of any other nation, however, the proportion of U.S. production of goods that goes to exports is smaller than that of other trading nations. Id. at 49. The 1975 percentages of production for export were: U.S., 10%; European Community (net of intratrade), 11%; Japan, 22%; and Canada, 32%. Id.

² Hearings, supra note 1, at 25-6 (statement of Fred C. Bergsten, Asst. Secy. for Intl. Affairs, Treasury Department).

³ According to Undersecretary Hodges, Dept. of Commerce:

The long term trade picture is not bright. The major reason for this is the huge increase in oil prices which will greatly increase the total cost of U.S. imports. This rise in the world market price of crude oil will also reduce the rate of economic growth abroad, which tends to reduce demands for U.S. exports. In addition, we anticipate that a post-1980 resurgence in U.S. economic growth and a falling off of the impact of the 1977 dollar depreciation will cause an increase in imports relative to exports. Furthermore,

worldwide economic expansion is now foreseen to be slower in the 1980's than it has been for the last decades, so that competition for sales in export markets will probably intensify.

Hearings, supra note 1, at 3.

⁴The Webb-Pomerene Act, 15 U.S.C. §§61-66 (1976). For citation to and discussion of proposals to amend Webb, see part 4 infra, p. 25.

⁵A. G. Oettinger, "Communications in the National Decision-Making Process" in M. Greenberger (ed.), Computers, Communications and the Public Interest (1971).

⁶For a discussion of the nature and growth of the communications industries, see O. Ganley & H. Ganley, International Implications of United States Communications and Information 11-25 (1981).

⁷For an analysis of the scope and contours of the communications industries, see J. McLaughlin & A. Birinyi, Mapping the Information Business, Harvard University Center for Information Policy, Public. No. P-80-5 (1980).

⁸See, e.g. Granger, supra note 1, at 53. For many years the huge absorptive capacity of the U.S. domestic economy coupled with the export capabilities of the U.S. agricultural sectors relieved the U.S. of any trade imbalance. Id. at 49, 51-2. In 1971, however, and for the first time since 1893, the U.S. suffered a trade deficit. Id. at 49. By 1977, the U.S. trade deficit exceeded \$30 billion. Id.

Granger attributes the deterioration of the U.S. trade position to two parallel dynamics: the escalating import cost of fuels (especially oil) and

raw materials; and the decreasing competitiveness of non-technology-intensive U.S.-manufactured goods in both domestic and foreign markets. Id. at 50-51.

⁹Department of Commerce, The Information Economy: Definition and Measurement (O.T. Spec. Public. 77-12 [1]) (1977).

¹⁰ See, e.g. Hacking, "The Increasing Extraterritorial Impact of U.S. Laws: A Cause for Concern Amongst Friends of America," in Perspectives on the Extraterritorial Application of U.S. Antitrust and Other Laws 59 (J. Griffin ed. 1979).

¹¹ See discussion infra at 11-14.

¹² See discussion infra at 11-14.

¹³ For a testimonial of the problems facing the small businessman abroad, see Statement of Milton M. Schulman for the U.S. Chamber of Commerce on the Export Trading Company Act of 1981 (S. 144), Hearings before the International Finance Subcommittee of the Senate Banking Committee, 97th Cong., 1st Sess. (March 5, 1981) [hereinafter cited as Schulman Statement].

¹⁴ For an indication of the variety of governmental responses to anti-competitive agreements, see OECD, Comparative Summary of Legislations on Restrictive Business Practices (1978).

¹⁵ General Agreement on Tariffs and Trade Multilateral Trade

Negotiations, reprinted in House Comm. on Ways and Means and Senate Comm. on Finance, 96th Cong., 1st Sess. Multilateral Trade Negotiations (Joint Comm. Print 1979) [hereinafter cited as Tokyo Round MTN]. For a discussion of the Tokyo Round, see 20 Harv. Intl. L. J. 695 (1979).

¹⁶ For an excellent example of the trade barriers an American industry must surmount in order to maintain export trade, see "Webb-Pomerene: The Great U.S. Ally in the Battle for World Trade," remarks by Jack Valenti, President of the Motion Picture Export Assn. of America, before the First Natl Conf. on Export Trading Companies, sponsored by the U.S. Chamber of Commerce, Mayflower Hotel, Wash. D.C. (Sept. 30, 1980) [hereinafter cited as Valenti Remarks].

¹⁷ Although in theory GATT Article XI eliminates such restrictions, General Agreement on Tariffs and Trade IV Basic Instruments and Selected Documents (1969) [hereinafter cited as GATT Documents], they continue to hamper international trade. See note, 20 Harv. Intl. L. J. 695, 697 n. 10 (1979). Valenti, supra note 16, at 4-6, cites: import or distribution quotas, screen quotas, import duties, taxes and charges, special taxes, release taxes, and so on. According to Valenti, "the list is imaginative and long and relentless." Id. at 6.

¹⁸ According to Valenti, supra note 16, at 3, the American film industry is hindered in its attempts to export "by an avalanche of non-tariff barriers that are both endless and ingenious."

¹⁹ One such "technical" barrier to trade in motion pictures is

"special dubbing and subtitling restrictions or requirements." Valenti Remarks, supra note 16, at 4. Title IV of the Trade Agreements Act of 1979, Pub. L. No. 96-39, 93 Stat. 144 (1979), which implements the MTN Code on Technical Barriers to Trade, Tokyo Round MTN, supra note 15, at 233-273, makes the Office of Special Representative for Trade Negotiations responsible for coordinating discussions and negotiations with foreign states for the purpose of establishing mutual arrangements with respect to standards related activities. Note, 20 Harv. Intl. L. J. 687, 693 (1979).

²⁰ The MTN Government Procurement Code, Tokyo Round MTN, supra note 16, at 129-232, aims at opening every government contract worth more than \$195,000 to foreign competition. See note, 20 Harv. Intl. L. J. 695, 699 (1979). While significant progress has been made under this code, as with the recent opening of the Nippon Telegraph and Telephone to U.S. bidders, Japan - U.S. Agreement on the Government Procurement Code, Dec. 19, 1980, ___ T.I.A.S. No. ___, reprinted in E. Asian Exec. Reps., Jan. 15, 1981, at 24 - 30, the difficulties in reversing closed procurement practices are great, see note, 22 Harv. Intl. L. J. 464 (1981), and the benefits for trade uncertain. Id. See also Business Week, Dec. 29, 1980, at 48.

²¹ House Comm. On Govt. Operations, International Information Flow: Forging a New Framework, H.R. Report No. 96-1535, 96th Cong., 2d Sess. 4-5 (1980) [hereinafter cited as House Report].

²² Walters and Monsen, State Owned Business Abroad: New Competitive Threat, Harv. Bus. Rev., Mar.-Apr. 1979, at 164.

²³ Subsidies by the U.S. Government of domestic production, as in the aerospace industry, to date have little significance for the communications industries. Moreover, while U.S. industry presumably has a countervailing duty remedy against subsidized competitors importing into the U.S., Trade Agreements Act of 1979, Pub. L. No. 96-39, 93 Stat. 144 Title I, subtitle A (1979), see note, 20 Harv. Intl. L. J. 687, 688-89 (1979), U.S. products and services abroad must compete on the terms presented to them.

²⁴ See Hearings, supra note 1, at 6 (statement of Luther H. Hodges, Jr., Undersecretary, Dept. of Commerce).

²⁵ National Association of Manufacturers, The International Implications of U.S. Antitrust Laws -- An Issue Analysis of Global Economic Reality 8 (1976) [hereinafter cited as NAM Study].

²⁶ Id.

²⁷ Id. at 8-9.

²⁸ Id. at 9.

²⁹ Id.

³⁰ Id.

³¹ Continuing with the example of non-tariff barriers facing the motion picture industry, the following legislation and regulation is cited by Valenti: prohibition or limitation of film distribution by foreign

interests; compulsory purchase and distribution of local films, and local printing requirements. Valenti Remarks, supra note 16, at 4-5.

³² See, e.g. Bigelow, Transborder Data Flow Barriers, 20 Jurimetrics 8 (1979).

³³ S. Nora & A. Minc., L'Informatisation de la Societe 9 (La Documentation Française, Paris, 1978) (English translation by D. Bell, The Computerization of Society, 1980).

³⁴ "Telecommunications — France Hangs Up," The Economist, December 12, 1981.

³⁵ Robinson, Strategic Issues Related to TBDF, in Transnational Data Regulation: The Realities 22-26 (1979).

³⁶ Canadian Banks and Banking Law Revision Act P 157(4) (1980).

³⁷ F. Hondius, Emerging Data Protection in Europe (1975). See also Stadlen, Survey of National Data Protection Legislation, 3 Computer Networks 174 (1979); Office of Telecommunications, U.S. Department of Commerce, Selected Foreign National Data Protection Laws and Bills (O.T. Spec. Public. 78-19) (Wilk ed. 1978); Kirby, Transborder Flows and the "Basic Rules" of Data Privacy, 16 Stan. J. Intl. L. 27 (1980), and legislation cited therein.

³⁸ For a discussion of the content and negative implications of Laws Regulating Personal Data, see note, Contracts for Transnational Information Services: Securing Equivalency of Personal Data Protection, 22 Harv. Intl. L. J. 157 (1981).

³⁹ Id. at 162-5.

⁴⁰ Id. at 163. But see id. at 164, n. 43.

⁴¹ Id. at 167.

⁴² House Report, supra note 21, at 3-4.

⁴³ See, e.g. Foreign Antitrust Judgements (Restriction of Enforcement) Act, No. 13, Austl. Acts (1979); and Business Records Protection Act, [1947] Ont. Stat. c. 10 (codified in Ont. Rev. Stat. C. 54 (1970)). For a discussion of the Australian Act, see note, 20 Harv. Intl. L. J. 663 (1979).

⁴⁴ Protection of Trading Interests Act, 1980, c. 11 (United Kingdom).

⁴⁵ No. 76-3940 (N.D. Ill. filed Oct. 15, 1976).

⁴⁶ For a discussion of the proceedings, see Sutherland, Rio Tinto-Zinc Corp. v. Westinghouse Electric Corporation: Extraterritorial Jurisdiction in Antitrust Matters, 5 Monash L. Rev. 76 (1978).

⁴⁷ Note, 21 Harv. Intl. L. J. 727, 731-2 (1980).

⁴⁸ Id.

⁴⁹ For citations to international fora pursuing the notion of international antitrust conventions, see 21 Harv. Intl. L. J. 727, 734 n. 46 (1980).

⁵⁰ U.N. Doc. A/RES/35/60 (1980).

⁵¹ For a discussion of the Guidelines, see 22 Harv. Intl. L. J. 405 (1981).

⁵² Tokyo Round MTN, supra note 15.

⁵³ GATT Documents, supra note 17.

⁵⁴ Department of Commerce and Office of Special Trade Representative, Report of the President on Export Promotion Functions and Potential Export Disincentives 9-21 (1980) [hereinafter cited as Export Disincentives Report].

⁵⁵ Telephone interview with Daniel Tarullo, Office of the Undersecretary for International Trade, Department of Commerce (Mar. 10, 1981).

⁵⁶ Antitrust and U.S. Export Competitiveness, remarks by Charles S. Stark, Chief, Foreign Commerce Section, Antitrust Division, before the Antitrust Law Section of the New York State Bar Assn., New York Hilton Hotel (Jan. 21, 1981) at 2 [hereinafter cited as Stark Remarks].

⁵⁷ "Antitrust Enforcement and the Antitrust Debate: Guarantors of the Free Enterprise System," remarks by John Shenefield before the Time, Inc., Conference on Antitrust (May 7, 1979) at 12.

⁵⁸ See, e.g. NAM Study, supra note 25, at 6.

⁵⁹ Id.

⁶⁰ Id.

⁶¹ Id. at 6-7. See also Hearings, supra note 1, at 77-82 (Statement of NAM).

⁶² NAM Study, supra note 25, at 6.

⁶³ Schulman, supra note 13, at 3.

⁶⁴ Id.

⁶⁵ Stark Remarks, supra note 56, at 4.

⁶⁶ 28 C.F.R. §50.6.

⁶⁷ Stark Remarks, supra note 65, at 4.

⁶⁸ Id. at 4-5.

⁶⁹ Id. at 5.

⁷⁰ Id.

⁷¹ Antitrust Division, U.S. Department of Justice, Antitrust Guide for International Operations (1977).

⁷² Antitrust Division, Antitrust Guide Concerning Research Joint Ventures (1980).

⁷³ Stark Remarks, supra note 65, at 3-4.

⁷⁴ Export Disincentives Report, supra note 54.

⁷⁵ Though cited in Stark Remarks, supra note 65, at 4, the Export Disincentives Report does not seem to contain the quoted language. In fact, the Report endorses the Title II antitrust exemption notion. Export Disincentives Report, supra note 74, at 9-24.

⁷⁶ NAM Study, supra note 25, at 6. See also Valenti Remarks, supra note 16, at 9.

⁷⁷ Valenti Remarks, supra note 16, at 9. See text accompanying note 125, infra.

⁷⁸ NAM Study, supra note 25, at 6.

⁷⁹ Id. at 6-7.

⁸⁰ Export Trading Companies, Trade Associations, and Trade Services, Report of the Senate Comm. on Banking, Housing and Urban Affairs to accompany S. 734, 97th Cong. - 1st Sess. 5 (1981) [hereinafter cited as Senate Banking Comm. Report].

⁸¹ 15 U.S.C. §§61-65 (1970).

⁸² 56 Cong. Rec. 13539 (1917).

⁸³ 53 Cong. Rec. at 13701 (1916). See also 53 Cong. Rec. at 13680 (1916); 55 Cong. Rec. at 7785 (1917); 55 Cong. Rec. at 2787 (1917). The sponsors of the bill responded to the perceived threat abroad by placing American businessmen on the same footing as their foreign competitors; it may be argued that almost any anticompetitive practice extant abroad in 1917 would have been exempted in the bill had the sponsors only known of it.

⁸⁴ 55 Cong. Rec. at 2785 (1917). Accord 55 Cong. Rec. at 2786 (1917).

⁸⁵ F.T.C. Release, Aug. 6, 1924, TNEC Monograph No. 6, 125.

⁸⁶ *United States v. U.S. Alkali Export Assn.*, 86 F. Supp. 59 (S.D.N.Y. 1949).

⁸⁷ 86 F. Supp. at 68.

⁸⁸ *United States v. Minnesota Mining and Mfg. Co.*, 92 F. Supp. 947 (D. Mass. 1950).

⁸⁹ 92 F. Supp. at 961.

⁹⁰ 92 F. Supp. at 963.

⁹¹ 92 F. Supp. at 965, citing Alkasso, supra note 86.

⁹² 92 F. Supp. at 965.

⁹³ Id.

⁹⁴ Staff Report to the Federal Trade Commission, Webb-Pomerene Associations: A 50-year Review 61 (1967) [hereinafter cited as 50 Year Review].

⁹⁵ Staff Analysis Submitted to the Federal Trade Commission, Webb-Pomerene Associations: Ten Years Later 15 (1978) [hereinafter cited 1978 FTC Study].

⁹⁶ 50 Year Review, *supra* note 94, at 23.

⁹⁷ National Commission for the Review of Antitrust Laws and Procedures, Report to the President and the Attorney General 298 (1979).

⁹⁸ Id.

⁹⁹ 1978 FTC Study, *supra* note 95, at 6.

¹⁰⁰ Id. at 7.

¹⁰¹ Id. at 8.

¹⁰² Id. at 8-11.

¹⁰³ This description of a fully functioning Webb association was taken from 50 Year Review, *supra* note 94, at 28-29.

¹⁰⁴ Id.

105 Id.

106 1978 FTC Study, supra note 95, at 9.

107 Id. at 10.

108 Id. at 10-12.

109 Id. at 14.

110 Id.

111 Id. at 13.

112 Id. at 13.

113 Id.

114 Id.

115 Id. at 13-14.

116 Valenti Remarks, supra note 16.

117 Id. at 2-3.

118 Id. at 4.

119 Id. at 3-4.

¹²⁰ Id. at 8-9.

¹²¹ Id. at 8.

¹²² Id. at 9.

¹²³ See discussion supra note 66, and accompanying text.

¹²⁴ Besides the need for quick and certain action, Valenti points to the potential for change in both the antitrust division management and in the business review letter. Valenti Remarks, supra note 16, at 9. In addition, the Antitrust Guidelines, supra note 71, do not touch upon many of the conditions faced by MPEAA. Id.

¹²⁵ Id. at 9.

¹²⁶ Id. at 6

¹²⁷ Id. at 6-7.

¹²⁸ See, e.g. 50 Year Review, at 34.

¹²⁹ Id. at 32-4. See also The Nature and Scope of Webb-Pomerene Associations, Testimony before the Subcomm. on Antitrust and Monopoly of the Senate Judiciary Comm. (June 20, 1967) (statement of Willard E. Mueller, Director, Bureau of Economics, FTC). For a review of other criticisms of Webb, see Presidents Report, supra note 97, at 298-300.

¹³⁰ See, e.g. S. 734 Report, infra note 136, at 5-6.

¹³¹ Id. at 7.

¹³² The content of S. 734 and its House equivalent, H.R. 1648, is set out infra, pp. 25-30.

¹³³ The content of H.R. 2326 is set out infra, p. 30.

¹³⁴ S. 734, 97th Cong., 1st Sess. §102(b) (1981) [hereinafter cited as S. 734].

¹³⁵ Id. at §103(5) (A)-(B); see also Senate Comm. on Banking, Housing, and Urban Affairs, Export Trading Companies, Trade Associations, and Trade Services, To Accompany S. 734, S. Rep. No. 97-27, 97th Cong. 1st Sess. 7-8 (1981) [hereinafter cited as S. 734 Report].

¹³⁶ S. 734 Report, supra note 135, at 10.

¹³⁷ Id. at 11.

¹³⁸ S. 734, at Sec. 106.

¹³⁹ See S. 734 Report, supra note 135, at 17.

¹⁴⁰ Id.

¹⁴¹ Id. at 9.

¹⁴² Specifically, the Danforth Proposal amends §§1-3, strikes §§4-5, and replaces them with §§4-12, and amends §6 by renumbering it §13.

¹⁴³ S. 734, at Sec. 202(a)(1).

¹⁴⁴ Id. at Sec. 202(a)(2).

¹⁴⁵ Id. at Sec. 202(a)(5).

¹⁴⁶ Id. at §2(a).

¹⁴⁷ Id. at §1(1).

¹⁴⁸ Id. at §1(2)(A),(C).

¹⁴⁹ Id. at §2(a)-(b).

¹⁵⁰ Id. at §2(a)(1)-(6). Under §5 of the bill, the Secretary of Commerce, the Attorney General, and the FTC are to establish guidelines for purposes of determining whether an association, its members, or its export trade activities meet the requirements of §2. S. 734 Report, at 31.

¹⁵¹ S. 734 at §4(a)(1)-(7); S. 734 Report at 29. In addition, under §4(a)(1)(g) the Secretary of Commerce may request additional information from the applicant.

¹⁵² S. 734 Report, at 31. This includes information provided by the applicant in its application, in its applications for amendments to the certificate, and in its annual reports. Besides the Secretary of Commerce, however, the Attorney General and the FTC have access to this information. S. 734 at §8(b).

¹⁵³ S. 734 at §4(b)(1); S. 734 Report at 29.

¹⁵⁴ S. 734 Report at 30.

¹⁵⁵ S. 734 at §4(b)(1); S. 734 Report at 29.

¹⁵⁶ S. 734 at §4(b)(1).

¹⁵⁷ See S. 734 Report at 30. §4(c) requires certified associations and ETC's to report any material changes in activities, methods, and operations. Id. Every certified association or ETC is to submit an annual report to the Secretary of Commerce. S. 734 at §6. §4(g) provides that final orders of the secretary under §4 shall be subject to judicial review pursuant to 5 U.S.C. c. 7.

¹⁵⁸ S. 734 at §4(b).

¹⁵⁹ See S. 734 Report at 31-2.

¹⁶⁰ S. 734 at §4(e)(1).

¹⁶¹ Id. at §4(e)(3).

¹⁶² S. 734 Report at 31.

¹⁶³ S. 734 at §7.

¹⁶⁴ Id. at §10.

¹⁶⁵ Id., §5 "Guidelines."

¹⁶⁶ H.R. 2326, 97th Cong., 1st Sess. §2 (1981) [hereinafter cited as H.R. 2326].

¹⁶⁷ Id. at §3.

¹⁶⁸ Telephone interview with Carl Hevener, Attorney, Bureau of Competition, FTC.

¹⁶⁹ Telephone interview with John Giles, Washington Counsel, Motion Picture Export Association of America.

¹⁷⁰ Hearings, supra note 1, at 136 (Statement of Ky P. Ewing, Deputy Assistant Attorney General, Antitrust Division, Department of Justice). Ewing cites in support of this position National Commission for the Review of Antitrust Laws and Procedures, Report to the President and Attorney General (1979) [hereinafter cited as President's Report].

¹⁷¹ See discussion supra, pp. 11-14.

¹⁷² Tarullo Interview, supra note 55.

¹⁷³ Hearings, supra note 1, at 58.

¹⁷⁴ Id.

¹⁷⁵ Id. at 138.

¹⁷⁶ Id. at 183 (Statement of Daniel Schwartz, Deputy Director, Bureau of Competition, Federal Trade Commission, accompanied by Carl Hevener, Attorney, Bureau of Competition), citing President's Report, supra note 170.

¹⁷⁷ Id. at 181.

¹⁷⁸ Id.

¹⁷⁹ Id. at 182.

¹⁸⁰ Id.

¹⁸¹ Id. at 183-84.

¹⁸² Id. at 190.

¹⁸³ Id.

¹⁸⁴ Statement of Malcolm Baldrige, Secretary of Commerce, before the Subcomm. On Monopolies and Commercial Law of the House Judiciary Comm., Mar. 26, 1981 [hereinafter cited as Baldrige Statement] See also Hearings, supra note 1, at 2 (statement of Luther H. Hodges, Jr., Undersecretary, Department of Commerce).

¹⁸⁵ Id. at 1-4.

¹⁸⁶ Id. at 4-5.

¹⁸⁷ Id. at 7.

188 Id. at 8.

189 Id.

190 Id.

191 Id. at 9.

192 Baldrige Statement, supra note 184, at 7.

193 Id.

194 Telephone interview with Norman Alterman, General Counsel for the Motion Picture Export Assn. of America (MPEAA) (Mar. 23, 1981); and Giles interview, supra note 169.

195 Alterman interview, supra note 194.

196 Alterman interview, supra note 194, and Giles interview, supra note 169.

197 S. 734 Report, at 31.

198 See provisions of H.R. 2326, supra at 30.

199 See, e.g. Valenti Remarks, supra note 16, at 9-10.

²⁰⁰ Telephone interview with Howard Weisberg, Director of International Policy, U. S. Chamber of Commerce.

²⁰¹ See, e.g. NAM Study, supra note 25, at 7-8; Hearings, supra note 1, at 72.

²⁰² See, e.g., Hearings, supra note 1, at 46 (statement of Neil Boyer and Raymond Waldman, of the U. S. Chamber of Commerce).

²⁰³ See, e.g. Testimony of Robert L. McNeil, Executive Vice Chairman, ECAT, before the Subcomm. on International Finance of the Senate Committee on Banking, Housing, and Urban Affairs, Mar. 17, 1980 [hereinafter cited as McNeil Statement]; testimony of Charles Levy, Vice President of ECAT, before the Subcomm. on International Economic Policy and Trade of House Comm. on Foreign Affairs, June 4, 1980.

²⁰⁴ See, e.g. President's Report, supra note 170, at 304; U.S. Commerce Department, U. S. Services Industries in World Markets -- Current Problems and Future Policy Development (1976).

²⁰⁵ Hearings, supra note 1, at 52.

²⁰⁶ Hearings, supra note 1, at 54.

²⁰⁷ See, e.g. McNeil Statement, supra note 203, at 2.

²⁰⁸ Statement of the National Association of Manufacturers before the International Finance Subcommittee of the Senate Committee on Banking,

Housing, and Urban Affairs, Mar. 18, 1980, at 8.

²⁰⁹ Telephone interview with Lloyd Kaufman, of Computer Equipment and Business Machines Assn. (CEBMA) (Apr. 14, 1981); telephone interview with Tom Christianson, Manager, Intl. Trade Relations, Hewlett-Packard (Apr. 13, 1981). Perhaps more precisely, some representatives of large corporations perceive the principal beneficiaries of the Danforth Proposal to be small businesses and banks. See, e.g. Telephone interview with Blaine Davis, Director of Planning, AT&T Intl. (March, 1981).

²¹⁰ Kaufman interview, Christianson interview, supra note 209. Telephone interview with Paul Freedenberg, Subcomm. on Intl. Finance of the Senate Banking Comm. (March, 1981).

²¹¹ Telephone interview with Jim Whittaker, of American Electronics Assn. (Apr. 13, 1981); Christianson interview, supra note 209.

²¹² This "marketing" problem, really a corollary of both the big business and the product differentiation reservations, was raised by Tom Christianson, Manager, Intl. Trade Relations, Hewlett-Packard, in a telephone interview of June 18, 1981.

²¹³ According to the MPEAA, this has been the greatest value of its Webb Assn. See supra note 121, and accompanying text. Others point out that, on the whole, the uniqueness of U. S. technology is a thing of the past. Consequently, for most firms, withholding the product leads only to a loss of markets, including follow-on. Christianson interview, supra note 212.

²¹⁴ Alterman interview, supra note 194.

²¹⁵ Telephone interview with Thomas Houser, former Director of the Office of Telecommunications Policy, currently with the National Assn. of Manufacturers, accompanied by Quentin Regal, Asst., General Counsel, NAM.

²¹⁶ While some believe trade barriers will create an "information armageddon," see, e.g. Wash. Post, Jan. 15, 1978 (column of John M. Eger, former director, Office of Telecommunications Policy), others downplay greatly the actual adverse effect foreign regulation has on TBDF. See, e.g. Telephone interview with Michael Rubin, National Technical Information Service (Apr. 14, 1981).

²¹⁷ See quote from House Report, supra, pp. 6-7.

²¹⁸ Telephone interview with Jordan Baruch, former Asst. Secretary of Science and Technology, Department of Commerce, currently with Jordan Baruch Consultants, Wash. D.C. (Apr. 14, 1981).

²¹⁹ Telephone interview with C. L. Haslem, former General Counsel for the Department of Commerce, currently General Counsel for the National Computer Graphics Association (Apr. 14, 1981).

²²⁰ Id.

²²¹ Houser interview, supra note 215.

²²² Freedenberg interview, supra note 210.

223 Baruch interview, supra note 218.

224 Id.

225 Tokyo Round MTN, supra note 15.

226 Telephone interview with C. L. Haslem, supra note 219.

227 Id.

228 Baruch interview, supra note 218.

229 See discussion pp. 11-14, supra.

230 See, e.g. Alterman interview, supra note 194.

231 Rubin interview, supra note 216.

232 See Valenti Remarks, supra note 16, at 9, and accompanying text. That business review letters are ineffective with respect to third parties is cited as a crucial defect. See, e.g. Telephone interview with Norman Alterman, General Counsel for the Motion Picture Export Assn. of America (June 18, 1981).

233 Telephone interview with Howard Lewis III, Asst. Vice President, International Economic Affairs, National Association of Manufacturers.

234 Christianson interview, supra note 209.

235 Alterman interview, supra note 194.

236 Haslem interview, supra note 219.