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THE ANTITRUST COMMISSION AND THE WEBB-POMERENE ACT: A CRITICAL ASSESSMENT

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The primary objective of the National Commission for the Review of Antitrust Laws and Procedures (NCRALP or Commission) was to study and make recommendations regarding the procedural and substantive rules of law to expedite and improve complex antitrust litigation.¹ The Commission's secondary task was to determine the need for retaining the various exemptions and immunities from the antitrust laws which inhibit free competition.² Of course, in light of NCRALP's extremely brief six month time limitation for making findings and recommendations³ and equally limited resources, the Commission was unable to evaluate each of the many existing exemptions and immunities.⁴ However, the Commission's review list included an analysis of the Export Trade Act of 1918,⁵ more commonly known as the Webb-Pomerene Act, along with such major antitrust exemptions as insurance,⁶ agriculture,⁷ and ocean shipping.⁸ The relatively obscure, and rarely judicially tested, Webb-Pomerene Act grants qualifying export associations a limited immunity from antitrust prosecution.⁹ That the Webb-Pomerene Act warranted NCRALP review was less a statement on the actual impact of the Act on competition, consumers or foreign trade, as a comment on the controversy it has generated from Congress,¹⁰ the government's antitrust enforcers,¹¹ and the academic¹² and

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¹ Exec. Order No. 12022, § 2(a)(1), 3 C.F.R. 155 (1977).

² *Id.* at § 2(a)(2).

³ *Id.* at § 2(b).

⁴ Those exemptions not examined by the Commission include: 15 U.S.C. § 17 (1976), 29 U.S.C. §§ 52, 101-13 (1970) (labor); 46 U.S.C. § 885 (1976) (marine insurance); 15 U.S.C. § 636 (1976) (small business joint ventures); and 42 U.S.C. § 6272 (1976) (defense preparedness).

⁵ 15 U.S.C. §§ 61-66 (1976).

⁶ 15 U.S.C. §§ 1011-15 (1976).

⁷ 7 U.S.C. §§ 291, 292, 601-24 (1976).

⁸ 46 U.S.C. § 814 (1976).

⁹ See text accompanying notes 35-45 *infra*.

¹⁰ On numerous occasions there have been attempts to repeal or expand the Act. See, e.g., H.R. 4493, 78th Cong., 2nd Sess., 90 CONG. REC. 3157 (1944) (urging repeal of the Act); S. 1483, 93d Cong., 1st Sess., 119 CONG. REC. 11184, 11197-99 (1973) and S. 1774, 93d Cong., 1st Sess., 119 CONG. REC. 14891, 14920-23 (1973) (defining "export trade" to include services and other major changes to strengthen the Act).

¹¹ See 875 ANTITRUST & TRADE REG. REP. (BNA) AA-3 (supporting repeal of the Webb-Pomerene Act); Letter from Miles W. Kirkpatrick, Chairman, Fed. Trade Comm., to O. V. Stovall, Director, Int'l Div., General Accounting Office (Sept. 19, 1972) (supporting retention of the Webb-Pomerene Act).

¹² See, e.g., Allison, *Antitrust and Foreign Trade: Exemption for Export Associations*, 11 HOUS. L. REV. 1124 (1974); Chapman, *Exports and Antitrust: Must Competition Stop at the Water's Edge?*, 6 VAND. J. TRANS. L. 399 (1973); Diamond, *The Webb-Pomerene Act and*

business¹³ communities.

For proponents of the Act, the Commission's decision to review and make recommendations on the export exemptions must have been greeted with somewhat modified rapture, for the prospect of receiving an impartial and adequate Commission examination was particularly dim.¹⁴ Prior to any analysis by the Commission and prior to the receipt of comments from interested persons: (1) it was clear that the Webb-Pomerene Act was accorded the lowest priority in terms of resource commitment;¹⁵ (2) there was no mandate to examine present day conditions in foreign trade, and therefore an examination of the multiple cooperative actions aside from export cartels was absent;¹⁶ (3) the Act was to be given an allegedly "independent" review by antitrust experts rather than by those international trade experts who are knowledgeable and concerned about this country's deteriorating trade account; and (4) the Chairman of the Commission had been an outspoken critic of the Act and had urged its repeal.¹⁷

Midway through the Commission's review, however, a glimmer of hope appeared for supporters of the Act. In late September of 1978, President Carter issued a major statement on export trade policy.¹⁸ The primary thrust of this statement involved creating a favorable environment to encourage American businesses to increase export trade and thereby contribute to the reduction of this country's trade deficit.¹⁹ Perhaps sensing the

Export Trade Associations, 44 COLUM. L. REV. 805 (1947); Note, *Appraisal of the Webb-Pomerene Act*, 44 N.Y.U. L. REV. 341 (1969).

¹³ See, e.g., NATIONAL ASSN. OF MFRS. (NAM), *THE INTERNATIONAL IMPLICATION OF U.S. ANTITRUST LAWS: AN ISSUE ANALYSIS OF GLOBAL ECONOMIC REALITY* (1976); Prepared Statement of the NAM before the National Comm. for the Review of Antitrust Laws and Proc. (NCRALP) (Nov. 17, 1978) [hereinafter cited as NAM Statement].

¹⁴ Of the 22 members appointed to the Commission, only Senator Jacob K. Javits was versed in and concerned with the application of this country's antitrust laws to foreign commerce. As noted earlier, the Chairman of the Commission, Mr. John Shenefield, is an outspoken critic of the Act. See note 13 *supra*.

¹⁵ An indication of the low priority accorded the Webb-Pomerene Act by NCRALP is found in the Commission's Preliminary Organization Chart, which categorized the Act under the heading "Other Antitrust Exemptions" and listed no staff person assigned to the review. See NCRALP, *COMMISSION BRIEFING BOOK* (June 13, 1978).

¹⁶ See NATIONAL COMMISSION FOR THE REVIEW OF ANTITRUST LAWS AND PROCEDURES, *REPORT TO THE PRESIDENT AND THE ATTORNEY GENERAL* (Jan. 22, 1979) [hereinafter cited as COMMISSION REPORT], reprinted in 897 ANTITRUST & TRADE REG. REP. (BNA) (Special Supp.). The Commission Report sets forth several basic questions which NCRALP adopted to determine whether a particular exemption or immunity should be retained. *Id.* at 188, 897 ANTITRUST & TRADE REG. REP. (BNA) (Special Supp.) at 55. Conspicuously missing is the issue of whether present day economic conditions warrant the exemption. The lack of any analysis relevant to this question severely undermines the usefulness of the Commission's discussion of the Webb-Pomerene Act.

¹⁷ See note 11 *supra*.

¹⁸ Statement by President Carter at White House Briefing, (Sept. 26, 1978), reported in *DAILY REPORT FOR EXECUTIVES* (BNA) (Sept. 26, 1978) at B-2.

¹⁹ The President stated:

There are instances in which joint ventures and other kinds of cooperative arrangements between American firms are necessary or desirable to improve our export

direction that NCRALP eventually would take, and undoubtedly influenced by Senator Javits's²⁰ and the Department of Commerce's²¹ urgings, President Carter appointed the Business Advisory Panel in late October, 1978.²² The Panel was composed primarily of businessmen and was requested to make recommendations on the export exemption to NCRALP.²³ The Panel met twice and submitted a summary of conclusions to the Commission in early December, 1978. On January 18, 1979, NCRALP issued the final Report to the President and the Attorney General.

A reading of the Commission's Report clearly indicates that, in the absence of the Business Advisory Panel's affirmative findings, NCRALP would have recommended repeal of the Webb-Pomerene Act. Working in the shadow of the Panel's recommendations, as well as the President's export promotion statement, however, the Commission essentially was forced into making significantly diluted recommendations. The Commission recommended that Congress initially conduct a more careful review of the export exemption.²⁴ If Congress subsequently determined to retain the Act, the Commission recommended that the exemption be conditioned on a showing of need by the Webb Associations.²⁵ In addition, the Commission recommended that Congress expand the exclusion to cover service industries.²⁶ The Commission intended the report's accompanying narrative discussion to form the basis for these recommendations. However, the report's overall tenor, unsupported conclusions, and self-serving references extracted from the information received by the Commission resulted in a less than objective view of the Webb-Pomerene Act. Although never refer-

performance. The Justice Department has advised that most such foreign joint ventures would not violate our antitrust laws, and in many instances would actually strengthen competition.

Id. at B-3.

²⁰ See Letter from Senator Jacob K. Javits to Mr. John Shenefield (Aug. 25, 1978).

²¹ Indications are that the Commerce Department exerted considerable pressure on the White House to establish a panel for the following three reasons: (1) the Antitrust Commission's evident bias against the Act would lead to a recommendation for its repeal, (2) it was disappointed that the President's export message failed to address the need for the export exemption and (3) the Chairman of the Antitrust Commission, Mr. Shenefield, believed that the Commission should devote little time to considering the exemption. See 886 ANTITRUST & TRADE REG. REP. (BNA) A-13 (Oct. 20, 1978).

²² See Press Release of NCRALP, (Oct. 27, 1978).

²³ *Id.* See also 886 ANTITRUST & TRADE REG. REP. (BNA) A-13 (1978).

²⁴ COMMISSION REPORT, *supra* note 16, at 295, 897 ANTITRUST & TRADE REG. REP. (BNA) (Special Supp.) at 85. The Report contained the following recommendations concerning the Webb-Pomerene Act:

The Webb-Pomerene exemption should be reexamined by the Congress. If it is retained, it should be amended in at least two ways:

1. The antitrust immunity for export associations should be made contingent on a showing of particularized need.
2. Services should be included within the Act's coverage.

Id.

²⁵ *Id.*

²⁶ *Id.*

enced, the Commission's discussion clearly was based predominantly upon a staff options paper, which was submitted prior to the vast majority of material from interested persons.

The Commission Report began by noting the origins of the Webb-Pomerene Act. In 1914, Congress directed the newly formed Federal Trade Commission (FTC) to study the conditions affecting U.S. export trade.²⁷ A year later the FTC published an extensive two-volume report which explained that the low level of American export trade was due primarily to the difficulties U.S. firms were experiencing in their efforts to compete against foreign businesses.²⁸ The FTC report deplored the presence of large cartelized foreign buyers and sellers and the existence of "more effective [foreign] organizations" which placed American exporting firms at a significant competitive disadvantage.²⁹ The FTC's study further noted that the threat of Sherman Act prosecutions deterred exporters from carrying out collective efforts to challenge such cartels and large commercial entities.³⁰ As a result, the FTC suggested that Congress pass legislation to remove this impediment. In response, Congress enacted the Webb-Pomerene Act,³¹ which provides a limited exception from both the Sherman and Clayton Acts to qualified joint ventures in export trade, designated Webb-Pomerene Associations (Webb Associations).

The fundamental purpose of the Webb-Pomerene Act was to permit American exporters, particularly smaller firms, to develop "countervailing power" to compete on an equal basis in international markets. Congress recognized that providing a limited antitrust exemption would enhance the competitive positions of American exporters and accomplish three objectives. First, the exemption would stimulate export trade and thereby reduce the country's significant trade deficit.³² Second, the Act would allow exporters to achieve greater efficiencies through joint marketing and would offset some of the costs incurred by individual exporters entering foreign trade.³³ Accordingly, American exporters could compete more effectively against integrated foreign cartels and large enterprises. Third, Congress intended to permit certain exporters to increase their prices abroad, thereby gaining profits which could not be attained without the exemption.³⁴ Therefore, to provide some limited certainty regarding the applica-

²⁷ See COMMISSION REPORT, *supra* note 16, at 295, 897 ANTITRUST & TRADE REG. REP. (BNA) (Special Supp.) at 85-86 (citing the Federal Trade Commission Act, § 6(h), 15 U.S.C. § 46(h) (1976)).

²⁸ 1 FEDERAL TRADE COMMISSION, REPORT ON COOPERATION IN AMERICAN EXPORT TRADE 370-81 (1916) [hereinafter cited as FTC EXPORT REPORT]; see COMMISSION REPORT, *supra* note 16, at 295, 897 ANTITRUST & TRADE REG. REP. (BNA) (Special Supp.) at 85-86.

²⁹ See COMMISSION REPORT, *supra* note 16, at 295, 897 ANTITRUST & TRADE REG. REP. (BNA) (Special Supp.) at 86.

³⁰ See *id.*; see also Simmons, *Webb-Pomerene Act and Antitrust Policy*, 1963 Wis. L. Rev. 426.

³¹ 15 U.S.C. §§ 61-66 (1976).

³² See 1 FTC EXPORT REPORT, *supra* note 28, at 4, 199-200 (1916).

³³ See *id.*; see also 53 CONG. REC. 13537 (1916) (remarks of Congressman Webb).

³⁴ See 55 CONG. REC. 2787 (1917); see also *United States v. Concentrated Phosphate*

tion of the antitrust laws to such export associations, Congress enacted the Webb-Pomerene exclusion.³⁵

To qualify for the Webb-Pomerene antitrust exemption, an association must be formed for the sole purpose of export trade and must be actively engaged solely in such trade.³⁶ The Act restrictively defines "export trade" to include only "trade or commerce in goods, wares or merchandise exported, or in the course of being exported from the United States. . . ."³⁷ Therefore, the Webb-Pomerene exemption does not extend to exports of services.³⁸ In addition, the Act sets forth three situations in which export associations are not protected by the exemption. First, if an association actually restrains trade within the United States or any of its territories, the group may be subject to antitrust action.³⁹ Second, the terms of the exemption prohibit conduct which is "in restraint of the export trade of any domestic competitor" of an association.⁴⁰ Finally, an association may not engage in any action which artificially affects prices within the United States "of commodities of the class exported by such association, or which substantially lessens competition within the United States or otherwise restrains trade therein."⁴¹

The Webb-Pomerene Act requires every association engaged solely in export trade to file a statement within 30 days of its creation as well as annual statements detailing the association's conduct and business during the preceding year.⁴² Administration of the Act is shared by the FTC and the Justice Department, with primary responsibility in the former. Although no mention is made in the Commission's Report, under section 5 the FTC can conduct investigations and make recommendations if misconduct is found.⁴³ Accordingly, if the FTC suspects that an association is violating the Act's provisions, it can conduct an investigation "for the re-adjustment of [the association's] business, in order that it may thereafter

Export Ass'n, 393 U.S. 199, 206 (1968).

³⁵ See 1 FTC EXPORT REPORT, *supra* note 28, at 198-200 (1916). One sponsor of the export exemption stated: "[F]or many years the manufacturers of this country have felt the need of passage of this bill in order to clarify their rights in the foreign export trade." 55 CONG. REC. 2785 (1917) (remarks of Senator Pomerene).

³⁶ 15 U.S.C. § 62 (1976).

³⁷ 15 U.S.C. § 61 (1976).

³⁸ Observers frequently argue that, if the Act is retained, Congress should expand the exemption to include services. See COMMISSION REPORT, *supra* note 16, at 301, 897 ANTITRUST & TRADE REG. REP. (BNA) (Special Supp.) at 88; Letter from Frank A. Weil, Ass't. Sec. for Indus. and Trade, Dept. of Commerce, to the NCRALP (Nov. 20, 1978); Prepared Statement of the NAM Before the NCRALP (Nov. 17, 1978); Testimony of Luther H. Hodges, Jr., Under Sec. of Commerce before the Subcommittee on Int'l Finance of the Senate Committee on Banking, Housing and Urban Affairs (Sept. 17, 1979) [hereinafter cited as Hodges Testimony].

³⁹ 15 U.S.C. § 62 (1976).

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² 15 U.S.C. § 65 (1976).

⁴³ *Id.*

maintain its organization and management and conduct its business in accordance with law."⁴⁴ Since 1945, when the Justice Department was given judicial approval to carry out its investigations without waiting for an FTC "readjustment proceeding," the section 5 procedure rarely has been followed.⁴⁵

As recognized in the Commission Report, only two major court decisions interpret the scope of the Webb-Pomerene Act. In *United States v. United States Alkali Export Association*,⁴⁶ the first judicial interpretation of the Act, the district court held that a Webb Association violated the Sherman Act by: (1) participating in foreign cartels;⁴⁷ (2) engaging in practices which result in "the use of monopoly power to extinguish the competition of independent domestic competitors engaged in the export trade;"⁴⁸ and (3) carrying out practices which stabilize domestic prices by removing surplus products from the domestic market.⁴⁹ In the second major decision, *United States v. Minnesota Mining & Manufacturing Co.*,⁵⁰ the court held that an export association could not establish or operate jointly-owned production facilities abroad.⁵¹ Significantly, the court affirmed the legality of a Webb Association, representing certain members of a highly oligopolistic industry, refusing to handle the products of the remaining competing American firms.⁵²

As mentioned in the NCRALP Report, the *Minnesota Mining* decision stands on its own for providing illustrative examples of conduct that Webb Associations may lawfully carry out. Thus, business firms can

- (1) create an association by a majority of American manufacturers;
- (2) use the association as the members' exclusive foreign outlet;
- (3) agree that goods will be purchased only from member producers;
- (4) fix resale prices for the association's foreign distributors; and
- (5) fix prices and establish quotas for members.⁵³

In a background discussion of the Webb-Pomerene Act, the Commission Report cites the "Silver Letter," a controversial 1924 FTC advisory opinion.⁵⁴ The opinion represents the first administrative ruling by the

⁴⁴ *Id.*

⁴⁵ See *United States v. United States Alkali Export Ass'n*, 58 F. Supp. 785, 787 (S.D.N.Y. 1944), *aff'd*, 325 U.S. 196 (1945). According to counsel representing several Webb Associations, no "readjustment hearings have been conducted by the FTC in the last thirty years." See Prepared Statement of Marcus Hollabaugh Before the NCRALP, at 35 (Nov. 29, 1978).

⁴⁶ 58 F. Supp. at 787.

⁴⁷ *Id.* at 786.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ 92 F. Supp. 947 (D. Mass. 1950).

⁵¹ *Id.* at 963.

⁵² *Id.* at 965.

⁵³ *Id.*

⁵⁴ Letter from Vernon W. Van Fleet, Chairman, Federal Trade Comm'n, to C. F. Kelly,

FTC and was issued in response to a request by several American silver producers contemplating the formation of an export association. The FTC concluded that the exemption permitted associations to engage in the sole activities of fixing export prices or allocating export markets.⁵⁵ The Commission ascribed great importance to this advisory opinion and summarily concluded that:

*Most associations formed after the "Silver letter" have limited their commercial activities to fixing prices rather than performing selling and exporting functions which are now usually handled by the individual members. Thus, the common feature of export associations today is not their performance or efficiency or cost-reducing functions, but rather the pursuit of traditional cartel-related activities. (emphasis added)*⁵⁶

This bold and damaging conclusion appears almost verbatim in the staff options paper prepared for NCRALP. This options paper, in turn, referenced two dated law review articles as support for the finding.⁵⁷

The Commission's blind reliance on such findings is irresponsible. In fact, the more recent empirical evidence regarding the functions of Webb Associations totally contradicts the information reported by the Commission. The most recent FTC staff analysis of Webb Associations stated: "It has been contended that setting prices and dividing business are the *exclusive* reasons that export trade associations exist. That does not appear to be the fact. While many associations do engage in one or other of these functions, they are often incidental to attainment of other commercial objectives."⁵⁸ The FTC analysis explained that only 12 of the 30 associations help "divide business among their members," and that the same number of associations determine the prices of the member firms to some extent.⁵⁹ The FTC study found only one association primarily involved in pricing, and these prices were recommended rather than binding on the members.⁶⁰ In addition, this sole association generally reported pricing variances of the member firms.

According to the FTC analysis, the Webb Associations perform a host of commercial functions for their members. These activities include: (1)

Silver Producers' Committee (July 31, 1924), reprinted in FEDERAL TRADE COMMISSION, STAFF REPORT, WEBB-POMERENE ASSOCIATION: A 50-YEAR REVIEW (1967) (Appendix D) [hereinafter cited as FTC 50-YEAR REVIEW].

⁵⁵ See COMMISSION REPORT, *supra* note 16, at 296, 897 ANTITRUST & TRADE REG. REP. (BNA) (Special Supp.) at 86.

⁵⁶ *Id.*

⁵⁷ See Allison, *Antitrust and Foreign Trade: Exemption for Export Associations*, 11 Hous. L. Rev. 1124 (1974); Larson, *An Economic Analysis of the Webb-Pomerene Act*, 13 J. Law & Econ. 461 (1970) [hereinafter cited as Larson].

⁵⁸ FEDERAL TRADE COMMISSION, SUMMARY AND ANALYSIS OF SURVEY OF WEBB-POMERENE ASSOCIATIONS 8 (Nov. 9, 1978) [hereinafter cited as 1978 WEBB ACT SURVEY].

⁵⁹ *Id.*

⁶⁰ *Id.* at 9.

the establishment of sales agencies from offices in the United States; (2) the establishment of sales agencies from foreign sales offices or through foreign sales agents; (3) market research and analysis of export markets; (4) sales to the United States for delivery outside this country; (5) credit information and collection facilities; and (6) a variety of other services that can best achieve efficiencies through joint action.⁶¹ The Assistant Secretary for Industry and Trade of the Commerce Department also reinforced the FTC's conclusions. The Assistant Secretary informed NCRALP that the Commerce Department was unaware of any association whose sole function involved fixing a common export price for members.⁶²

The Commission's assumptions regarding the conduct of Webb Associations lead to the implicit conclusion that such associations are indeed cartels in the purest sense of the term. Even though Congress envisioned that Webb Associations might act as export cartels in very unusual circumstances,⁶³ the evidence indicates that this result has not occurred in the vast majority of cases. According to one senior government antitrust policymaker, Webb Associations have not been the effective "cartelizers" that the NCRALP Report would have one believe. The Justice Department's Director of Domestic and International Planning recently stated that an "all-inclusive condemnation of [Webb Associations] ignores the fact that many export associations lack market power and exist merely to achieve minor economies of scale in selling abroad."⁶⁴ In addition, this policymaker concluded that "since there are very few products in which the U.S. alone accounts for a dominant share of the world's export, most of the [Webb] associations do not have the power to achieve prices higher than the international level."⁶⁵

Finally, the staff options paper which provided the basis for the Commission's conclusion⁶⁶ in turn primarily relied on a 1970 analysis of the Webb-Pomerene Act by Professor Larson.⁶⁷ Distressingly, Professor Larson made no attempt to analyze the effects Webb Associations have had on prices in international markets. Such empirical data, of course, could determine whether the associations in fact have succeeded as so-called cartels. Preliminarily, in view of the FTC finding and supporting evidence,

⁶¹ *Id.* at 12.

⁶² Letter and attached responses from Frank A. Weil, Asst. Sec. for Dom. & Int'l Bus., Dept. of Commerce, to the NCRALP (Nov. 20, 1978) [hereinafter cited as Weil Responses].

⁶³ See *United States v. Minnesota Mining & Mfg. Co.*, 92 F. Supp. 947, 963-65 (D. Mass. 1950); text accompanying notes 32-41 *supra*.

⁶⁴ Address by Joel Davidow, Center for Interdisciplinary Research, Bielefeld, West German (July 16, 1979) [hereinafter cited as Davidow Address].

⁶⁵ Remarks of Joel Davidow, *reprinted in* Legal Times of Washington, June 26, 1978, at 21.

⁶⁶ NCRALP, STAFF REPORT ON EXPORT ASSOCIATIONS (Oct. 2, 1978) [hereinafter cited as NCRALP STAFF REPORT].

⁶⁷ Larson, *supra* note 57. The NCRALP staff accepted Professor Larson's sweeping conclusions as factual. For example, Larson concludes: "The Act is not used to combat either foreign selling or buying cartels. It has never been so used." *Id.* at 479.

such a conclusion is tenuous. Nevertheless, several economists recently made an attempt to provide an analysis of the Act's effects.⁶⁸ These economists found that very few products of Webb Associations "are likely to be successfully cartelized" and that there were few indications that members receive substantially increased prices for their products.⁶⁹ The authors of this study concluded, therefore, that Webb Associations have been unsuccessful "cartelizers." Accordingly, the analysis concludes by recommending repeal of the Act because participating firms were not receiving adequate profit returns to justify the exemption.⁷⁰ Proponents of the export exemption, naturally, would argue the converse: for in passing the Act, Congress did not envision that American export cartels would mushroom across the international trade landscape. Rather, the legislators primarily intended Webb Association members to obtain cost savings through joint marketing and information exchange efforts.⁷¹ Nevertheless, critics of the Webb-Pomerene Act incorrectly believe that the "success" of the export exemption is measured by the ability of the associations to cartelize American export trade.⁷² The relatively small percentage of Webb Association exports as compared to the total of American exports is not due primarily to the fact that only a handful (if any) of American products are susceptible to successful monopoly activity in export trade. Rather, the failure of this government to promote Webb Associations as successful vehicles for achieving economies of scale through cooperative export arrangements is responsible for the underutilization of the exemption.

The NCRALP Report discussed current employment of the exemption by initially verifying the virtually undisputed view that the Act has failed to meet Congress's expectations for promoting export trade.⁷³ According to the most recent FTC statistics, Webb Association exports accounted for only 1.5 percent of total American exports, nearly one-third less than in 1962.⁷⁴ An observation that the exemption has not met congressional expectations, however, is certainly a different conclusion than a statement on the usefulness of the exemption. Current estimates show that Webb Associations account for approximately \$1.7 or \$1.9 billion per year of

⁶⁸ Amacher, Sweeney & Tollison, *A Note On The Webb-Pomerene Law And The Webb-Cartels*, 23 ANTITRUST BULL. 371 (1978).

⁶⁹ *Id.* at 372, 377.

⁷⁰ *Id.* at 377.

⁷¹ See text accompanying notes 32-35 *supra*.

⁷² See Statement of C. Fred Bergsten, Asst. of the Treasury for Int'l Affairs, before the Subcom. on Int'l Finance of the Senate Comm. on Banking, Housing and Urban Affairs (Sept. 17, 1979). Assistant Secretary Bergsten observed that "Webb Associations have generally been successful only in two areas: motion picture and television film exports, and exports of standardized raw materials." *Id.*

⁷³ COMMISSION REPORT, *supra* note 16, at 298, 897 ANTITRUST & TRADE REG. REP. (BNA) (Special Supp.) at 86-87.

⁷⁴ 1978 WEBB ACT SURVEY, *supra* note 58, at 15; see COMMISSION REPORT, *supra* note 16, at 299, 897 ANTITRUST & TRADE REG. REP. (BNA) (Special Supp.) at 87.

American exports.⁷⁵ At a time when the United States trade deficit exceeds \$25 billion per year, any contribution must be considered useful.

The Commission Report failed to note, however, why Webb Associations have not made a greater contribution towards promoting export trade. One of the primary reasons is the lack of any governmental balancing between the national interests in stimulating exports and protecting competition. As evidence of this deficiency, note that other antitrust exemptions, such as those applicable to air and ocean transportation, and agricultural cooperatives, are administered by agencies directly concerned with fulfilling the purpose of the exemption.⁷⁶ In contrast, the Webb-Pomerene Act is administered by the antitrust enforcement agencies. Certainly, if Congress transferred administrative authority over the Act to the Commerce Department, and the Special Trade Representative's office encouraged American firms to file as Webb Associations, the Act indeed could play a meaningful role in reducing this country's trade deficit.

With respect to size and characteristics of membership in Webb Associations, NCRALP expressed considerable concern that the associations primarily are composed of large corporations.⁷⁷ In a similar vein, the Commission Report cited the 1967 FTC 50-Year Review⁷⁸ to show that most successful associations deal in homogeneous products and that the members of such groups are generally leaders of an oligopolistic industry. More recently, however, evidence indicates that Webb Associations are typically of moderate size, having \$500,000 to \$1 million in sales per year.⁷⁹ Nonetheless, assuming *arguendo* that the Report is correct, the Commission failed to discuss any explanation for this observation. The fact that many unstandardized commodities are unsuitable for export may explain the composition of certain associations. For example, large purchasers of such goods as textiles and television sets generally purchase by brand names rather than by general description. Products that Webb Associations sometimes handle, such as wood pulp and sulphur, are more suitable for the types of commercial activities carried out by the associations, such as joint marketing. Moreover, the fact that leaders in oligopolistic industries comprise the membership of several successful associations probably can be attributed to two factors. First, the nature of these industries often require substantial economies of scale and entry barriers are too high for participation by small and medium sized firms. Second, many smaller firms may encounter greater organizational difficulties in forming an association than a few large firms. Additionally, small firms are less likely to risk the consid-

⁷⁵ See Hodges Testimony, *supra* note 38, at 8.

⁷⁶ See *id.* at 17.

⁷⁷ COMMISSION REPORT, *supra* note 16, at 299, 897 ANTITRUST & TRADE REG. REP. (BNA) (Special Supp.) at 87.

⁷⁸ FTC 50-YEAR REVIEW, *supra* note 54, at 32-34, 44-45; see COMMISSION REPORT, *supra* note 16, at 299, 897 ANTITRUST & TRADE REG. REP. (BNA) (Special Supp.) at 87.

⁷⁹ See Hodges Testimony, *supra* note 38, at 12.

erable uncertainty as to whether the limited export exemption really provides adequate antitrust protection.

The NCRALP Report highlights another principal concern about the Webb-Pomerene Act, regarding the domestic spillover effects of the exemption. This position asserts that, by permitting companies to cooperate for export purposes, Congress invites anticompetitive restraints in domestic interstate commerce.⁸⁰ As succinctly stated by one author: "It is a rare swimmer whose breathing is different depending upon whether he swims in an ocean or a river."⁸¹

At the outset, the spillover effects argument is believed to be inconsistent with the Justice Department's alleged effort to contribute to this country's export promotion needs. In this latter context, the Department asserts that it will not prosecute collective export activities whose only effect is a restraint of foreign markets, particularly such export restraints as price fixing and market allocation, which do not exclude others from exporting.⁸² However, in the context of Webb-Pomerene Act discussions such as the NCRALP Report, critics argue that such export transactions should not be permitted because they "invariably" invite anticompetitive conduct in U.S. commerce. The Antitrust Division has relied heavily on the spillover effects argument as a basis for urging repeal of the Act. As far back as 1967, the Assistant Attorney General then heading the Antitrust Division stated before a Senate Antitrust Subcommittee:

*[T]he existence of an antitrust exemption for export associations inevitably affects competition at home (and thereby affects the American consumer). Every export agreement that offsets the amount of a product sold abroad must inevitably affect the amount sold at home. And to the extent that the agreements allow exporters to control prices abroad it is likely to misallocate resources at home. (emphasis added)*⁸³

Although the NCRALP staff options paper cites two major studies which might dilute the frequently accepted domestic spillover criticism of the Act,⁸⁴ the Commission Report failed to include these studies. Neverthe-

⁸⁰ See COMMISSION REPORT, *supra* note 16, at 299, 897 ANTITRUST & TRADE REG. REP. (BNA) (Special Supp.) at 87.

⁸¹ Metzger, *Cartels, Combines, Commodity Agreements and International Law*, 11 TEXAS INT'L L.J. 527, 534 (1976). Professor Metzger notes that "[c]ountries the world over have taken no action to prevent their nationals from restraining the trade of others through cartels and combines." *Id.* at 532.

⁸² See J. Raht, *International Cartels and Their Regulation*, at 27 (Nov. 10, 1979) (Columbia Univ. Conf. on Int'l Reg. of Restrictive Bus. Prac., Airline House, Va.); D. Rosenthal, *Subject Matter Jurisdiction in the U.S. Export Trade*, at 3 (April 23, 1977) (71st Annual Meeting of the Amer. Soc. of Int'l Law, San Francisco, Cal.).

⁸³ Testimony of Donald F. Turner, *International Aspects of Antitrust 1967: Hearing Before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary*, 90th Cong., 1st Sess. 124 (1967), *cited in*, 312 ANTITRUST & TRADE REG. REP. (BNA) A-19 (July 4, 1967).

⁸⁴ NCRALP STAFF REPORT, *supra* note 66, at 23, 29.

less, three basic responses to this criticism exist. First, as indicated in the Act's legislative history, Congress was keenly aware of the possibility that the exemption might adversely affect interstate commerce.⁸⁵ Congress intended to remedy this possibility, however, by empowering the FTC to conduct a section 5 readjustment hearing whenever the association's members were restraining domestic trade or otherwise misusing the Act.⁸⁶ If necessary, the Justice Department could also bring suit in federal district court to remedy the abuse.⁸⁷ As stated in the Attorney General's 1955 Antitrust Commission Report, "abuses of the Act could be readily dealt with by either the Federal Trade Commission or the Justice Department."⁸⁸ This opinion was reinforced more recently by a General Accounting Office Report on the Webb-Pomerene Act.⁸⁹

Second, by enacting the Webb-Pomerene exemption, Congress intended to effectuate a policy in the national interest and stimulate exports even though there might exist some dangers to domestic competition.⁹⁰ Although the Justice Department's enforcement policies appear untarnished by judicial advice, the court in *Minnesota Mining* stated that: "[T]he courts are required to give as ungrudging support to the policy of the Webb-Pomerene as to the policy of the Sherman Act. Statutory eclecticism is not a proper judicial function."⁹¹

Third, Webb Association counsel, in practice, narrowly construe the export exemption and closely monitor the methods association members employ to carry out activities. In view of the additional policing of association activities by both the Justice Department and the FTC, it is extremely unlikely that Webb Associations will conspire to restrain domestic trade,

⁸⁵ See, e.g., 55 CONG. REC. 3573 (1917) (remarks of Rep. Morgan); 56 CONG. REC. 4723 (1917) (remarks of Rep. Volstead); 56 CONG. REC. 175 (1917) (remarks of Senator Cummins).

⁸⁶ See text accompanying note 43 *supra*.

⁸⁷ See text accompanying note 45 *supra*.

⁸⁸ REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS (1955), cited in, General Accounting Office, Clarifying Webb-Pomerene Act Needed to Help Increase U.S. Exports 14 (Aug. 22, 1973) [hereinafter cited as GAO STUDY].

⁸⁹ GAO STUDY, *supra* note 87, at 15. The Commission Report failed to note the GAO's findings and conclusions, which supported proponents of the Act, despite the fact that numerous submissions to NCRALP referenced this study. See, e.g., Weil Responses, *supra* note 62, at 12; NAM Statement, *supra* note 13, at 8; Letter from Robert M. Gants, Nat'l Constructors Ass'n, to Rufus Phillips Chmn., Business Advisory Panel to NCRALP (Dec. 1, 1978) [hereinafter cited as Gants Letter].

In response to "spillover" concerns expressed by Senator Norris, Senator Pomerene responded:

I call [Senator Norris's] attention especially to the last two paragraphs of section 5, which confer upon the Federal Trade Commission full power over any agreements, transactions, or acts of any of these associations in the foreign trade; and if the Commission should find that [such agreements] are violative of the provisions of this bill or, for that matter, of any of our antitrust laws [the FTC can take appropriate remedial action].

55 CONG. REC. 2786 (1917); see 15 U.S.C. § 65 (1976).

⁹¹ United States v. Minnesota Mining & Mfg. Co., 92 F. Supp. 947, 965 (D. Mass. 1950).

particularly since criminal prosecutions are more likely today than in the past.⁹²

The NCRALP Report further details two related arguments often raised against the Webb-Pomerene exemption. Critics of the Act contend that the blanket nature of the exemption is too broad in scope.⁹³ In addition, opponents argue that the exemption is unnecessary, since antitrust law already permits certain joint ventures which are necessary to gain entry in foreign markets.⁹⁴ In contrast, the Commission Report includes proponents' arguments that, by permitting joint commercial arrangements in export trade, Webb Associations can achieve the economies of scale needed to compete against larger foreign rivals.⁹⁵ Moreover, the need for the export exemption to eliminate antitrust uncertainties is one of the cornerstones of support for the Act. In this regard, both the proponents' and opponents' arguments deserve further elaboration.

The Justice Department has argued that the Webb-Pomerone exemption is not really necessary because many joint export ventures have pro-competitive effects and, therefore, are permissible under the Sherman and Clayton Acts.⁹⁶ For example, the *Antitrust Guide for International Operations* states:

Normally, the Department would not challenge a merger or joint venture whose only effect was to reduce competition among the parties in a foreign market, even when goods or services were being exported from the United States. . . . [S]hort-term consortia are useful where large risks or dollar amounts are involved . . . or where complimentary skills are required (as with the typical construction joint venture).⁹⁷

⁹² The Webb-Pomerene exemption, therefore, is not unlike certain other antitrust exemptions in this respect. For example, one other such exemption permits the world's major oil companies to cooperate on a continuous basis to meet and carry out "Allocation Systems Tests", which are intended to prepare the industrial nations for the possibility of another oil embargo. See Energy Policy & Conservation Act of 1975, 41 U.S.C. § 6272 (Supp. V 1975). Although alarming to critics of this exemption, the U.S. government antitrust personnel charged with monitoring the oil companies' activities have determined that such joint activities have had no discernible effect on U.S. commerce and, therefore, support retention of the exemption. See General Accounting Office, U.S. Oil Companies' Involvement in the International Energy Program (Oct. 21, 1977). This GAO Report quotes the FTC's Director, Bureau of Competition as saying: "Congress, in passing the EPC Act, made the legislative determination that the benefits to be derived from oil company participation in the IEP are sufficient to risk any anticompetitive effects." *Id.* at 22. Arguably, Congress intended this "balancing test" approach to be applied to export promotion and the Webb-Pomerene exemption.

⁹³ COMMISSION REPORT, *supra* note 16, at 299, 897 ANTITRUST & TRADE REG. REP. (BNA) (Special Supp.) at 87.

⁹⁴ *Id.*

⁹⁵ *Id.* at 301, 897 ANTITRUST & TRADE REG. REP. (BNA) (Special Supp.) at 88.

⁹⁶ See 875 ANTITRUST & TRADE REG. REP. (BNA) AA-3; COMMISSION REPORT, *supra* note 16, at 299, 897 ANTITRUST & TRADE REG. REP. (BNA) (Special Supp.) at 87.

⁹⁷ Department of Justice, Antitrust Division, Guide For International Operations, 21 (Jan. 26, 1977) [hereinafter cited as Antitrust Guide].

This opinion is intended to alleviate the fears of exporters, including those involved in services (e.g., construction), who are contemplating a "one shot" joint venture. The Guide explains that American antitrust laws rarely are susceptible to clear and concise rules in relation to foreign commerce.⁹⁸ In addition, the Justice Department qualifies their joint venture acquiescence quoted above, stating: "Any joint venture among competitors involves some antitrust risk that the cooperation may spill over into other areas."⁹⁹ Therefore, many exporters may be unwilling to take these "risks," particularly since the point at which the joint venture becomes unlawful is extremely vague. With this type of "guidance," American exporters understandably feel constrained by the antitrust laws, in spite of Justice Department efforts to assuage these perceptions. Of course, even Webb Associations are not immune to the risk of domestic spillover effects. Nevertheless, if properly administered, the exemption would substantially minimize such damages.

Furthermore, joint selling companies frequently need to operate on a *long-term* basis in order to reap the benefits of significant foreign markets. Thus, short-term joint ventures, although perhaps permissible on an ad hoc basis by the Justice Department, are not as meaningful as the Department would have businessmen believe. Without the Webb-Pomerene exemption, one Commerce Department official indicated that:

Many companies, fearing illegality, would cease engaging in long-term joint activities which are essential to developing profitable foreign markets. Joint operations, that is, would be limited to single projects. Indication that the [Act] does protect joint export activities from potentially crippling antitrust challenges is provided by the decision in the Minnesota Mining and Manufacturing case. . . . Many of the activities listed in the opinion would be curtailed or impossible without the protection of Webb-Pomerene Act. (emphasis added).¹⁰⁰

Courts would undoubtedly find many Webb Association practices unlawful in the absence of the export exemption. Agreements on prices and quotas are two of the more obvious examples of antitrust violations, even where the established price is not set at an anticompetitive level. Additionally, many examples considered by the *Minnesota Mining* court might constitute unlawful conduct if the Webb-Pomerene Act did not explicitly

⁹⁸ *Id.* The Antitrust Guide states:

The United States antitrust statutes do not provide a checklist of specific, detailed statutory requirements, but instead set forth principles of almost constitutional breadth. This broad mandate frequently requires private parties, prosecutors and the courts to consider the overall purpose and effect of business arrangements in order to evaluate them under the antitrust laws.

Id.

⁹⁹ *Id.* at 20; see text accompanying note 92 *supra*. See also Address by John Shenefield, Time, Inc. Conference on Antitrust (May 7, 1979).

¹⁰⁰ Weil Responses, *supra* note 62, at 7-8.

sanction the behavior.¹⁰¹ The prospect of a criminal enforcement proceeding or a private treble damage action by a domestic competitor might deter participation by many association members. Therefore, supporters of the Webb-Pomerene Act believe that the exemption at least provides a limited degree of certainty concerning the legality of joint exporting arrangements.

Finally, the NCRALP Report mentions the critical argument that the exemption is unnecessary because export brokers could provide many (if not all) of the services which Congress intended Webb Associations to fulfill. The export broker's primary interest, however, involves arranging a sale, regardless of which manufacturer or group of manufacturers profits. Hence, as one Commerce Department official pointed out, a producer seldom can rely on the active promotion of his particular products.¹⁰² Similarly, a broker might not desire to continue a business promotion relationship with the producer after a given sale is concluded. Moreover, the broker is not necessarily concerned with the promotion of American exports. Rather, the broker arranges a sale "regardless of the source of supply or the destination of sale."¹⁰³ In contrast, a Webb Association makes a significant contribution to both its members and the nation "as a responsible continuing source" of American goods.¹⁰⁴

The NCRALP Report summarily notes that supporters of the Webb-Pomerene Act believe that a continuing need exists to permit joint arrangements for American exporters in order to offset the "economic disparity that exists between themselves individually and monopsonistic foreign buyers."¹⁰⁵ In response, the report contends that members of Webb Associations seldom have cited foreign cartels as the reason for joining an

¹⁰¹ The *Minnesota Mining* court found that Webb Associations could lawfully exclude competitors of the member firms. *United States v. Minnesota Mining & Mfg. Co.*, 92 F. Supp. 947, 965 (D. Mass. 1950). Should the associations engage in such conduct without sufficient business justifications, the Justice Department would likely instigate an antitrust proceeding in the absence of the Webb-Pomerene exemption. Similarly, exclusive contracts between Webb Associations and foreign distributors would be unlawful without an exemption. See *Klor's Inc. v. Broadway-Hale Stores*, 359 U.S. 207 (1959) (group refusal to deal violative of the Sherman Act); *Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320 (1961) and *Standard Oil Co. v. United States*, 337 U.S. 293 (1949) (exclusive contracts violative of § 3 of the Clayton Act). Such exclusive contracts, however, prevent the foreign distribution from going to independent non-member producers or combination export managers. Therefore, the Webb Association's market power is improved considerably. Exclusive contracts also are necessary to maintain supplies on a consistent basis. Finally, without the Webb-Pomerene exemption, cooperative export marketing probably either would be prohibited or sharply curtailed.

¹⁰² Weil Responses, *supra* note 62, at 17-18. Moreover, in passing the Webb-Pomerene Act, Congress believed that joint exporting would enable exporters to sell their goods more profitably by eliminating export brokers. See 53 CONG. REC. 13701 (1916) (remarks of Rep. Fordney).

¹⁰³ Weil Responses, *supra* note 62, at 18.

¹⁰⁴ Letter from Laurence N. Odence, Sulphur Export Corp., to Rufus Phillips, Chmn., Business Advisory Panel to the NCRALP (Nov. 30, 1978) [hereinafter cited as Odence Letter].

¹⁰⁵ COMMISSION REPORT, *supra* note 16, at 301, 897 ANTITRUST & TRADE REG. REP. (BNA) (Special Supp.) at 88.

association.¹⁰⁶ As authority for this proposition, the Commission Report cites the 1970 Larson analysis.¹⁰⁷ In form, Larson based his conclusions upon data compiled in the early 1960's and promulgated by the FTC in 1967. The NCRALP Report misses the mark by not referencing the most recent (and therefore more germane) 1978 FTC Webb-Pomerene survey.¹⁰⁸ This study "suggests the likelihood of a new situation" from that which existed when the 1916 FTC Report and the 1955 Attorney General's Report were issued.¹⁰⁹ Indeed, the 1978 FTC analysis lists only four instances where private cartels compete with Webb Associations.¹¹⁰ However, the associations also compete against: (1) cooperative marketing groups; (2) state trading agencies; and (3) quasi-public commercial companies. Therefore, the 1978 FTC study concluded that "public and private marketing power now appear to be of unusually equal competitive importance."¹¹¹

The recent FTC analysis found the proliferation of foreign government involvement in traditionally private sector commercial affairs even more evident when analyzing important customers of Webb Associations.¹¹² For example, in the case of one Webb Association, state-controlled entities, "which enjoy preferential tariffs and import quotas which discriminate against U.S. importers," marketed approximately 70 to 75 percent of world trade in the goods.¹¹³ Further, these state entities are capable of applying bargaining pressures "which normally would not be acceptable as business norms within the United States, but which are countenanced and sometimes supported by their governments."¹¹⁴ Therefore, U.S. exporters and Webb Associations generally find it extremely difficult to compete and sell individually against state-trading systems.¹¹⁵ In centrally planned production and resource allocation, there is no necessary link between economic lists and prices. Indeed, like cartels, state-trading organizations are given a monopoly over the importing and exporting of goods and may control the quantities and prices of such goods. The decisions of the state planners promote governmental objectives and bear no relation to competitive conditions.¹¹⁶

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*; see Larson, *supra* note 57, at 486.

¹⁰⁸ 1978 WEBB ACT SURVEY, *supra* note 58.

¹⁰⁹ *Id.* at 13.

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² Nine Webb Associations stated that foreign governments were their leading customers or prospective customers. Three other associations included government agencies among their many customers. In addition, four Webb Associations reported state trading companies as principal customers. Finally, three associations listed foreign buying cartels as their more important customers. *Id.*

¹¹³ Letter from Thomas Mulvihill, Jr., Phosphate Chemicals Export Ass'n, to Rufus Phillips, Chmn., Business Advisory Panel to the NCRALP (Nov. 22, 1978).

¹¹⁴ *Id.*

¹¹⁵ See Gants Letter, *supra* note 88; Odence Letter, *supra* note 102.

¹¹⁶ See generally NEUBERGER & LARA, THE FOREIGN TRADE PRACTICES OF CENTRALLY PLANNED ECONOMIES AND THEIR EFFECTS ON U.S. INTERNATIONAL COMPETITIVENESS (1977).

As a consequence, governments of centrally planned or market economies will establish a national or export cartel for policy reasons. Therefore, it is extremely difficult for the individual American exporter to face non-price competition in these countries' home markets and in third country markets. As the ABA Antitrust Section concluded in 1954, the Webb-Pomerene Act should be retained not only because of the existence of foreign cartels, but because of the new international climate.¹¹⁷ The Antitrust Section concluded that "the existence of state controlled buying agencies, state monopolies and other foreign industrial combinations [make] it desirable that American exporters be permitted to combine among themselves in export associations."¹¹⁸ Arguably, a united voice in sales negotiations, marketing and other commercial activities is needed particularly for those American exporters wishing to enter Eastern European markets. Similarly, in the potentially lucrative China market, a united and reliable representative export entity is more likely to gain market entry.

Neither the Commission Report nor the staff options paper discussed the international trade aspects of foreign trading companies. American exporters currently face competition from large integrated trading companies which have been established worldwide, particularly in Japan. These organizations proceed on the notion that a combination operates more efficiently than the independent constituent firms. The enormous power and success of international trading companies is most pronounced in Japan, where their role in export expansion may constitute the "greatest contribution to the postwar Japanese economy."¹¹⁹

The foreign trading firms provide an impressive array of "bonuses" to their clients. For example, the groups furnish a staggering amount and number of credit, loans, and loan guarantees. The trading companies procure substantial low-interest loans from commercial banks and pass these low rates on to customers. This procedure is particularly helpful to the many small and medium sized exporting firms who are clients of the mammoth trading companies and who could otherwise not afford the higher rates of direct commercial loans. Moreover, the trading companies furnish a significant amount of marketing, technological and even legal and political information to their customers, usually without additional charges.¹²⁰ Such benefits enable the trading companies to achieve substantial cost reductions for the manufacturer customers.

The final criticism of the Webb-Pomerene Act noted by the NCRALP

¹¹⁷ Report of the ABA Comm. on Antitrust Problems in International Trade, 5 ABA SECTION OF ANTITRUST L. 188 (1954).

¹¹⁸ *Id.*

¹¹⁹ A. YOUNG, THE SOGO SHOSHA: JAPAN'S MULTINATIONAL TRADING COMPANIES 129 (1979). In 1976, the ten largest Japanese trading companies grossed nearly \$155 billion in sales, carried out 56.4% of Japan's total exports and 55.6% of its imports. *Id.* at 4. These transactions accounted for slightly over 5% of world trade. *Id.*

¹²⁰ *Id.* at 67.

Report is that exemption of American export cartels from the antitrust laws severely undermines this country's credibility in advocating the adoption of strong international antitrust rules.¹²¹ The Report infers that, because the exemption sanctions American export cartels, our trading partners have retaliated by implementing their own cartels. In addition, the Commission Report implicitly equates foreign antitrust enforcement efforts with American policies. The staff options paper reflects this presumption, stating: "[T]he argument that foreign producers are not constrained by antitrust laws . . . and are therefore able to deal more effectively vis-a-vis American firms in foreign markets is certainly no longer valid today, if indeed it ever was."¹²²

To argue that the Webb-Pomerene exemption, which accounts for only 1.5 percent of American export trade, is an embarrassment to this country or has precipitated national cartel retaliations is nothing less than naive. If anything, this country's trading partners should be placed in a position of justifying why American domestic producers and exporters continually face the multiple noncompetitive conditions prevalent in foreign trade. The retaliation argument is particularly misleading for it is based on an isolated incident involving American sulphur exports¹²³ and fails to acknowledge the fact that literally hundreds of foreign cartels are established for reasons totally unrelated to the Webb-Pomerene Act. Indeed, many countries consider national export cartels a legitimate form of business activity and, therefore, encourage the formation of these groups.¹²⁴

Unlike other antitrust systems in the world, American law prohibits any cooperative arrangements by firms which restrain export trade, even if the restraint has no effect on domestic interstate trade.¹²⁵ Most other industrialized nations strike a balance between antitrust enforcement and other national priorities, such as export promotion.¹²⁶ A 1974 OECD study recommended that, at a minimum, the world's major trading nations require all export cartels to report to the relevant antitrust authorities and that the nations adopt procedures to assure enforcement of export exemp-

¹²¹ COMMISSION REPORT, *supra* note 16, at 300, 897 ANTITRUST & TRADE REG. REP. (BNA) (Special Supp.) at 88.

¹²² NCRALP STAFF REPORT, *supra* note 66, at 26.

¹²³ In 1963, the British Restrictive Practices Court upheld the lawfulness of a British purchasing cartel on the grounds that such a cartel was necessary to bargain with and secure fair terms from the Webb Association. *In re National Sulphuric Acid Association's Agreement*, L.R. 4 R.P. 169 (Rest. Prac. Ct. 1963), C.R. 6 R.P. 210 (1966), *cited in* FUGATE, FOREIGN COMMERCE AND THE ANTITRUST LAWS 247 (1973).

¹²⁴ See Weil Responses, *supra* note 62, at 24-25, where he concluded that "all our major trading partners permit, and in fact often encourage, their exporting companies to join together in national export cartels." *Id.*

¹²⁵ See 15 U.S.C. §§ 1, 2 (1976).

¹²⁶ As recently stated by Joel Davidow, Director of Domestic and International Planning at the Justice Department, and the United States representative to the UNCTAD and OECD Restrictive Business Practice sessions: "Other [countries] would have very little bias against private trade restraints per se, evaluating them after the fact in terms of their effects." Davidow Address, *supra* note 64.

tions.¹²⁷ Presently, the United States stands alone in strictly following the OECD recommendations.

The answer to the prevalence of worldwide cartels does not lie in repeal of the Webb-Pomerene exemption, as opponents of the Act contend. Such a unilateral act would serve no purpose whatsoever other than to further damage American export competitiveness. This country can ill afford such economic sacrifices for foreign policy ends. A less extreme and more rational solution involves the United States continuing to negotiate with other countries to eliminate export cartels and other noncompetitive devices. Modification of the Webb-Pomerene Act, if necessary, should hinge on successful negotiation of such agreements and should be conditioned on proper monitoring of the accords.

Apparently, the conclusions of the Business Advisory Panel, had a significant impact on the National Commission's final recommendations. The Panel concluded that Congress should retain the Webb-Pomerene exemption for four basic reasons. First, the Panel felt that the American balance of trade problem had reached critical dimensions and that the Act "probably has a desirable impact" in this area.¹²⁸ Second, the Panel recognized the non-competitive aspects of international trade facing American businesses, including unfavorable practices of certain foreign governments and competition from foreign cartels.¹²⁹ Because the export exemption enables businesses to "share the rapidly escalating costs of bid preparation, market analysis, financing and risk taking in the international market," the Panel found that the Act offset some of the competitive disadvantages and improved the competitive positions of American firms.¹³⁰ Third, the Business Advisory Panel rejected the domestic spillover argument because the antitrust authorities have sufficient means to prohibit any adverse domestic effects that may result from joint export arrangements.¹³¹ Fourth, the Panel found the argument that the Act inhibits the United States' ability to negotiate various international agreements to terminate foreign cartels unpersuasive.¹³² The Panel did note, however, that Congress could amend the Act to prohibit any conduct proscribed by international agreement.¹³³ Finally, after concluding that the exemption should be retained, the Panel recommended that Congress expand the Act to include services, since a significant percentage of export projects require provision of both goods and services.¹³⁴

¹²⁷ OECD, EXPORT CARTELS, REPORT OF THE COMMITTEE OF EXPERTS ON RESTRICTIVE BUSINESS PRACTICES 52-53 (1974).

¹²⁸ NATIONAL COMMISSION FOR THE REVIEW OF ANTITRUST LAWS AND PROCEDURES, REPORT TO THE PRESIDENT AND THE ATTORNEY GENERAL, Vol. 2, 294 (Jan. 22, 1979) [hereinafter cited as ADVISORY PANEL REPORT]

¹²⁹ *Id.* at 293-94.

¹³⁰ *Id.* at 294.

¹³¹ *Id.* at 296-97.

¹³² *Id.*

¹³³ *Id.* at 297.

¹³⁴ *Id.* at 298.

The introduction to NCRALP's conclusions concerning the Webb-Pomerene exemption makes it clear that the arguments promulgated by supporters of the Act failed to impress the Commissioners. After essentially summarizing the most pronounced criticisms of the exemption, the Report stated: "As a result, a number of Commissioners favor outright repeal of the Act."¹³⁵ However, because of the limited time available to study the Act and "especially in light of the Business Advisory Panel's conclusion[s]," the Commission merely recommended that Congress reexamine the exemption.¹³⁶ If Congress subsequently concludes that the Act should be retained, the Report strongly recommended conditioning the exemption upon a showing of need by individual export associations.¹³⁷ The Commission believed that a "need" requirement would reflect more accurately the original purpose of the Act by permitting only those cooperative export arrangements necessary to meet the combinations of foreign competitors or customers. Thus, the Commissioners recommended that the "need" requirement involve a determination of whether the "associations can provide genuine economies in the promotion and conduct of U.S. export trade or where associations are needed for the defense of legitimate commercial interests."¹³⁸

The Business Advisory Panel considered and rejected the proposed "need" qualification of the exemption for three reasons. First, if foreign trade conditions were not exactly as anticipated, the exemption might be in jeopardy.¹³⁹ Second, it might be difficult to establish valid criteria to determine when a particular exemption is needed.¹⁴⁰ Finally, trying to impose strict limitations on the type of export activity which Webb Associations might undertake could destroy the requisite flexibility necessary to enter foreign markets effectively.¹⁴¹

In all likelihood, conditioning the Webb-Pomerene exemption on a showing of need would have the effect of repealing the Act. Webb Associations are organized in part to provide some commercial continuity to retain foreign contracts. Under the Commission's proposal, however, associations would confront the nearly impossible task of predicting whether future foreign trade conditions will continue to warrant an antitrust exemption. Moreover, the "need" requirement as proposed by NCRALP fails to recognize that Webb Associations require countervailing power to meet not only foreign cartels, but also trading companies, government and quasi-government entities. The associations must also deal with many other vagaries unique to international trade, such as exchange rate fluctuations

¹³⁵ COMMISSION REPORT, *supra* note 16, at 302, 897 ANTITRUST & TRADE REG. REP. (BNA) (Special Supp.) at 88.

¹³⁶ *Id.* at 302, 897 ANTITRUST & TRADE REG. REP. (BNA) (Special Supp.) at 89.

¹³⁷ *Id.*

¹³⁸ *Id.* at 304, 897 ANTITRUST & TRADE REG. REP. (BNA) (Special Supp.) at 89.

¹³⁹ ADVISORY PANEL REPORT, *supra* note 128, at 297.

¹⁴⁰ *Id.* at 297-98.

¹⁴¹ *Id.* at 298.

and foreign nontariff trade barriers. Apparently, the collective export arrangements, which greatly assist in meeting these challenges, would not qualify for exemption according to the Commission's sense of "need." Finally, whatever rules and regulations promulgated by the antitrust authorities to condition the exemption would likely be enormously complex, burdensome and restrictive. Such conditions undoubtedly would discourage exporters from participating in Webb Associations.

Although not mentioned in the report's formal recommendations, NCRALP suggested placing an additional burden on Webb Associations by requiring the proposed group to prove that it "would not adversely affect either the domestic or international trade of the United States."¹⁴² If adopted by Congress, this alteration also might have the effect of deterring American exporters from utilizing the exemption. Indeed, the Justice Department already submits that many cooperative export efforts necessarily have some impact on domestic interstate trade.¹⁴³ Thus, it is unlikely that any proposed association could meet the burden of proving *no* adverse domestic or international consequences. Moreover, such an approach fails to weigh the benefits which an export association may realize with the domestic antitrust effects. Finally, the real economic costs of shouldering the burden of proof on this issue may inhibit businesses from attempting to form Webb Associations.

The United States is committed, in the most profound way, to a whole set of presumptions regarding the sanctity of the free market system. A terrible sense of betrayal accompanies any departure from this environment. The attainment of competitive markets is not simply an objective this nation believes desirable. Rather, it is central to American social and political fabric and is linked to the theme that unfettered competition represents a "charter of economic freedom." This theory regards any abandonment of competition as inviting economic regulation, which in turn leads to undesirable governmental interference with entrepreneurial freedom.

Nonetheless, both explicit and implicit competitive sacrifices occasionally are made where a convincing public interest rationale exists. For example, the subtle abandonment of market competition may appear through the loss of small enterprises which cannot absorb the additional costs of environmental controls. More explicit sacrifices take the form of specific statutory exemptions or immunities, generally favoring certain industrial sectors of the economy. In this regard, the Webb-Pomerene exemption is unique. It is not confined to a particular industry, but affects a cross-section of the manufacturing community which produces goods destined for consumption outside of the United States. Further, unlike many other exemptions, the Webb-Pomerene Act does not induce government regulation which controls prices or production. On the contrary, the Act

¹⁴² COMMISSION REPORT, *supra* note 16, at 304, 897 ANTITRUST & TRADE REG. REP. (BNA) (SPECIAL SUPP.) AT 89.

¹⁴³ See text accompanying notes 82 & 98 *supra*.

encourages enterprises to make independent economic decisions regarding international sales. Domestic benefits accrue through stimulated production, increased employment and profits, and improved international trade accounts.

Any evaluation of the NCRALP Report probably should consider the brief timetable and limited resources of the Commission. Nevertheless, these restrictions alone cannot excuse the report's evident lack of objectivity. It is regrettable that the NCRALP Report perpetuated many of the myths which cloak Webb Association activities and failed even to note many of the current needs for retaining and improving the exemption.