The Foreign Trade Antitrust Improvements Act of 1981

George E. Garvey
The Catholic University of America, Columbus School of Law

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Recommended Citation
THE FOREIGN TRADE ANTITRUST IMPROVEMENTS ACT OF 1981

GEORGE E. GARVEY*

INTRODUCTION

On December 15, 1981, the Chairman of the House Committee on the Judiciary, Peter Rodino, introduced a bill entitled the Foreign Trade Antitrust Improvements Act of 1981 (Antitrust Improvements Act).¹ The Act proposes to amend the Sherman Act, Clayton Act, and Federal Trade Commission Act to remove what many perceive to be needless uncertainty concerning the extrater-

* Associate Professor, The Catholic University of America Columbus School of Law; J.D. University of Wisconsin (1972); B.A., University of Illinois (1969). Former Counsel to the Subcommittee on Monopolies and Commercial Law, House Committee on the Judiciary (1980-1981).

ritorial application of the U.S. antitrust laws. The Antitrust Improvements Act would limit the application of the Sherman Act and Federal Trade Commission Act to foreign conduct that has a direct, substantial, and reasonably foreseeable effect on commerce within the United States or which excludes U.S. entities from foreign commerce. It also would amend section 7 of the Clayton Act to remove from that section's reach joint ventures engaged solely in export trade. The Antitrust Improvements Act is one of several legislative proposals intended to eliminate or minimize the perceived adverse effects of the antitrust laws on export trade. Unlike alternative bills, the Act deals with the perceived problems in a concise and direct fashion.

This article will explore the effects of the antitrust laws on international trade and the probable reasons for any adverse impact. It will then consider the primary alternative legislative proposal intended to remedy the perceived antitrust barrier to trade, the Export Trade Association Act of 1981. Finally, the article examines the respon-

5. See infra note 192.
7. See infra note 192.
siveness of the Antitrust Improvements Act to the problems and the potential hazards of an altered antitrust policy.

EFFECTS OF U.S. ANTITRUST POLICY ON INTERNATIONAL TRADE

During the past decade the U.S. position in international trade has deteriorated badly in several respects: the U.S. share of the international market has declined dramatically; U.S. producers have become increasingly vulnerable to competition within the United States from foreign industries; OPEC has jarred the U.S. economy with massive oil price increases; and the United States has suffered huge deficits in its balance of payments. Each of these factors has stimulated efforts by both the executive and legislative branches of government to establish and pursue aggressively policies that will promote U.S. exports.

Traders and observers have repeatedly identified the U.S. antitrust laws and their enforcement as barriers to desirable joint export activities. For example, after President Kennedy established the White House Conference on Export Expansion in 1963 to con-
sider ways to stimulate U.S. exports,\textsuperscript{16} the Conference found only two export disincentives imposed by the government, and one of them was the uncertain reach of the U.S. antitrust laws.\textsuperscript{17} Although subsequent executive studies have identified a larger number of government erected barriers to export trade, the more recent studies continue to cite potential antitrust liability as a factor.\textsuperscript{18}

The adverse effect of the antitrust laws on U.S. export trade may be divided into two categories. The first is largely a matter of perception: U.S. business thinks that the antitrust laws are a significant barrier to the types of collective activity that they believe are necessary to combat significant risks and competitive practices in the international market. The second, related problem arises from the uncertain jurisdictional scope of the laws.

\textit{U.S. Industry Perception of the Antitrust Laws as a Trade Barrier}

Although the antitrust laws have been consistently identified as an export disincentive, little concrete evidence exists to support the claim that these laws have deterred otherwise legal trade activities.\textsuperscript{19} Several recent studies demonstrate the absence of grounds for this concern. In July 1980, the U.S. Trade Representative and the Secretary of Commerce transmitted to President Carter an extensive evaluation of government incentives and disincentives to U.S. export trade.\textsuperscript{20} The report identified taxation of U.S. citizens working overseas, the Foreign Corrupt Practices Act,\textsuperscript{21} and export control legislation as the most significant barriers to export trade.\textsuperscript{22}

\begin{itemize}
\item \textsuperscript{16} M. Dawson, \textit{supra} note 11, at 1.
\item \textsuperscript{17} \textit{Id.} at 15.
\item \textsuperscript{18} \textit{Id.} at 3.
\item \textsuperscript{20} \textit{INT’L TRADE ADMIN., U.S. DEP’T COMMERCE, REVIEW OF EXECUTIVE BRANCH EXPORT PROMOTION FUNCTIONS AND POTENTIAL EXPORT DISINCENTIVES} (1980) [hereinafter cited as \textit{Executive Branch Review}].
\item \textsuperscript{21} 15 U.S.C. §§ 78a, 78m, 78dd-2, 78ff (1976 & Supp. IV 1980).
\item \textsuperscript{22} \textit{Executive Branch Review}, \textit{supra} note 20, at ¶ 1-7.
\end{itemize}
Referring to the antitrust laws, the report stated: "The extraterritorial reach of U.S. antitrust laws and their application to certain types of international transactions also concern exporters, but no specific instances were shown of these laws unduly restricting exports."23 Furthermore, John Ongman recently concluded on the basis of economic theory that there is no evidence of significant antitrust barriers to export trade: "On the basis of available evidence, the Sherman Act does not substantially impede export trade in goods and services. The theoretical arguments of this article predict that such evidence will not be found."24

Because business has generally been unwilling or unable to identify the specific international activities that they have avoided because of antitrust concerns,25 it is difficult either to confirm or disprove the validity of their fears. Any concern, however, has become substantially less tenable over time. In 1977 the Department of Justice announced in the Antitrust Guide for International Operations26 that it does not believe that the antitrust laws extend to foreign activities unless they have a "substantial and foreseeable effect on the United States commerce . . ."27 Furthermore, the Antitrust Guide analyzes in depth the antitrust implications of fourteen cases that illustrate the problems most likely to face U.S. businesses engaged in foreign trade.28 Additionally, the Justice Department has gone even further to eliminate the fears of U.S. business engaged or capable of engaging in export trade. Under the Department's business review procedure, it will provide a statement of its enforcement intentions regarding specific conduct submitted for review.29 In 1978, the Antitrust Division sent 35,000 letters to businesses stating that it would review any export-related matter within thirty days.30

23. Id. at ¶ 1-9. However, the perceived uncertainties about the application of antitrust law to trading companies remains a factor that may deter U.S. industry. Id.
27. Id. at 6.
28. Id. at 10-63.
30. Shenefield, Antitrust and U.S. Exports—Myth Over Reality, in U.S. International Competitiveness, supra note 11, at 13; see also Subcommittee Hearings, supra note 19 (statement
This two-pronged response by the Department of Justice to the U.S. industry perception of the existence of an antitrust barrier to foreign trade is quite extraordinary. The *Antitrust Guide* provides private antitrust counselors with the views of the agency bearing responsibility for antitrust enforcement by demonstrating the application of the laws to concrete problems. If greater assurance is desired, an exporter may obtain on an expedited basis the actual enforcement intentions of the Department before committing itself to a course of action. Few other areas of law allow businesses to protect themselves so thoroughly prior to engaging in desired activities.\(^3\)

Although U.S. business may continue to perceive the antitrust laws as a barrier to desirable joint activities in foreign commerce, they are not, in fact, an impediment to the type of concerted conduct advocated by proponents of greater export trade: efficiency-creating combinations between firms that are not sufficiently large to enter foreign markets alone.\(^3\)

**Uncertainties Concerning the Extraterritorial Scope of the U.S. Antitrust Laws**

The uncertain jurisdictional scope of the antitrust laws may deter aggressive exports both by creating doubt over the actual realm of potential liability and by heightening the perception of an antitrust risk.\(^3\) There are basically three scholarly and judicial approaches to the extraterritorial reach of U.S. antitrust laws: (1) an "effects" test; (2) a "comity" approach; and (3) an "in commerce" analysis. The

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\(^3\) Of John H. Shenefield.


32. *Id.* at 10–14.

mere existence of three analytical approaches to defining the reach of the antitrust laws, as well as the potential for inconsistent applications by courts adopting any one of the theories, is a cause for uncertainty and arguably creates a chilling effect on U.S. foreign commerce.

The Sherman Act proscribes restraints of trade and monopolization of "commerce among the several states, or with foreign nations."\(^{34}\) The Sherman Act, however, does not define foreign commerce. The formulation of this definition has been left to the courts, and they have provided several interpretations.

The earliest significant case to reach the U.S. Supreme Court addressing the issue of the reach of the antitrust laws, *American Banana Co. v. United Fruit Co.*, held that Congress, consistent with prevailing notions of international law, did not intend antitrust law to reach conduct occurring in other nations.\(^{35}\) Mr. Justice Holmes, writing for the majority, emphasized the place of the alleged violation as a factor:

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\text{[T]he general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done... For another jurisdiction, if it should happen to lay hold of the actor, to treat him according to its notions rather than those of the place where he did the acts, not only would be unjust, but would be an interference with the authority of another sovereign, contrary to the comity of nations, which the other state concerned justly might resent.}^{36}\]

In subsequent decisions, the Court shifted its focus from the location of the conduct and thereby substantially limited the import of *American Banana*. In *Thomsen v. Cayser*\(^{37}\) and *United States v. Sisal Sales Corp.*,\(^{38}\) for example, the Court predicated jurisdiction on the nexus

\(^{35}\) 213 U.S. 347 (1909).
\(^{36}\) Id. at 356.
\(^{37}\) 243 U.S. 66 (1917). In *Thomsen*, defendants were carriers in South African trade. Plaintiffs, shippers, alleged that defendants, united as "The South African Lines," fixed rates and shut off outside competition by requiring shippers to pay a percentage in addition to a reasonable freight rate, which would be refunded to the shippers only if they refrained from shipping by other lines. Id. at 74. The Supreme Court affirmed the district court's judgment in favor of plaintiffs under the Sherman Act. Id. at 89.
\(^{38}\) 274 U.S. 268 (1927). In *Sisal Sales*, appellees—three U.S. banks, two Delaware cor-
between the conspiracy and the United States, and the effects of the challenged conduct on U.S. commerce. The fact that the conspiracies were effectuated primarily through extraterritorial conduct was not controlling in either case.\textsuperscript{39} The trend toward an "effects" standard culminated in \textit{United States v. Aluminum Co. of America}.\textsuperscript{40} The international aspect of the \textit{Alcoa} case involved an agreement made abroad between foreign competitors.\textsuperscript{41} The situs of both the agreement and the conduct was, therefore, outside the United States. Judge Learned Hand, writing for the court, observed that the analysis should focus on the place where the "effects" were experienced rather than on the situs of the conduct or agreement.\textsuperscript{42} Recognizing the potential conflict between U.S. and foreign trade policies, however, Judge Hand concluded that foreign conduct which is \textit{intended} to affect U.S. commerce, and does so, will create Sherman Act liability.\textsuperscript{43} Finally, the opinion established a presumption that the prohibited effects had occurred

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porations, a Mexican corporation, and a U.S. broker—secured a monopoly of interstate and foreign commerce in sisal, in part by persuading the governments of Mexico and Yucatan to enact discriminatory legislation. \textit{Id.} at 272-73. The Court distinguished \textit{American Banana}:

Here we have a contract, combination and conspiracy entered into by parties within the United States and made effective by acts done therein... The United States complain of a violation of their laws within their own territory by parties subject to their jurisdiction, not merely of something done by another government at the instigation of private parties. True, the conspirators were aided by discriminating legislation, but by their own deliberate acts, here and elsewhere, they brought about forbidden results within the United States. They are within the jurisdiction of our courts and may be punished for offenses against our laws.\textit{Id.} at 276.

\textsuperscript{39} Thomsen v. Cayser, 243 U.S. at 88; United States v. Sisal Sales Corp., 274 U.S. at 276.

\textsuperscript{40} 148 F.2d 416, 439-45 (2d Cir. 1945).

\textsuperscript{41} \textit{Id.} at 442. In \textit{Alcoa}, the court examined a Swiss corporation or "cartel," formed by a Canadian corporation, a French corporation, two German corporations, a Swiss corporation, and a British corporation, that exercised control over the production of aluminum. \textit{Id.}

\textsuperscript{42} \textit{Id.} at 443. The court noted that "it is settled law... that any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends." \textit{Id.}

\textsuperscript{43} \textit{Id.} at 443-44. Judge Hand also stated that, in light of international complications likely to arise, "it is safe to assume" that Congress did not-intend the Sherman Act to reach every agreement made beyond U.S. borders which may have repercussions in the United States. \textit{Id.}
The court thus shifted the burden to the defendant to prove that the intended results had not been achieved. Alcoa's intent requirement has proven to be of little practical consequence. Courts often have looked solely to the effect that the challenged conduct has had on the foreign or domestic commerce of the United States, without considering the intent of the parties. A leading treatise on international antitrust concludes that:

[I]n applying Alcoa the courts have focused more on objective evidence of the impact on United States commerce and on the reasonable foreseeability of that impact, rather than on the actor's state of mind. For purposes of jurisdiction, intent seems to be worth consideration as a major issue only where the impact on the United States is indirect and not terribly substantial in size.

The Antitrust Division of the United States Department of Justice has adopted an "effects" test. The Antitrust Guide states:

[T]he U.S. Antitrust laws should be applied to an overseas transaction when there is a substantial and foreseeable effect on

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44. Id. at 444.
45. See, e.g., National Bank of Canada v. Interbank Card Ass'n, 1980-81 Trade Cas. (CCH) ¶ 63,836 (2d Cir. 1981) (while asserting that "the inquiry should be directed primarily toward whether the challenged restraint has, or is intended to have, any anticompetitive effect upon United States commerce," the court went on to note that the "critical factor" was the likelihood of "anticompetitive effect" upon U.S. commerce); Occidental Petroleum Corp. v. Buttes Gas & Oil Co., 331 F. Supp. 92, 102-03 (C.D. Cal. 1971), aff'd 461 F.2d 1261 (9th Cir.), cert. denied 409 U.S. 950 (1972) (a "direct" effect on U.S. commerce sufficient to support Sherman Act jurisdiction); Sabre Shipping Corp. v. Am. President Lines, 285 F. Supp. 949, 953 (S.D.N.Y. 1963), aff'd 407 F.2d 173 (2d Cir.), cert. denied sub nom. Japan Line, Ltd. v. Sabre Shipping Corp., 395 U.S. 922 (1969). But see Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287, 1296 (2d Cir. 1979) ("[w]hen foreign nations are involved ... it is unwise to ignore the fact that foreign policy, reciprocity, comity, and limitations of judicial power are considerations that should have a bearing on the decision to exercise or decline jurisdiction."); Timberlane Lumber Co. v. Bank of America, 549 F.2d 597, 611 (9th Cir. 1976) ("[t]he effects test by itself is incomplete because it fails to consider other nations' interests").

Fugate suggests that Alcoa may be read to indicate that the intent element will be considered only when no U.S. subjects are involved, i.e., that "courts will scrutinize the activities of foreigners abroad with more care before arriving at a conclusion as to the effects of such acts on U.S. foreign trade." W. FUGATE, supra note 33, at 74; accord, REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 76 (1955).

46. 1J. ATWOOD & K. BREWSTER, supra note 33, § 6.07, at 154.
the United States commerce...

... [T]o apply the Sherman Act to a combination of United States firms for foreign activities which have no direct or intended effect on United States consumers or export opportunities would, we believe, extend the Act beyond the point Congress must have intended.47

The “effects” criterion has enjoyed widespread judicial acceptance,48 but federal courts have never reached a consensus on the formulation of the standard.49 They have noted jurisdiction when activities have had “direct,”50 “substantial,”51 and “anticompetitive”52 effects on commerce. Application of these standards may result in the same disposition in any particular case,53 but there have been other formulations that would justify, or perhaps

47. Antitrust Guide, supra note 26, at 6-7 (emphasis added).
48. See, e.g., supra note 45.
49. See Timberlane Lumber Co. v. Bank of America, 549 F.2d at 610-11 (citing cases and summarizing the various formulations of the effects standard); Occidental Petroleum Corp v. Buttes Gas & Oil Co., 331 F. Supp. at 102. See also American Bar Ass'n, Section of Antitrust Law, Report to Accompany Resolutions Concerning Legislative Proposals to Promote Export Trading, 11-13 (Oct. 26, 1981) (citing cases and discussing consequences of different formulations of standard) [hereinafter cited as ABA Report].
51. See Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d at 1292 (observing that, in general, “practices having a substantial effect on American foreign commerce are subject to the Sherman Act”).
52. E.g., National Bank of Canada v. Interbank Card Ass'n, 1980-81 Trade Cas. (CCH) ¶ 63,836, at 78,472 (“the inquiry should be directed primarily toward whether the challenged restraint has, or is intended to have, any anticompetitive effect upon United States commerce...”); Industrial Inv. Dev. Corp. v. Mitsui & Co., Ltd., 594 F.2d 48, 52 (5th Cir. 1979) (“Sherman Act jurisdiction now depends upon a showing of anticompetitive effects within the United States.”); See Waldbaum v. Worldvision Enterprises, Inc., 1978-2 Trade Cas. (CCH) ¶ 62,378, at 76,257 (S.D.N.Y. 1978).
53. The ABA Report, supra note 49, at 14, states that beyond the simple recitation of the chosen “effects” test there is similarity in the approaches of many of the recent opinions. The report suggests that the true focus of the inquiry is the challenged conduct's foreclosure of other United States companies' export opportunities. Id. at 16.
require, different conclusions. These cases state or imply that any effect\textsuperscript{54} or a not insubstantial\textsuperscript{55} effect on U.S. commerce is sufficient to invoke the jurisdiction of an antitrust court.

The unpredictable aspects of the effects test are compounded by the nebulous concept of "foreign commerce." Clearly, the import and export trade of the United States is U.S. foreign commerce.\textsuperscript{56} In Pacific Seafarers, Inc. v. Pacific Far West Lines, Inc., however, the Court concluded that the shipment of cement and fertilizer between Taiwan and South Vietnam was foreign commerce of the United States, primarily because the shipments were financed through the Agency for International Development.\textsuperscript{57} The source of the financing, and the fact that both the conspirators and injured carriers were U.S. flagship operators, established a dominant U.S. "characteristic" sufficient to render the defendants liable for excluding a U.S. competitor from the trade between two foreign nations.\textsuperscript{58}

\textsuperscript{54} See Wells Fargo & Co. v. Wells Fargo Express Co., 556 F.2d 406, 428 (9th Cir. 1977), which clarified Timberlane Lumber Co. v. Bank of America, 549 F.2d 597 ("although foreign activities must of course have some effect on United States foreign commerce before they can be reached, we disagree... that the effect must be 'substantial'") (emphasis in original); Industria Siciliana Asfalti, S.P.A. v. Exxon Research and Eng'g Co., 1977-1 Trade Cas. (CCH) ¶ 61,256, at 70,783–84 (S.D.N.Y. 1977) (averments sufficient to invoke Sherman Act because, inter alia, "required element" of "impact upon United States commerce" present).

\textsuperscript{55} E.g., Dominicus Americana Bohio v. Gulf & Western Indus., 473 F. Supp. 680, 687 (S.D.N.Y. 1979) ("it is probably not necessary for the effect on foreign commerce to be both substantial and direct as long as it is not de minimis"). See Occidental Petroleum Corp. v. Buttes Gas & Oil Co., 331 F. Supp. at 102–03 (distinguishing "direct and substantial 'effect'" which is necessary to find a violation of the Sherman Act from the effect which is "no' both in substantial and indirect" which will suffice to support jurisdiction under the Act). See also Subcommittee Hearings, supra note 19 (statement of David H. Goldsweig) (citing Dominicus Americana as an example of the uncertainty which surrounds the formulation of the "effects" standard in private litigation).

\textsuperscript{56} See Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 193–94 (1824), in which the Court stated: "It has, we believe, been universally admitted that [the words of the Commerce Clause] comprehend every species of commercial intercourse between the United States and foreign nations. No sort of trade can be carried on between this country and any other, to which this power does not extend."

\textsuperscript{57} 404 F.2d 804 (D.C. Cir. 1968), cert. denied, 393 U.S. 1093 (1969).

\textsuperscript{58} Id. at 816.
It is reasonable and internationally acceptable to predicate jurisdiction over foreign or domestic persons engaged in foreign activities on the impact of their conduct on U.S. commerce. It is difficult to discern with any certainty, however, which formulation of the standard a particular court will apply. At one extreme, liability may be based on a finding that the activity in question had any effect on foreign commerce with U.S. characteristics, while another judge may require proof that the conduct had a direct, substantial, and foreseeable effect on commerce within the United States. Clarification of this standard is an appropriate matter for legislative action.

A second approach to defining the extraterritorial reach of the U.S. antitrust laws involves the application of principles of international comity. In 1976, the U.S. Court of Appeals for the Ninth Circuit concluded in *Timberlane Lumber Co. v. Bank of America* that the jurisdictional determination in an antitrust action involving foreign commerce should not rest solely on the domestic effects of the activity.61 The Court discussed the diverse formulations that had been applied and noted that strict adherence to the “direct and substantial” formulation could have undesirable results:

59. The “effects” doctrine is not universally embraced but is widely accepted. See B. HAWK, *supra* note 33, at 33 (noting a “growing acceptance” of an effects doctrine by European antitrust authorities). West Germany and Austria have explicit provisions in their laws providing for application of the “effects” test to extraterritorial activities having prohibited domestic effects. Rahl, *International Application of American Antitrust Laws: Issues and Proposals*, 2 NW. J. INT’L L. & BUS. 336, 340–41 (1980) [hereinafter cited as Rahl]. In addition, the EEC has endorsed the effects doctrine for application of the Treaty of Rome antitrust provisions. *Id.* The United Kingdom, while opposing the “effects” standard on the grounds of national sovereignty, obtains the benefits of the standard by virtue of its membership in the EEC. *Id.*

60. See *Subcommittee Hearings, supra* note 19 at 9-11, (statement of James R. Atwood, former Deputy Assistant Secretary and Deputy Legal Adviser, U.S. Dept. of State). Atwood states that a strong case can be made that it is time for legislative intervention, since the need for clarification in the law is strong and overdue, and Congress, through the medium of legislative history, can provide the full background and explanation for what may appear to be a shift in U.S. law. *Id.* at 10–11; cf. ABA Report, *supra* note 49, at 23 (recommending that Congress postpone consideration of antitrust legislation until it receives a detailed expert study of the interplay of the U.S. antitrust laws with foreign trade).

61. 549 F.2d 597, 611 (9th Cir. 1976). In *Timberlane*, plaintiffs alleged that officials of the Bank of America and others located in both the United States and Honduras conspired to prevent Timberlane, through its Honduras subsidiaries, from milling lumber in Honduras and exporting it to the United States. *Id.* at 601. Holding that Sherman Act jurisdiction is not limited to cases of direct and substantial effect on U.S. foreign commerce, the court
In some cases, the application of the direct and substantial test in the international context might open the door too widely by sanctioning jurisdiction over an action when [international comity and fairness] would indicate dismissal. At other times, it may fail in the other direction, dismissing a case for which comity and fairness do not require forebearance, thus closing the jurisdictional door too tightly—for the Sherman Act does reach some restraints which do not have both a direct and substantial effect on the foreign commerce of the United States.62

Timberlane established a three-part test: (1) the activity must have some actual or intended effect on U.S. foreign commerce; (2) the effect must be sufficiently great to present a cognizable injury to the plaintiff; and (3) the interest of the United States must be sufficiently strong vis-a-vis any other related nations to justify the assertion of jurisdiction.63

The Timberlane approach has gained some acceptance. The U.S. Court of Appeals for the Third Circuit developed it further in Mannington Mills, Inc. v. Congoleum Corp. by identifying ten factors to consider in determining whether the principles of comity permit the assertion of jurisdiction.64 Officials of the Department of Justice, the Department of State, and the Federal Trade Commission have also devised a three-part “balancing test” to apply in determining whether to exercise jurisdiction under the Act. Id. at 615.

62. Id. at 613.
63. Id.
64. 595 F.2d at 1297-98. The factors are:

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

Id. (footnote omitted).
expressed support for the Timberlane test. Atwood and Brewster conclude that "it is likely that the Timberlane approach, de-emphasizing the effects test in favor of a more complex and multivariable comity analysis, will be influential if not controlling in foreign commerce litigation for some time to come."

To the extent that the Timberlane/Mannington Mills model directs courts to consider the possible conflicting interests of foreign nations, and identifies various relevant factors, it is a desirable development. It does present problems, however. First, it intentionally minimizes the "effects" requirement. Given the high regard courts have shown for the policy underlying the Sherman Act, a jurisdictional standard that ultimately turns on a balancing of conflicting policies may extend the reach of the law to foreign activities having an insignificant nexus to U.S. commerce. In addition, Timberlane magnifies existing uncertainty regarding the application of antitrust laws as it is frequently difficult to predict the actual effects of prospective foreign conduct on commerce in the United States. Sound counseling under Timberlane would require both a reasonable estimation of the likely U.S. effects of the conduct and an analysis of foreign and domestic laws and policy. In Mannington Mills for example, the court of appeals remanded the case to the district court to determine the policies of twenty-six different nations regarding the validity and abuse of patent rights.

Finally, a requirement that courts engage in an extensive comity

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65. 1 J. Atwood & K. Brewster, supra note 33, § 6.11, at 162.
66. Id. at 163.
67. 595 F.2d at 613.
68. In Northern Pac. Ry. Co. v. United States, 356 U.S. 1 (1958), the Court summarized the policy underlying the Sherman Act in the following terms:

The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic and social institutions.

Id. at 4. See also Appalachian Coals, Inc. v. United States, 288 U.S. 344, 359–60 (1933).
69. See Occidental Petroleum Corp. v. Buttes Gas & Oil Co., 331 F. Supp. at 102–03 (implying that courts confuse jurisdictional prerequisite with effect necessary to find a violation of the Sherman Act). But see ABA Report, supra note 49, at 14 (suggesting that, despite various formulations of the jurisdictional standard, results of cases show that true focus of courts has been foreclosure of export opportunities to United States companies).
70. 595 F.2d at 1298.
analysis in every antitrust case involving extraterritorial conduct before admitting jurisdiction raises significant administrative problems.\textsuperscript{71} Neither the source of the court's knowledge of the relevant laws nor the proper allocation of the burden of proving that comity principles justify the assertion of jurisdiction is readily apparent. It would be intolerable to require plaintiffs in every case to establish, as a threshold requirement, all relevant foreign and domestic internal and international law and policy and the appropriateness of the action under these possibly conflicting norms. It is also unrealistic to compel courts to take judicial notice of the relevant laws of foreign nations.

Courts have not been insensitive to the interests of foreign governments. The *Timberlane* court admitted that the "direct and substantial effects" formulation implicitly took foreign interests into account.\textsuperscript{72} Likewise, the act of state\textsuperscript{73} and foreign government compulsion\textsuperscript{74} doctrines have mandated dismissal to avoid international

\textsuperscript{71} I. J. ATWOOD & K. BREWSTER, supra note 33, § 6.21 at 180. "Thus, while *Timberlane* and *Mannington Mills* provide an analytically sound framework for determining the proper scope of Sherman Act extraterritorial jurisdiction, whether that framework is workable in the day-to-day world of litigation is still to be proven." Id.

\textsuperscript{72} 548 F.2d at 612.

\textsuperscript{73} Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682, 697 (1976) ("the major underpinning of the act of state doctrine is the policy of foreclosing court adjudications involving the legality of acts of foreign states on their own soil that might embarrass the Executive Branch in the conduct of our foreign relations"); Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 428 (1964) ("the less important the implications of an issue are for our foreign relations, the weaker the justification for exclusivity [of decision] in the political branches"); see *Mannington Mills*, Inc. v. Congoleum Corp., 595 F.2d 1287, 1292-93 (3d Cir. 1979); Industrial Inv. Dev. Corp. v. Mitsui & Co., Ltd., 594 F.2d 48, 51 (5th Cir. 1979), cert denied, 445 U.S. 903 (1980); Hunt v. Mobil Oil Corp., 550 F.2d 68, 72-3 (2d Cir.), cert. denied, 434 U.S. 984 (1977).

The classic statement of the act of state doctrine is contained in Underhill v. Hernandez:

Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgement on the acts of government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.

168 U.S. 250, 252 (1897).

\textsuperscript{74} See *Timberlane*, 549 F.2d at 606-07; United States v. The Watchmakers of Switzerland Information Center, Inc., 1963 Trade Cas. (CCH) ¶ 70,600 (S.D.N.Y. 1962), modified, 1965 Trade Cases (CCH) ¶ 71,352 (S.D.N.Y. 1965); W. FUGATE, supra note 33, at 75-82; ANTITRUST GUIDE, supra note 26, at 8.

A good statement of the foreign compulsion doctrine is contained in *Mannington Mills*: 1982] 15
embarrassment. If a conflict of laws analysis is needed in addition to the act of state and compulsion doctrines, however, it makes more sense to retain the effects test as the threshold jurisdictional standard. It is reasonable to assume that the United States has no interest in regulating foreign conduct that does not have some meaningful impact on U.S. interests. After the original determination of jurisdiction, a balancing of competing national policies could justify dismissal of the case upon a finding by the court of appropriate facts. While a defendant must expect to bear the burden of establishing the propriety of dismissing the case, a court may choose as a matter of sound policy to allow the federal government to intervene in a private suit and advise it of the foreign policy implications of a dispute.

Similar in effect but somewhat distinct [to the act of state doctrine] is the defense of foreign compulsion which shields from antitrust liability the acts of parties carried out in obedience to the mandate of a foreign government. The sovereign compulsion defense is not principally concerned with the validity or legality of the foreign government's order, but rather with whether it compelled the American business to violate American antitrust law.

595 F.2d at 1293.

75. See Mannington Mills, 595 F.2d at 1299-1303 (Adams, J., concurring. Contra 1 J. Atwood & K. Brewster, supra note 33, § 6.13, at 166.

76. Dominicus Americana Bohio v. Gulf & Western, 473 F. Supp. 680, 688 (S.D.N.Y. 1979) ("[n]aturally, the defendants must bear the burden of demonstrating that foreign policy considerations outweigh the need to enforce the antitrust laws where the foreign commerce of the United States is affected.").

77. John H. Shenefield has stated that, in the context of cases where American interests are weak, "[w]hile it is clear that the defendant ought to have the burden on filing a motion for dismissal of setting out why subject matter jurisdiction should not be exercised, it is less clear who should have the burden of ultimately persuading the court." Address by John H. Shenefield, ABA Int'l Law Section (Dec. 10, 1980), reprinted in 5 TRADE REG. REP. (CCH) ¶ 50,424, at 55,964. Shenefield expressed the view that which side should have that burden depends on what kind of test is involved—"[w]hether the court is making a jurisdictional finding based on conflicts factors or an abstention decision based on quasi-diplomatic and relief issues,"—and concluded that "[i]f the test is designed to determine whether domestic antitrust law is applicable, I think that the plaintiff should convince the court that there are sufficient 'contacts' to justify this country's acting as a forum." Id.

Shenefield summarized the manner in which the government has intervened in private suits:

As you probably know, the Department of State had a practice—until 1978—of conveying diplomatic notes from foreign nations to courts hearing cases with international implications. At times the Department of State also sent its own assessment of the case's importance to U.S. foreign relations. Since 1978, the U.S. government has encouraged foreign governments to contact the courts
The third analytical approach to the scope of the antitrust laws applies the laws whenever the action has taken place “in foreign commerce.” James Rahl, former dean of the Northwestern University Law School, has been the most articulate spokesman for the view that antitrust jurisdiction is not limited to activities that affect U.S. foreign or interstate commerce.\(^7\) He believes that “the [Sherman] Act reaches a restraint or monopolization either (1) if it occurs \textit{in the course} of foreign commerce, or (2) if it \textit{substantially affects} either foreign or interstate commerce.”\(^7\) Under this formulation any restraint of exports from or imports to the United States would be subject to Sherman Act scrutiny regardless of where the effects might be experienced. It is enough that the restraint occurs \textit{in U.S. foreign commerce}.\(^8\)

Officials of the Antitrust Division of the Department of Justice have focused on the parties injured by extraterritorial activities and have therefore rejected Dean Rahl’s formulation.\(^8\) Rahl, on the
directly, rather than using us as an intermediary.

While I do not foresee a return to our practice before 1978, it may nevertheless be appropriate—in highly unusual cases—for the United States government to participate in some way. For example, it may be useful for the Department of Justice to file an \textit{amicus} brief for the limited purpose of providing the government’s assessment of the quasi-diplomatic factors involved in the case. Our participation may assist the court by providing guidance as to the weight to be given various quasi-diplomatic considerations, such as the likely impact on U.S. foreign relations. As the Ninth Circuit recognized in \textit{Timberlane}, the executive branch is in the best position to judge quasi-diplomatic questions surrounding the conduct of foreign affairs by the U.S. or foreign nations.

\textit{Id.} at ¶ 55,966 (footnote omitted).


79. \textit{Foreign Commerce Jurisdiction}, \textit{supra} note 78, at 523 (emphasis in original) (footnote omitted).

80. \textit{Id.}

81. \textit{American Antitrust}, \textit{supra} note 78, at 7; Douglas Rosenthal, former Chief of the Foreign Commerce Section of the Antitrust Division, has stated his belief that courts do not, as a matter of law, have jurisdiction over restraints of export trade where the injuries are felt solely in foreign markets. \textit{Hawk}, \textit{supra} note 33, at 49. Professor Hawk disagrees with Rosenthal’s conclusion. \textit{Id.} at 50.
other hand, believes that the Sherman Act was intended to prevent any restraint of the commerce of the United States. 82 Despite the widespread acceptance of the effects test, the “in commerce” formulation has a sound historic and scholarly basis. It is a respectable interpretation of the Sherman Act and has implicit support in those decisions applying a minimal standard. 83

In summary, the jurisdictional reach of the antitrust laws to foreign commercial activities, or to domestic activities that primarily affect commerce abroad, has never been clearly defined. The earliest cases focused on the site of the conduct or on the place where the agreement was entered into. Following Alcoa, a broad consensus developed that the Sherman Act encompassed all activities having an effect on domestic commerce or competitors without regard to the locus of the agreement or conduct. The formulation of this effects standard, however, has never been uniform and the intent requirement of Alcoa appears to have been lost in most subsequent formulations. The Timberlane decision added greater flexibility to the process but at the expense of certainty. A Timberlane/Mannington Mills analysis may make the assertion of jurisdiction by U.S. courts less traumatic to foreign sovereigns, but it renders the likelihood of potential antitrust liability less predictable for U.S. business. In addition, it is not clear if Timberlane effectively supplants or supplements the effects jurisdictional requirement. Finally, Dean Rahl’s arguments for an “in commerce” standard are persuasive. Antitrust counselors certainly cannot discount the possibility that courts may assert jurisdiction based solely on allegations that the purported illegal conduct occurred in U.S. foreign commerce.

The uncertainty that these several jurisdictional formulations engender adds credibility to the argument that antitrust laws impair trade. Atwood and Brewster conclude that:

The vagueness of these rules, relating as they do to the basic scope of United States Antitrust, is an unfortunate commentary on the state of American law... American business will on occasion be left with an unhappy choice between a cautious approach that may mean a loss of commercial opportunities and a more persuasive interpretation that may

82. Rahl, supra note 59, at 343-44.
83. See supra notes 54-55.
provoke costly litigation.\textsuperscript{84}

The Export Trade Association Act of 1981

The Antitrust Improvements Act is in part a response to other legislative efforts that would more radically alter the application of the antitrust laws to U.S. exporters.\textsuperscript{85} This section considers the desirability of one of the more important of these alternatives currently being considered and receiving some support, the Export Trade Association Act of 1981 (Trade Association Act).\textsuperscript{86}

The Trade Association Act would amend the Webb-Pomerene Act\textsuperscript{87} and establish a regulatory procedure to obtain certification that an export trading company or association may engage in specified activities with limited antitrust immunity.\textsuperscript{88} The proponents of the bill believe that it would make three beneficial changes to the Webb-Pomerene Act: first, protection would be extended to associations providing services, as well as to those selling goods;\textsuperscript{89} second, administration of the Act would be shifted from the

\textsuperscript{84} 1 J. ATWOOD \& K. BREWSTER, supra note 33, § 7.10 at 196.
\textsuperscript{89} Id. sec. 203, 127 CONG. REC. S3667, S3669 (daily ed. Apr. 8, 1981) (proposing new section 1 to Webb-Pomerene Act. § 1, 15 U.S.C. § 61 (1976)).

The Webb-Pomerene Act’s failure to protect service organizations has been a matter of some concern.
Federal Trade Commission (FTC) to the Department of Commerce;\textsuperscript{90} and, third, the Trade Association Act's certification procedure would result in greater certainty regarding the applicability of the antitrust laws to association activities.\textsuperscript{91}

Despite the laudable goals of the Trade Association Act, its ability to stimulate trade has been seriously questioned. A \textit{Wall Street Journal} editorial, for example, referred to a predecessor bill, S. 2718, as "mere gimmickry."\textsuperscript{92} Indeed, this is a very dangerous time in U.S. economic history to send a signal to business and labor alike that the allowance of less competition by means of antitrust immunity is the solution to the international trading problems of the United States. Anything that distracts U.S. industry from a total commitment to greater productivity and efficiency will delay the day that the United States regains its prominent role in the international market.\textsuperscript{93}

There are also very specific objections to the Trade Association Act, including: first, the Trade Association Act would establish an


90. S. 734, 97th Cong., 1st Sess., sec. 206(a), 127 CONG. REC. S3667, S3670-71 (daily ed. Apr. 8, 1981) (proposing new section 4(a)-(d) to Webb-Pomerene Act §§ 4, 5 at 15 U.S.C. §§ 64, 65 (1976)). As it transfers primary administrative responsibility from the Federal Trade Commission to the Department of Commerce, the Trade Association Act creates an affirmative, mandatory oversight role for both the FTC and the Department of Justice that is far more extensive than under the present Act. \textit{See id.}


93. \textit{See Rodino Remarks, supra} note 85, at 1, 4; \textit{Subcommittee Hearings, supra} note 19 (statement of James A. Rahl, Professor of Law, Northwestern Univ.). The textile industry provides an excellent example of the need for, and benefits of, increased productivity. Not long ago, the industry was unable to compete effectively against foreign competition within the United States. A long-term commitment to modernization, however, has made the United States textile industry the envy of much of Europe. It is not only strong domestically
extraordinarily complex multi-agency administrative process; second, it would employ a vehicle—the Webb-Pomerene Act—that has proven itself largely unresponsive to the legitimate needs of U.S. exporters; third, the bill contains an undesirable "negative pregnant," *i.e.*, the implication that export trading companies and associations *need* antitrust immunity; and, fourth, the "certainty" that the bill attempts to create is illusory.

*Bureaucratic Procedures*

The primary purpose of the Trade Association Act is to promote exporting by small- and medium-sized U.S. firms. The method sought to be employed, however, ignores two overriding factors. First, the antitrust laws are not now a serious impediment to the type of conduct the legislation seeks to foster among small firms. For example, two empirical studies commissioned by the Department of Commerce and introduced at the Senate hearings on the bill concluded that the antitrust laws do not prevent the establishment of trading companies or associations by small companies. One of these studies concludes:

We believe that there are no fundamental legal issues which constrain the Trading Company Concept. The Webb-Pomerene Act certainly permits groups of firms to join together under the umbrella of a trading company if that were appropriate. The cases in which legal problems arose with Webb Associations were ones in which the members controlled a significant share of the domestic market in the goods in which they dealt. We do not believe that small/med-


95. See supra notes 19-32 and accompanying text.

ium sized companies would have such difficulties.\textsuperscript{97}

The second significant factor disregarded by proponents of the Trade Association Act is the effect of the additional bureaucratic procedures on small business. The cost of complying with complex federal regulation is a major disincentive to any activity by small businesses.\textsuperscript{98} The procedures contained in the proposed Trade Association Act are regulation run rampant.

The chairman of a small firm that has successfully entered the export market reacted to the procedures contained in the Trade Association Act as follows:

My real concern is that the required certification procedure set forth in S. 734, both as to information required in the application and as to the administrative findings required on need and on what the trading companies do not do, involving three separate government departments, is so complicated that it will serve more as a barrier than an incentive so far as small business participation is concerned....

We need incentives, not disincentives for small business to enter into world trade. A complicated certification process will be a disincentive, joining a number of others already in place.\textsuperscript{99}

Although one might respond that no disincentive or barrier will be created because U.S. businesses will not be required to obtain certification under the Trade Association Act before engaging in export activities, nevertheless the negative implications created by the existence of a complex administrative certification procedure\textsuperscript{100} will

\textsuperscript{97} Hay Assocs., A Study to Determine the Feasibility of the Export Trading Company Concept As a Viable Vehicle for Expansion of United States Exports 126 (Mar. 1977), reprinted in 1979 Senate Hearings, supra note 89, at 566.


\textsuperscript{99} Subcommittee Hearings, supra note 19 (statement of Gordon Johnson, Chairman of Log. Etronics, Inc.).

\textsuperscript{100} See infra notes 156–162 and accompanying text.
force businesses to seek the protections of the Act. In short, the Trade Association Act creates a major disincentive to export activities by small firms—a complex bureaucracy—to eliminate a non-barrier—antitrust. A review of the bill's procedures demonstrates the extent of this problem.

Exporters seeking the protection of the Trade Association Act would be required to file a detailed application with the Secretary of Commerce. This application would have to identify, *inter alia*, the members, officers, and shareholders of the company or association, its export trade activities and methods of operation, and a description of the factors and circumstances which show that "its activities will serve a specified need in promoting the export trade of the described goods, wares, merchandise, or services."

Before issuing a certificate, the Secretary of Commerce would have to find that the applicant's trade activities and methods of operation will serve a "specified need" in promoting exports and

(1) serve to preserve or promote export trade;
(2) result in neither a substantial lessening of competition or restraint of trade within the United States nor a substantial restraint of the export trade of any competitor of such association or export trading company;
(3) do not unreasonably enhance, stabilize, or depress prices within the United States of the goods, wares, mer-

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102. "The term 'export trade activities' means activities or agreements in the course of export trade." S. 734, 97th Cong., 1st Sess., sec. 203, 127 Cong. Rec. S3667, S3669 (daily ed. Apr. 8, 1981) (proposing new section 1(3) to Webb-Pomerene Act § 1, 15 U.S.C. § 61 (1976)). "The term 'export trade' means trade or commerce in goods, wares, merchandise, or services, exported from the United States or any territory thereof to any foreign nation." Id. (proposing new section 1(1)).

103. "The term 'methods of operation' means the methods by which an association or export trading company conducts or proposes to conduct export trade." Id. (proposing new section 1(4)).


105. *Id.*
chandise, or services of the class exported by such association or export trading company;

(4) do not constitute unfair methods of competition against competitors engaged in the export trade of goods, wares, merchandise, or services of the class exported by such association or export trading company;

(5) do not include any act which results, or may reasonably be expected to result, in the sale for consumption or resale within the United States of the goods, wares, merchandise, or services exported by the association or export trading company or its members; and

(6) do not constitute trade or commerce in the licensing of patents, technology, trademarks, or know-how, except as incidental to the sale of the goods, wares, merchandise, or services exported by the association or export trading company or its members. . . .

If the Secretary of Commerce were to hold that certification was appropriate, a copy of the proposed certificate would be delivered to the Department of Justice and the Federal Trade Commission (FTC). The Justice Department and/or the FTC could advise the Secretary of Commerce within fifteen days of receipt of the proposed certificate if either wished to offer advice regarding the Secretary's determination. The objecting agency would then formally advise the Commerce Department and the applicant of its disagreement with the Secretary within forty-five days. If the Secretary of Commerce chose to issue a certificate over the objection of the Justice Department or FTC, the certificate would remain ineffective for thirty days. During this thirty-day period either antitrust enforcement agency would be permitted to file a suit in federal district court


108. Id.

109. Id.

to revoke the certificate. Finally, the Secretary would be granted the discretion to impose such terms and conditions as he may deem necessary to comply with the Trade Association Act, and the certified company or association would have a continuing obligation to report any material changes in its activities or operations.

There was nearly unanimous agreement among the witnesses who appeared before the Subcommittee of the House Committee on the Judiciary that the complex procedure of the Trade Association Act would deter rather than promote export trade. John H. Shenefield, a former Assistant Attorney General for the Antitrust Division, referred to the House counterpart to the Trade Association Act in stating:

Its erection of a complex regulatory structure of certification, with provision for interdepartmental consultation, mandating multiple, uncertain and burdensome avenues of challenge and appeal, would in itself be a disincentive to export. The prospect of one agency of the United States government suing to overturn the ruling of another agency is hardly likely to reassure a business community seeking clarification and guidance.

In a similar vein, an expert on regulatory matters said:

I have found over the years that it is almost impossible to explain to the average citizen the logic of their having received conflicting advice from separate Federal agencies. When citizens deal with their Federal government, they think of it as one government and they do not understand

114. See Subcommittee Hearings, supra note 19 (statements of Eleanor M. Fox, Gordon Johnson, Thomas M. Rees, and A. Paul Victor). In addition, one commentator has noted that the internal provisions of the Trade Association Act are inconsistent. Murphy, supra note 101, at 412-13.
why it does not respond as one.\textsuperscript{116}

The difficulty generated by a multi-agency review is exacerbated when, as in the Trade Association Act, the agencies have diverse goals. The Commerce Department is charged with promoting exports,\textsuperscript{117} while the Department of Justice and FTC must enforce the antitrust laws and promote competition to the greatest extent possible.\textsuperscript{118} History has shown that trade promotion agencies are generally insensitive to the fundamental goals of antitrust,\textsuperscript{119} and also that the tension between bodies charged with enforcement and those charged with promotion can result in extraordinary regulatory complexity and delay.\textsuperscript{120}

The procedural provisions of the Trade Association Act have also been criticized because of their extensive disclosure requirements and the standards for certification.\textsuperscript{121} Applicants would have to disclose potentially confidential information, \textit{e.g.}, future markets and marketing practices, that may have nothing to do with competition.\textsuperscript{122} Similarly, several of the criteria for certification, \textit{e.g.}, a

\textsuperscript{116} Subcommittee Hearings, supra note 19 (statement of Fred Emery, Director, \textit{Federal Register} (1970-79).


\textsuperscript{122} The Trade Association Act, as proposed, requires disclosure of the goods or services to be sold, the countries where they will be sold, and the activities and methods to be employed in their sale. S. 734, 97th Cong., 1st Sess., sec. 206, 127 \textit{Cong. Rec.} S3667, S3670 (daily ed. Apr. 8, 1981) (proposing new section 4(a)(5), (7), (8) to Webb-Pomerene Act §§ 4, 5, 15 U.S.C. §§ 64, 65 (1976)).
"specified need" in the promotion of export trade, have no relevance to the concerns of the Sherman Act.\textsuperscript{123}

The problems inherent in government regulation may prove exceedingly difficult in the area of export trade. International trading is a dynamic venture.\textsuperscript{124} Opportunities arise quickly and frequently must be seized or lost.\textsuperscript{125} The regulatory "lag" that annoys public utilities\textsuperscript{126} could prove fatal to U.S. trading companies that rely largely on secrecy and speed.\textsuperscript{127} Moreover, the regulatory lag that prevents utilities from quickly passing through their cost increases provides a "dividend" to the utility's consumers.\textsuperscript{128} Trade opportunities lost due to regulatory delay, however, would have no offsetting benefits for the public.

Government regulation presents two problems: first, regulation such as that of the Trade Association Act\textsuperscript{129} imposes restrictions and costs on the regulated party,\textsuperscript{130} and second, government regulation tends to foster monopoly where competition is both possible and

\textsuperscript{123} Three of the six criteria for certification have little, if any, relationship to the goals of the antitrust laws. The second (trade restraints), third (price fixing), and fourth (unfair methods of competition) criteria of section 204 relate to traditional antitrust concerns, \textit{i.e.}, the maintenance of competition. The first, fifth, and sixth, however, foster goals relating to promoting exports, preventing resale of exported goods in the U.S., and eliminating unnecessary licensing of patents, trademarks, or know-how. See \textit{supra} note 106 and accompanying text.


\textsuperscript{125} Id.


\textsuperscript{127} \textit{Inside Philipp Bros., A $9 Billion Supertrader}, \textit{Bus. Week.}, Sept. 3, 1979, at 111.

\textsuperscript{128} When during periods of rising costs a utility is unable to raise prices to maintain a "reasonable" return, its consumers, rather than its shareholders, receiving the benefit of service at a price below competitive levels. Warren, \textit{supra} note 126, at 17.

\textsuperscript{129} See \textit{supra} text accompanying notes 94-99.

\textsuperscript{130} R. Carr, The Taxes of Regulation, Remarks before the Allegheny Bar Association (Pittsburgh, Pa., Oct. 1, 1981) (copy on file at the offices of \textit{Law & Policy in International Business}). Carr, Deputy Assistant Attorney General, Antitrust Division, U.S. Department of Justice, argues that:

the routes of escape from regulatory supression are almost necessarily less efficient than those of the unimpeded market, and hence impose costs—taxes—on the society. Consumers in the affected markets bear much of those costs, most obviously in the form of higher than competitive prices, sometimes in poorer quality products or services, but also in the form of restricted output and reduced incentives for innovation and increased productivity.

\textit{Id.}
When this occurs it is the public that suffers.\textsuperscript{132} In the context of the Trade Association Act, the public interest would be injured if the antitrust enforcement agencies do not seriously review all proposed certificates for potential anticompetitive effects. The Commerce Department, the body responsible for that review, has demonstrated some insensitivity to the goals of antitrust in the past.\textsuperscript{133}

It is essential that the appropriate regulatory bodies remain constantly alert to the danger that a certified company or association may achieve immunized monopoly power. The legislation envisions the creation of efficiency-promoting combinations.\textsuperscript{134} If the induction to export, however, becomes the unrestrained ability to exact monopoly profits, rather than the right to enter efficiency-promoting associations, domestic consumers and competitors will be threatened. Monopoly profits can, after all, only be achieved by restricting production to a level lower than that which would exist in a competitive market. When this occurs, the supra-competitive profits in the export market will draw the product out of the U.S. market and raise domestic prices.\textsuperscript{135} Furthermore, the exporters will naturally be inclined to attempt to control domestic supply and prices to prevent arbitrage.\textsuperscript{136} In short, there would be a strong incentive to suppress production artificially in both foreign and domestic markets to force a price increase.

The grant of monopoly power to an export cartel would also create an incentive to eliminate actual or potential competition from domestic firms for the export market.\textsuperscript{137} A cartel simply cannot tolerate competition.\textsuperscript{138} A monopolistic association, therefore,

\begin{itemize}
\item \textsuperscript{131} See, e.g., R. Bork, The Antitrust Paradox, 347-49 (1978); see also R. Posner, supra note 126, § 12.8.
\item \textsuperscript{132} Bork, supra note 131, at 364.
\item \textsuperscript{133} See Folsom, supra note 119, at 1634, 1638.
\item \textsuperscript{135} Those who oppose export trade combinations argue that they not only encourage anticompetitive conduct abroad, but also invite the opportunity for similar restraints with respect to prices and production in the domestic market. See National Commission, supra note 89, at 299.
\item \textsuperscript{136} See Posner, supra note 126, at 205-06.
\item \textsuperscript{137} Id.
\item \textsuperscript{138} Firms operating outside the cartel can often benefit from the high prices set by the cartel by charging a lower price. By taking business away from the cartel, outside competition ultimately causes its dissolution. See National Commission, supra note 89, at 300.
\end{itemize}
would have a strong motive to react aggressively to the entry of any non-member competitor and might have the power to engage in predatory competition, at least with small competitors.

The regulatory mechanism and certification process of the Trade Association Act will have adverse effects if enacted. If the Act's requirements are strictly adhered to, the financial costs, as well as the aggravation, will provide a strong disincentive to potential small- and medium-sized exporters. If enforcement is relaxed to minimize this problem, the public interest may suffer through increased monopolization of the U.S. export trade.

Webb-Pomerene Act

The Trade Association Act would expand the Webb-Pomerene Act to provide a more elaborate certification mechanism in an effort to make antitrust immunity more certain. The reliance on an expanded Webb-Pomerene Act is based on two faulty premises: first, the Webb-Pomerene Act does not adequately protect small- and medium-sized firms, and second, it has failed to stimulate expansion of export activities because it does not provide sufficient certainty.

The Webb-Pomerene Act grew from a need to allow U.S. producers to compete overseas with powerful foreign cartels. In 1916 the Federal Trade Commission published a study that noted the importance of export trade to the U.S. economy and the disadvantages suffered by domestic producers due to the concerted activities of foreign competitors and purchasers. As a result Congress enacted the Webb-Pomerene Act two years later authorizing exporters to combine in order to share the costs and risks of exporting without antitrust liability.

141. Id. at 19.
142. Id. at 18. See also S. 144 Hearings, supra note 89, at 18-20 (statement of Sen. Stevenson) and 33-34 (statement of Sen. Danforth).
143. See National Commission, supra note 89, at 295.
145. Pub. L. No. 65-126, § 50, 40 Stat. 516 (1918). The FTC Report noted that considerable doubt existed both within the business and legal communities as to the application
The Webb-Pomerene Act has not lived up to congressional expectations and very few exporters have chosen to operate under the Webb exemption. In 1976, for example, the Webb associations accounted for only 1.5 percent of U.S. exports. The law has generally been used not by small firms to gain efficiencies, but rather by large firms to set prices and terms of sale for foreign markets: "[T]he common feature of Webb export associations today is not their performance or efficiency or cost-reducing function, but rather the pursuit of traditional cartel-related activities." 147

Implicit in the Trade Association Act is the suggestion that the nature and scope of the Webb-Pomerene exemption is not sufficiently clear to attract small exporters. 148 There is, however, little factual support for this conclusion. As a practical matter, it is inconceivable that an efficiency-promoting association of small firms would fall outside of the antitrust exemption currently enjoyed by combinations of large firms in concentrated industries that are engaged in classic cartel practices.

The Federal Trade Commission has conducted several reviews of Webb associations since the passage of the Webb-Pomerene Act. In of the antitrust laws to export trade. "This uncertainty, with the attendant possibility of prosecution, prevented American companies from cooperating in export activities and hindered a needed expansion of U.S. exports. In order to clarify this situation, the Commission recommended that legislation be enacted to remove this doubt." National Commission, supra note 89, at 296.

146. American Business Abroad, supra note 33, at 312 n.141.

I was advised that we could not look to other firms in our industry for a partnership in providing such a full range of products in these possible transactions because joint discussions or a joint venture setting mutually agreed prices between us and our U.S. competitors as to foreign customers was thought to risk a violation of the U.S. antitrust laws. More recently, I have talked to antitrust lawyers who are 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 antitrust counsel, fears the antitrust law and is inclined to stay as far away from possible exposure as he can, even if it means giving up business opportunities.

S.144 Hearings, supra note 89, at 285-86 (testimony of Milton Schulman).
a 1955 study of Webb associations that had disbanded or were inactive, the FTC attempted to determine why they chose not to utilize the exemption.149 There was no evidence that uncertainty caused the attrition. The major reason identified for dissolution of an association was foreign price competition.150 Other significant reasons included the existence of foreign trade barriers, a desire to restructure the association, and a failure to continue conforming to the requirements of the law. Only one association blamed the actions of a foreign agency or cartel for its dissolution.151

The Webb-Pomerene Act is ineffective not because its application is uncertain, but because it is premised on erroneous economic concepts. Cartels seldom produce efficiencies; they are difficult to maintain and discipline, and cannot survive competition.152 The most successful Webb associations are made up of major firms producing standardized raw materials in concentrated U.S. industries that could export individually and still realize economies of scale.153 Where competition did not exist, such as in the markets dominated by the cartels of pre-World War II Europe, the exempt Webb associations did not break the cartels by creating competition; rather, the stringent application of U.S. antitrust laws ended the European cartels.154

All told, the Webb-Pomerene Act is not a sound vehicle for a meaningful clarification of the antitrust laws. Its application to export-promoting associations of small- or medium-sized firms is reasonably clear, but in the past they have chosen not to use it. Surely adding a substantial regulatory bureaucracy and complex procedure will not stimulate greater use.155

Negative Implications of the Trade Association Act

The obvious implication of a statute establishing immunity from the antitrust laws is that the immunity is needed; i.e., that the im-

149. FTC Webb-Pomerene 50-Year Review, supra note 147, at 26–27.
150. Id. at 26.
151. Id.
152. See supra note 138 and accompanying text.
153. See FTC Webb-Pomerene 50-Year Review, supra note 147, at 64–66.
155. See supra notes 109–120 and accompanying text.
munized activity would violate the law but for the exemption. A close look at the Trade Association Act, however, shows that when its standards are met the certified activities would not violate the antitrust laws. Immunity under the Trade Association Act could be withheld even when there is no cognizable domestic effect suggesting violation of the antitrust laws. For example, certification must be denied if the applicant does not show that its activities serve a "specified need" in promoting export trade, though the activities may not have any significant impact on U.S. markets, consumers, or competitors. The logical implication of the bill is that the antitrust laws are fully applicable to concerted export activities regardless of their effect on the U.S. marketplace. Immunity may be given or withheld at the discretion of a federal bureaucracy for reasons that are wholly unrelated to the competitive impact of the export activity.

The Webb-Pomerene Act itself has been criticized for harboring a negative implication, or "negative pregnant," regarding the international reach of the antitrust laws. The Supreme Court read such an implication into the Act in Pfizer v. India where the Court held that foreign plaintiffs injured by an antitrust violation have standing to sue in U.S. courts under section 4 of the Clayton Act on the same basis as domestic corporations or individuals. The Court based its decision in part on the view that transactions in U.S. exports are covered by the Sherman Act unless the Webb pro-

156. Ky P. Ewing, then Deputy Assistant Attorney General of the Antitrust Division, Department of Justice, testified at a hearing before the Senate Banking Committee that an antitrust exemption for trading companies was not necessary because appropriate joint export activities were not currently illegal under the U.S. antitrust laws. 1979 Senate Hearings, supra note 89, at 137–52. Mr. Ewing testified to the same effect again in 1981. S. 144 Hearings, supra note 89, at 341–44. He noted that the certification procedures that would allow a trading company to qualify for an exemption to the antitrust laws would be extremely complex, creating a bureaucratic nightmare. Id. at 341. In addition, he underscored the Justice Department's traditional view that U.S. businesses do not require antitrust exemption or clearance to engage in joint exporting activity, the sole purpose of which is to sell goods or services for consumption abroad. Id. at 342.


158. J. ATWOOD & BREWSTER, supra note 33, at 351–52. See also Subcommittee Hearings, supra note 19, at 12 (statement of James R. Atwood).

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cedures are utilized.\textsuperscript{160} Atwood and Brewster argue that the Webb-Pomerene Act should be repealed rather than amended because exporters acting outside the provision of the amended Act, 98 percent of U.S. export trade, would "be even further intimidated by the negative pregnant that is inherent in the Webb Act's narrow grant of immunity."\textsuperscript{161}

The Trade Association Act's implication that the antitrust laws apply to all non-immunized joint export activities, coupled with the complex immunizing mechanism, will affect small- and medium-sized firms. If these companies believe that they must act at their peril under the antitrust laws, or subject themselves to pervasive review and regulation by several federal agencies, they are likely to avoid the export market altogether.\textsuperscript{162} The very fact that this legislation is being considered may already be chilling U.S. export activities.

A primary goal of the Trade Association Act is to foster the creation of trading companies. This goal is based in large part on the phenomenal success of Japanese export trading companies, the Sogo Shosa,\textsuperscript{163} highly integrated firms engaged in aggressive international trade that are generally able to provide a "full line" of export services, including financing, insurance, and transportation.\textsuperscript{164} These trading companies, however, are not simply service organizations, but rather transnational corporate giants that dominate much of the Japanese economy.\textsuperscript{165}

The Trade Association Act suggests that companies modeled on the Japanese firms, or approaching that model, risk violating the an-

\textsuperscript{160}. The Supreme Court suggested that Congress, which had provided a "narrow and carefully limited exception for export activity that would otherwise violate the antitrust laws," would not have done so if it intended to make the treble damage remedy available only to consumers in the United States. For this reason, the Court concluded that a civil cause of action for antitrust violations was also available to foreign sovereigns. See id. at 314 n.12.

\textsuperscript{161}. J. ATWOOD & K. BREWSTER, supra note 33, at 352.

\textsuperscript{162}. See supra notes 98-99 and accompanying text.

\textsuperscript{163}. 1979 Senate Hearings, supra note 89, at 28-29 (statement of C. Fred Bergsten, Assistant Secretary of Treasury for International Affairs) and 104-107 (statement of the National Association of Manufacturers).

\textsuperscript{164}. Id. at 58-59 (statement of Frederick W. Huszagh, Executive Director, Dean Rusk Center).

\textsuperscript{165}. Id. at 29. C. Fred Bergsten testified that the top nine Japanese trading companies wield staggering market power. In 1975, they controlled 56.4 percent of all Japanese exports, 55.6 percent of total imports and their total sales represented 31 percent of Japan's

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titruct laws. Yet, while U.S. firms await passage of this legislation, Japanese trading companies that are subject to U.S. antitrust laws are expanding their U.S. operations, thus indicating that these laws do not deter export trading company activities. In addition, at least three U.S. trading giants that rival the Japanese companies in size and business volume have operated for many years: Cargill, Inc., which is reputed to be the world's largest grain-trading company, Continental Grain Company, and Philipp Brothers.

Presumably, the Japanese firms and giant U.S. grain and oil traders, together with the great majority of U.S. exporters that have chosen to operate outside of the Webb-Pomerene Act, are well counseled and do not believe that their activities violate the antitrust laws. Establishing an elaborate mechanism for them to obtain antitrust immunity may compel an interpretation of the antitrust laws that requires them to do so. The result could be extremely serious: existing exporters may be found liable in treble damages for past activities, and all existing and potential exporters, large and small, would have to decide if the rewards of the export market are worth the price of pervasive federal regulation.

Degree of Certainty

To be effective, the Trade Association Act should satisfy three criteria: its standards must be clear, its procedures swift and unburdensome, and its benefits certain. The Act fails on all three counts. Not only are the legislation's standards nebulous and its

nominal gross national product. Id.

166. Large Japanese trading companies, particularly the Mitsubishi group, have expanded their operations in the U.S. market which they consider attractive because of its stability. In turn, the Japanese companies increasingly are being sought as partners by major American corporations because of "their expertise, their globe-girdling marketing prowess and the low-cost financing they can provide." U.S. Ties Growing for Japan's Traders, N.Y. Times, Aug. 10, 1980, D1, col. 1.


168. Morgan indicates that on average, Cargill, Inc. and Continental Grain Company each handle about a quarter of total U.S. grain exports. Id. at 234.

169. Philipp Brothers, a division of Engelhard Minerals & Chemicals Corp., is reputed to be one of the world's largest and most diversified marketers of raw materials. See Inside Philipp Bros., supra note 124, at 108.

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procedures complex, but the promised certainty is illusory. Certification would not immunize an association from suit. The proposed statute would protect associations only for those trade activities and methods of operation that are certified and conducted within the terms and conditions stated in the certificate. An association or trading company that is sued must expect to shoulder the burden of proving that the Commerce Department, in consultation with the Justice Department and Federal Trade Commission, authorized its activities. The nature of the certification process, and the standards for certification, will render such a defense extremely difficult when serious anticompetitive injury has been experienced in the domestic market or by a domestic competitor in foreign commerce.

Certification may not be granted under the Trade Association Act for activities that substantially restrain trade in the United States or with a domestic competitor, or that will unreasonably affect prices in the United States. It will not take a very ingenious lawyer to understand that a complaint must only allege conduct outside the scope of the certificate. Such an allegation will not be difficult to make. Suppose, for example, that an association has been certified to establish prices and allocate territories among its members and that its pricing and territorial policies seriously injure a U.S. competitor or consumer. The injured party may allege that the association members have combined or conspired to destroy it, an act which itself violates antitrust law without regard to the legality of the means employed to accomplish the act. An allegation of injurious

171. See supra notes 94–138 and accompanying text.
172. See Murphy, supra note 101, at 409.
174. Id. (proposing new section 2(a)(2)).
175. Id. (proposing new section 2(a)(3)).
177. Radiant Burners, Inc. v. People's Gas Light and Coke Co., 364 U.S. 656 (1961) (refusal to provide gas for use in plaintiff's burners because burners did not have "seal of approval" illegal in the absence of objective standards for obtaining seal); Sugar Institute, Inc. v. United States, 296 U.S. 553 (1936) (Institute's requirement that all members adhere to publicly announced prices and terms illegal, although announcement of prices and terms not illegal).
conduct not specifically identified in a certificate would similarly threaten to deny the defendant's activities the protection of the Trade Association Act.

For several reasons courts will be likely to find liability whenever a significant U.S. injury has occurred. First, there will be a natural disinclination to leave without relief a domestic party who has suffered a serious antitrust injury. Second, the Secretary of Commerce has no authority to certify conduct having a substantial anticompetitive effect on U.S. persons or commerce, and the courts are not likely to find that a certificate was intended to provide protection when those effects have been experienced. Finally, antitrust exemptions are narrowly construed.

The Trade Association Act also requires certified associations to report any “material changes” in their membership or operations and allows amendment of the certificate. The House counterpart to the Trade Association Act, H.R. 1648, states that an amendment noting a material change must be filed within thirty days to avoid an “interruption in the period for which the certificate is in effect.”

The legislation’s lack of certainty is exacerbated by the danger of losing a certificate’s protection if the challenged conduct proves to be a material change in the association’s activities, or if the association is held to have failed to report in timely fashion some other material change. The concept of “materiality” itself has spawned complex, fact-specific litigation in other legal contexts.

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180. S. 734, 97th Cong., 1st Sess. sec. 206(a), 127 CONG. REC. S3669, S3671 (proposing new section 4(c)-(d) to Webb-Pomerene Act §§ 4, 5, 15 U.S.C. §§ 64, 65 (1976)).
181. H.R. 1648, 97th Cong., 1st Sess., sec. 206(a) (proposing new section 4(c) to Webb-Pomerene Act §§ 4, 5, 15 U.S.C. 64, 65 (1976)).
The protective benefits of the proposed legislation are also jeopardized by the several avenues open for amendment or decertification. If the Department of Justice or FTC disagrees with a Commerce Department certification, either agency would have the option of suing the newly certified association before its certificate becomes effective. At any time the Secretary of Commerce would be permitted to begin a proceeding to revoke or modify a certificate or the two antitrust enforcement agencies could file suit to have the association decertified. Any decision to seek certification would take into account this "sword of Damacles' of unclear government regulation.

At times the failure of the Department of Justice or the FTC to seek injunctive relief immediately in the event either agency notified the Department of Commerce of their disapproval would be more chilling than the action itself. The potential benefits to be derived from the certification would have to be great to persuade an association to go ahead with a substantial commitment to export trade, knowing that the Department of Justice believes its certificate to be improvidently granted. Similarly, the fact of decertification may needlessly deter permissible trade activity. For example, an association may lose its certification if it sells goods that are later sold back into the United States or if it transfers technology not incidental to the sale of goods. The risk of antitrust liability upon the loss of a certificate would be extraordinary, even if the association had never engaged in questionable activities. Prudence may require an association to terminate all trade activities until the certificate can be reinstated.

The Chilling Effect on Export Trade

On both practical and philosophical levels the Antitrust Improvements Act is fundamentally different from the Trade Associa-
tion Act in its implicit statements of the appropriate scope of the antitrust laws. Although both bills attempt to render less uncertain the reach of the antitrust laws to international transactions, the bills select different means to reach that end. The Antitrust Improvements Act states that antitrust laws do not apply to activities that do not directly, substantially, and foreseeably affect the U.S. marketplace or U.S. competitors. In contrast, the Trade Association Act states implicitly that the antitrust laws apply fully to foreign trade, but if certain procedures are followed and standards met, an association may be granted limited immunity from the laws.

There are many reasons why U.S. businesses avoid the export market: language barriers, the application of alien laws, fluctuations in exchange rates, various domestic legal restrictions and controls, and a generally adequate home market. The concern over antitrust enforcement has been for the most part a nagging fear without demonstrable substance. The Trade Association Act would give substance to that concern by offering the traditional remedy for an industry that cannot or should not operate under the constraints of the competitive marketplace: regulation.

Without providing absolute immunity from suit, or certain dismissal at the pleadings stage of litigation, the Trade Association Act gives business less than the Antitrust Improvements Act at a much higher cost. Once traders observe that the Justice Department or Federal Trade Commission obstructs certification, or that suits alleging activity beyond the scope of the certificates result in lengthy, complex litigation, few traders will choose to seek certificates. If in addition courts read a negative pregnant into the bill, requiring certification, the Trade Association Act would become yet another dramatic disincentive to desirable trade.

The Foreign Trade Antitrust Improvements Act of 1981

The Antitrust Improvements Act, if enacted, would basically codify existing enforcement policy and the dominant judicial view

189. See Subcommittee Hearings, supra note 19 (statement of James R. Atwood).
190. See generally Report of the President, supra note 10.
of the appropriate Sherman Act jurisdictional standard.194 As originally introduced, the bill established the effects standard and exempted joint export ventures from section 7 of the Clayton Act.195 In its present version, the Act would apply the effects standard only to export trade, exempt joint export ventures from the scope of the Clayton Act, and clarify section 5 of the Federal Trade Commission Act by similarly limiting its application to export trade where the requisite effects may be found.196

Applicable Standards

Adoption by Congress of an appropriate jurisdictional standard for antitrust law would be a significant response to the uncertainty about and perceived threat of antitrust enforcement. The adoption of the standard embodied in the Antitrust Improvements Act—"direct, substantial, and reasonably foreseeable effect"—would clearly be appropriate because it already has found support in prior judicial decisions and enforcement policy.197 It would provide certainty both by fixing the appropriate effects standard and by eliminating the risk that liability may be based on extraterritorial activities having no appreciable domestic consequences.198

At congressional hearings on H.R. 2326, the predecessor to the current version of the bill, H.R. 5235,199 several witnesses testified that the jurisdictional standard should require that the proscribed conduct have a "foreseeable," as well as a "direct and substantial," effect requirement.200 Chairman Rodino accepted the suggestion: H.R. 5235 predicates jurisdiction on a "direct, substantial and reasonably foreseeable effect" on domestic commerce or domestic persons.201 The inclusion of a "foreseeability" test is consistent with Judge Hand's intent requirement as courts have viewed it since

196. See supra note 192.
197. See supra notes 34–60 and accompanying text.
198. The ABA Report states that the House bill would afford American businesses increased assurance that joint and unilateral export activities would be protected as long as they do not affect United States domestic or export commerce. ABA Report, supra note 49, at 30.
199. See supra note 1.
200. See, e.g., Subcommittee Hearings, supra note 19 (statement of John H. Shenefield).
201. See supra note 192.
Alcoa,202 and is not particularly onerous for potential plaintiffs. A "reasonably foreseeable" test is an objective standard that will not require proof of an actor’s state of mind. Rather, it will require proof that the facts were such as to put a reasonable person on notice of the prohibited domestic effects.

The Antitrust Improvements Act would prevent the Timberlane/Mannington Mills comity formulation203 from expanding jurisdiction to activities lacking any significant effect on the U.S. market. It would not, however, prevent the federal courts from considering issues of comity, but would set a jurisdictional threshold that must be crossed before comity considerations would be appropriate or necessary. That is, jurisdiction would not lie solely because its assertion would be inoffensive to the principles of comity among nations; there also would have to be a sufficient domestic effect.

Clayton Act and Federal Trade Commission Act Amendments

The amendments to the Clayton Act and Federal Trade Commission Act are necessary to effectuate the salutary amendment of the Sherman Act. Through the Antitrust Improvements Act the sponsors are announcing to the exporting community and the courts that U.S. exporters should be free to compete aggressively in foreign markets under the rules that prevail in those markets.204 Section 7 of the Clayton Act, however, reaches potentially anticompetitive joint ventures in their incipiency and could proscribe joint export activities having minimal or merely potential domestic effects.205 The Antitrust Improvements Act, therefore, would exempt all joint ventures limited to export commerce with foreign nations, leaving such joint ventures subject to the amended Sherman Act and the Federal

202. See supra notes 40-47 and accompanying text.
203. See supra notes 61-77 and accompanying text.
204. See Rodino Remarks, supra note 85, at 3.
205. U.S. v. Von's Grocery Co., 384 U.S. 270, 277 (1966) ("Congress sought to preserve competition among many small businesses by arresting a trend toward concentration in its incipiency. . . ."); U.S. v. Penn-Olin Chemical Co., 378 U.S. 158, 171 (1964) ("[the purpose of the] original Act was to arrest incipient threats to competition which the Sherman Act did not ordinarily reach"); Brown Shoe Co. v. U.S., 370 U.S. 294, 317 (1962) ("[A] keystone in the erection of a barrier to what Congress saw as the rising tide of economic concentration, was its provision of authority for arresting mergers at a time when the trend to a lessening of competition in a line of commerce was still in its incipiency.")
Trade Commission Act.\textsuperscript{206} Section 5 of the Federal Trade Commission Act has not been a serious threat to Americans engaged in international trade.\textsuperscript{207} The potential sweep of the statute, however, particularly the fact that it reaches activities that tend toward a violation of the Sherman Act,\textsuperscript{208} renders it a threat to the Antitrust Improvements Act's goal of removing a needless disincentive to export trade, \textit{i.e.}, uncertainty about the applicability of the antitrust laws to extraterritorial conduct.\textsuperscript{209} This aim would be seriously jeopardized if one antitrust enforcement agency retained the authority to apply a different, less stringent standard and prohibit activities that the amended Sherman Act and Clayton Act would permit. Accordingly, H.R. 5235 would make an appropriate amendment to the Federal Trade Commission Act as well as to the Sherman Act.\textsuperscript{210}

\textit{Imports}

Some witnesses expressed concern in congressional hearings that the Antitrust Improvements Act would extend to import, as well as export, activities:\textsuperscript{211} "it is important that there be no misunderstanding that import restraints, which can be damaging to American

\footnotesize{\begin{itemize}
\item \textsuperscript{206} See supra note 192.
\item \textsuperscript{207} Subcommittee Hearings, supra note 19 (statement of David N. Goldsweig).
\item \textsuperscript{208} Federal Trade Commission v. Cement Institute, 333 U.S. 683, 694 (1948) ("all conduct violative of the Sherman Act may likewise come within the unfair trade practice prohibitions of the Trade Commission Act").
\item \textsuperscript{209} See, e.g., Remarks of the Honorable Peter W. Rodino, Jr.:
\end{itemize}}

\begin{quote}
My own involvement with legislative efforts to increase exports has been focused on the antitrust laws. Many businessmen say that our antitrust laws have prevented participation by American producers in the export market because they are uncertain about how the laws apply to joint export transactions. While proper antitrust counseling could eliminate most of these problems, the mere perception of an antitrust barrier may deter some small and medium-sized firms from entering the export market.

Together with Mr. McClory, the ranking minority member of the Judiciary Committee, I have introduced legislation to clarify the international reach of the antitrust laws with respect to export activities. H.R. 2326, the Foreign Trade Antitrust Improvements Act, will eliminate application of the antitrust laws to export transactions that have no direct and substantial impact on our domestic marketplace.
\end{quote}

Rodino Remarks, supra note 85, at 4.

\footnotesize{\begin{itemize}
\item \textsuperscript{210} See supra note 192.
\item \textsuperscript{211} Subcommittee Hearings, supra note 19 (statement of James R. Atwood).
\end{itemize}}
consumers, remain covered by the law."\(^2\)\(^{12}\) H.R. 5235 addresses this issue by limiting the statute's reach to "conduct involving export trade or export commerce."\(^2\)\(^{13}\) It is doubtful that H.R. 2326 would have had adverse effects on import trade. The Wilson Tariff Act\(^2\)\(^{14}\) remains a specific barrier to restraints on imports, and any meaningful restriction on imports would satisfy a "direct, substantial and reasonably foreseeable effect" standard.

Limiting the bill to export trade leaves the Sherman Act's applicability to import restraints clearly unaltered. It does, however, create a problem. Cases like *Pacific Seafarers, Inc.* extend the scope of the Sherman Act to conduct that involves neither the import nor export trade of the United States.\(^2\)\(^{15}\) As introduced, the Antitrust Improvements Act applied to conduct such as that found in *Pacific Seafarers, Inc.* as well as to export trade; the new form of the legislation leaves the issue to the courts.\(^2\)\(^{16}\)

**U.S. Resolve and International Cartels**

Dean Rahl voiced the most serious objection to the Antitrust Improvements Act when he noted that it might generate new or reinvigorate existing international cartels. Having documented the role of U.S. antitrust enforcement in the demise of many major international cartels operating after World War II,\(^2\)\(^{17}\) Rahl fears that any retreat from an aggressive antitrust policy may encourage their rebirth.\(^2\)\(^{18}\) The concern is justified. The unique role of the United States as an advocate of a competitive international market\(^2\)\(^{19}\) adds significance to any hint that its commitment to this goal is waning. If

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212. *Id.* (statement of James R. Atwood).
213. *See supra* note 192.
215. *See supra* notes 57-58 and accompanying text.

foreign and domestic businessmen are led to believe that "no holds are barred" in the international market it could have unfortunate consequences. The re-establishment of international cartels is undesirable, of course, because cartels produce fewer goods for higher prices and allocate resources inefficiently.\(^{220}\)

A perception that the United States is no longer committed to the goal of international competition would also diminish, if not destroy, the credibility of the United States as the major advocate of free markets. The United States has, through persuasion, example, and the application of its own antitrust laws, been largely responsible for a major shift in the free world's attitude towards private monopoly.\(^{221}\) The German and Japanese antitrust laws, for example, are largely patterned on U.S. laws,\(^{222}\) and the United States has been a principal advocate of the free market by promoting the General Agreement on Tariffs and Trade, the Organization for Economic Cooperation and Development, and the United Nations Conference on Restrictive Business Practices.\(^{223}\) Those governments that are not historically committed to a competitive marketplace may more vigorously resist any future changes toward open international markets if the United States lessens its commitment to free trade.

A more concrete and serious potential consequence of a relaxation of antitrust laws would be the growth of protectionist legislation. If it appears that one of the most powerful economies in the world is turning the protection of its antitrust laws inward—freeing its industries to engage in monopolistic practices beyond its shores—other nations may establish protectionist barriers against U.S. firms.\(^{224}\) Several foreign nations are already angered by the enforcement of U.S. antitrust laws against their business firms.\(^{225}\)

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\(^{220}\) See generally R. Posner, supra note 154, chs. 9, 10.

\(^{221}\) See Rahl, supra note 154.


\(^{224}\) Ongman, supra note 24, at 186–87.

the United States appears to lessen the protection afforded those firms under the antitrust laws while still subjecting them to civil and criminal prosecution, foreign anger could quickly turn to outrage. The existing "blocking"\textsuperscript{226} and "clawback"\textsuperscript{227} statutes could be followed by outright discriminatory protectionist legislation.

Although Dean Rahl's fear is well-founded and serious, several factors minimize the risk of regeneration of cartels. Most obvious is the existence of significant foreign antitrust statutes.\textsuperscript{228} Any U.S. firm believing that the Antitrust Improvements Act, or any other statute, can eliminate all restraints on international anticompetitive activities is mistaken. In the first place, it is likely that a major international cartel would have adverse effects on U.S. commerce and thus come within the jurisdiction of U.S. courts. In addition, more significant anticompetitive practices would violate the laws of our largest trading partners, the European Community\textsuperscript{229} and Japan.\textsuperscript{230}

The legislative history that Congress would compile in any amendment of antitrust law can demonstrate to foreign nations the continuing commitment of the United States to free trade. Congress could emphasize that the Antitrust Improvements Act is based, at least in part, on a recognition that many foreign governments have adopted their own rules embodying the principles of U.S. antitrust laws and policy and that the United States should renew its resolve to foster mutual cooperation in the establishment and enforcement of these policies. James Atwood testified that:

H.R. 2326 would make clear to foreign governments that the protection of competition within their home markets is their responsibility, not the responsibility of the United States. The United States should stand ready to provide reasonable enforcement assistance to foreign antitrust authorities investigating the conduct of American firms, and H.R. 2326

\textsuperscript{226} 1 J. ATWOOD & K. BREWSTER, supra note 33, § 4.17; Pettit & Styles, supra note 225, at 699-714.
\textsuperscript{227} 1 J. ATWOOD & K. BREWSTER, supra note 33, § 4.18.
\textsuperscript{229} See generally B. HAWK, supra note 33; COMMON MARKET AND AMERICAN ANTITRUST, supra note 33.
should therefore not be viewed as a “hunting license” for American firms to exploit foreign consumers or to cartelize foreign markets. Rather, it is an invitation to our trading partners to strengthen and develop their own antitrust programs, and where appropriate to scrutinize suspected conduct by American firms.

Thus I am convinced that legislation such as H.R. 2326, when properly understood and explained, will not be regarded as a retreat from America’s devotion to a free and competitive system of world trade.231

CONCLUSION

The Antitrust Improvements Act is a reasoned response to the widely held perception that the antitrust laws are a barrier to desirable international trade. It carefully signals to the international and domestic trade community that extraterritorial activities are primarily the concern of those nations affected by the conduct. At the same time, however, it reasserts a national commitment to protect U.S. consumers and competitors from substantial injury caused by anticompetitive acts.

Many antitrust experts who have examined the proposed legislation have noted their preference for the creation of a study commission prior to the adoption of any substantive change to the Sherman Act.232 Although there is merit to the suggestion and a commission is warranted, it is appropriate for Congress to adopt legislation now. The political momentum for a response to the “antitrust problem” is so great that the passage of some legislation is extremely likely. That legislation may either reject the principles of competition in the international market and establish a regulatory exemption, or it may fine-tune the antitrust laws to account for the unique characteristics of foreign trade. The Antitrust Improvements Act adopts the latter approach and is manifestly preferable to other, more radical approaches.

Finally, whatever risk there might be that the Antitrust Improvements Act could be interpreted to signal a loss of commitment to a competitive, free enterprise system could be minimized by


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careful construction of the legislative history. It can and should be made clear that the United States will not tolerate international activities, by its own or other nationals, that substantially interfere with the operation of free market forces in the United States. Likewise, the United States should continue to foster free international trade through bilateral and multilateral cooperation and agreement. If appropriately drafted, the primary import of the legislation will be to recognize that the regulation of foreign market activities is primarily the concern of those nations most directly affected by the conduct. U.S. antitrust laws may then continue to protect U.S. commerce and consumers.