

# Challenges to United States Foreign Trade and Investment: Antitrust Law Perspectives

## Introduction

In recent years United States antitrust law has gone international with a vengeance. Thus, "international antitrust" is no longer the sole preserve of academicians and a small band of devotees. Instead, it has become an important factor in the international business arena: a factor that businessmen must address and one which United States Attorney Generals feel they must deal with in policy statements.<sup>1</sup> There have been some changes in United States law which make it more relevant to international transactions, such as passage of the Foreign Sovereign Immunities Act<sup>2</sup> and extension of the Antitrust Civil Process Act<sup>3</sup> so as to authorize government inquiry outside the territorial limits of the United States. But the antitrust laws themselves have stayed much in the form in which they were originally enacted, in 1890, 1914, 1936 and so forth. What has changed drastically is the economic environment in which those laws operate. As was inevitable, national economies have grown increasingly interdependent, to an extent inextricably so. The antitrust laws and their enforcers have made efforts to adapt in order to stay relevant in this changing economic milieu.

As the Antitrust Division's *Antitrust Guide for International Operations*,<sup>4</sup> itself a harbinger of the times, points out: "Competition by foreign pro-

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<sup>1</sup>See, e.g., Address by Attorney General Griffin B. Bell, American Bar Association Annual Meeting (Aug. 8, 1977). See also Address by Associate Attorney General Michael J. Egan, International Bar Association Meeting (Nov. 3, 1977); Remarks by John H. Shenefield, Extraterritorial Impact of U.S. Antitrust Laws, ABA Section of International Law Meeting (Aug. 9, 1978) [hereinafter cited as remarks], reprinted in 5 TRADE REG. REP. (CCH) ¶50, 386 (1978).

<sup>2</sup>28 U.S.C. §§ 1602-1611 (1976 & Supp. 1979)

<sup>3</sup>15 U.S.C. 1311-1314 (1976), as amended by Antitrust Civil Process Act Amendments of 1976, Pub. L. No. 94-435, § 102, 90 Stat. 1385.

<sup>4</sup>ANTITRUST DIVISION, U.S. DEP'T OF JUSTICE ANTITRUST GUIDE FOR INTERNATIONAL OPERATIONS (1977) [hereinafter referred to as GUIDE.] For appraisals of GUIDE, see Joelson, *An American Practitioner's View*, in PERSPECTIVES ON THE EXTRATERRITORIAL APPLICATION OF U.S. ANTI-

ducers is particularly important to the American consuming public when imports are or could be a major source of a particular product, or where the domestic industry is dominated by a single firm or a few firms.”<sup>5</sup> So the Antitrust Division and the Federal Trade Commission keep a close watch for competitive restraints affecting the flow of imports into the United States. The private antitrust enforcers are not outdone in this respect, however. For example, a massive private antitrust suit brought by an American corporation against members of an alleged uranium cartel recently entered its fourth year,<sup>6</sup> and more recently, the Machinists Union sued the Organization of Petroleum Exporting Countries (OPEC) and its members.<sup>7</sup> Both suits, not surprisingly, relate to that current *bête noire* of the American consuming public, the energy industries.

On the other hand, American businessmen have reiterated the charge that the United States antitrust laws hamper this nation’s efforts to boost exports and improve our balance of payments position.<sup>8</sup> The Antitrust Division rejects these claims and stresses the antitrust concern that “each United States-based firm engaged in the export of goods, services, or capital should be allowed to compete on the merits and not be shut out by some restriction imposed by a bigger or less principled competitor.”<sup>9</sup> The issue of whether American firms are unfairly hampered in their efforts abroad by the reach of United States antitrust becomes even more complex when it is posed in the context of the “Arab boycott,” as is the case in the *Bechtel* litigation.<sup>10</sup> And, as we shall discuss later, the issue of whether the Webb-Pomerene Act,<sup>11</sup> the antitrust exemption designed to promote exports, should be expanded, repealed, or otherwise adjusted has just been neatly ducked by the National Commission for the Review of Antitrust Laws and Procedures, which referred the matter to the Congress.<sup>12</sup>

The questions of exports and imports do not, however, exhaust the subject matter. The Antitrust Division, for example, generated more headlines and more threats of retaliation from abroad some time ago when it obtained the indictments under the Sherman Act of a number of international shipping

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TRUST AND OTHER LAWS 120 (J. Griffin, ed. 1979); Griffin, *A Critique of the Justice Department’s Antitrust Guide for International Operations*, 11 CORNELL INT’L L.J. 215 (1978); Fugate, *The Department of Justice’s Antitrust Guide for International Operations*, 17 VA. J. INT’L L. 645 (1977); Seki, *The Justice Department’s New Antitrust Guide for International Operations—A Summary and Evaluation*, 32 BUS. LAW. 1633 (1977).

<sup>5</sup>GUIDE, *supra* note 4, at 4.

<sup>6</sup>*Westinghouse Elec. Corp v. Rio Algom Ltd.*, No. 76 C3830 (N.D. Ill., filed Oct. 15, 1976).

<sup>7</sup>*International Association of Machinists and Aerospace Workers v. The Organization of Petroleum Exporting Countries*, No. 78 5012 (C.D. Cal., filed Dec. 27, 1978).

<sup>8</sup>For a recent discussion of this debate, see Ongman, *Is Somebody Crying “Wolf”?* *An Assessment of Whether Antitrust Impedes Export Trade*. 1 NW. J. INT’L L. & BUS. 163 (1979).

<sup>9</sup>GUIDE, *supra* note 4, at 5.

<sup>10</sup>*United States v. Bechtel Corp.*, No. C-76-99-WAI (N.D. Cal. 1979) (decision approving consent decree).

<sup>11</sup>15 U.S.C. §§ 61-65 (1976).

<sup>12</sup>See notes 68-72 and accompanying text *infra*.

lines for allegedly conspiring on the terms relating to the shipment of freight in the United States-Europe trade. The nature of the alleged conspiracy was outside the scope of the antitrust exemption afforded by the Shipping Act.<sup>13</sup>

These disputes, as different as they are on their faces, pose some troublesome common questions:

1. Are the United States antitrust laws, designed decades ago largely to deal with the domestic "trusts," adequate to cope with the complexities of our international economy?

2. Are these laws, which were designed to deal with private business restraints, suited to test the marketing arrangements fostered by foreign governments in the management of their economies?

3. If the answer is that the antitrust laws are adaptable to today's international issues, are the courts sufficiently adaptable for the purpose? That is, if decisions such as *Timberlane*<sup>14</sup> are to be heeded, United States courts are now to take into account foreign governmental interests affected by antitrust litigation. Will the courts adjust to this new role?

Before we can attempt answers to these questions, we need to take a closer look at the United States antitrust laws and at the legal issues that underlie the broader questions.

### **I. The Scope of the United States Antitrust Laws**

The starting place, in determining the application of the United States antitrust laws to international transactions, is, of course, the language of each statute. In some instances Congress obviously gave the question of international commerce careful thought and draftmanship; in other statutes, however, the international scope of the provisions seems to have been, at best, a low priority consideration. The generality of the language utilized, a common problem with legislative antitrust formulations, has given the courts much leeway in developing United States international antitrust policy.

The Sherman Act, our basic antitrust law, contains a prohibition against contracts or combinations in restraint of trade or commerce ". . . with foreign nations"<sup>15</sup> and also contains a prohibition against acts of monopolization with respect to any part of the trade or commerce "with foreign nations."<sup>16</sup> A more obscure statute, the Wilson Tariff Act, declares unlawful combinations in restraint of trade relating to the importation of articles from a foreign country.<sup>17</sup> This statute has had little independent use and, largely

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<sup>13</sup>United States v. Atlantic Container Ltd., No 79-00271 (D.C. Cir., filed June 1, 1979). The defendants pleaded no contest to the felony charges and were fined a total of \$6.1 million. According to the Justice Department, this is the most severe penalty ever imposed under the Sherman Act.

<sup>14</sup>*Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597 (9th Cir. 1976).

<sup>15</sup>Sherman Antitrust Act §1, 15 U.S.C. §1 (1976).

<sup>16</sup>*Id.* §2.

<sup>17</sup>15 U.S.C. §§ 8-11 (1976).

because of its forfeiture provisions, has been utilized primarily to accompany Sherman Act allegations.

The Clayton Act has a variety of antitrust provisions and, with it, a perplexing array of phrases relating to the United States "commerce" criterion. Section 3 of the Clayton Act,<sup>18</sup> which relates to "tying" and exclusive dealing arrangements, applies only to persons *engaged* in United States commerce, where the challenged transaction takes place *in the course of such commerce*, and the commodities concerned are "for use, consumption or resale within the United States or its territories."<sup>19</sup> This language seems, among other things, to exclude coverage of sales by American firms abroad (exports). It should be noted, however, that foreign sales involving the kind of activity sought to be precluded by section 3 of the Clayton Act might be reached by the broader language of section 1 of the Sherman Act or section 5 of the Federal Trade Commission Act.<sup>20</sup>

Another section of the Clayton Act, section 7, is our basic antimerger law,<sup>21</sup> but it also carries some problems in the international context. It bars the acquisition by a corporation engaged in United States commerce of stock or assets of another corporation engaged in United States commerce, where the effect may be anticompetitive "in any line of commerce in any section of the country."<sup>22</sup> Does this language mean that a merger or joint venture which reduces competition only in *foreign* markets is not covered? This is an unanswered question, but once again the Sherman and FTC Acts may be available to help fill the possible loophole.

The Robinson-Patman Act, an amendment to section 2 of the Clayton Act,<sup>23</sup> bars certain discriminatory practices by sellers which favor large buyers. It also is perplexing in its philosophy towards international transactions inasmuch as its subdivisions use varying phrases on the subject. Subsection 2(a) prohibits price discrimination as to commodities sold "for use, consumption, or resale within the United States" or its territories, thereby excluding export transactions. In contrast, the limitation is not found in subsections (c), (d), and (e), which deal with prohibited brokerage payments, promotional allowances, services and facilities. The courts have given these differences in language effect in determining the territorial sweep of the various provisions.<sup>24</sup>

Finally, we have the earlier mentioned section 5 of the Federal Trade Commission Act<sup>25</sup> which, with its recent broadening amendment, applies to unfair methods of competition "in or affecting" United States commerce. This

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<sup>18</sup>15 U.S.C. § 14 (1976).

<sup>19</sup>*Id.*

<sup>20</sup>15 U.S.C. § 45 (a) (1) (1976).

<sup>21</sup>15 U.S.C. § 18 (1976).

<sup>22</sup>*Id.*

<sup>23</sup>15 U.S.C. § 13 (1976).

<sup>24</sup>*See, e.g.,* Baysoy v. Jessop Steel Co., 90 F. Supp. 303 (W.D. Pa. 1950).

<sup>25</sup>15 U.S.C. § 45 (a) (1) (1976).

broad jurisdictional sweep, when coupled with the fact that the FTC Act can reach all practices which violate antitrust principles or other practices,<sup>26</sup> gives section 5 great importance in United States international antitrust law, even though the Commission has thus far used it sparingly in this regard.

Because of the broad scope of these laws, all international commercial arrangements are susceptible to United States antitrust law if the requisite impact on the commerce of the United States is established. This means not only that cartels must be wary, but that simple sales agreements, distribution arrangements, mergers, joint ventures, and licensing of patents, know-how or trademarks must be able to face antitrust scrutiny. The usual focus of the scrutiny, as we have indicated, is whether there is a restraint on the availability, the volume, or the price of imports or of exports. But even where exports, imports, or transportation to or from the United States are not involved, a restraint on United States commerce may cause the antitrust laws to be triggered. For example, in the *Pacific Seafarers* case,<sup>27</sup> the plaintiff and defendant shipping lines were both United States nationals. Furthermore, a United States government agency was financing the plaintiff's cargoes. These facts were held to establish a sufficient "nexus" to bring into effect United States antitrust law, notwithstanding the fact that the goods were owned by foreigners and being shipped between foreign ports.

## II. Antitrust Exemptions and Defenses Relating to Foreign Commerce

Because the foreign commerce of the United States necessarily touches on the interests of foreign governments or persons who owe no allegiance to the United States antitrust laws, it is natural that our law will have carved out certain exemptions and defenses to allow for the special needs of the international setting. However, these exemptions and defenses are, generally, quite narrow, controversial, and uncertain of application. This situation reflects the basic dilemma concerning the application of the United States antitrust laws to international transactions: on the one hand, if antitrust is to remain a cornerstone of our economic philosophy, it cannot be limited to domestic transactions; on the other hand, once United States antitrust is given play in the international arena, where the economic and legal philosophies of other governments are entitled to equal status, there is no neat formula for its application.

One major antitrust exemption affecting international trade is the Webb-Pomerene Act,<sup>28</sup> which was enacted in 1918 in an effort to give American exporters some help in their struggles against foreign competitors. Then, as now, the claim was that foreign industries were both cartelized and assisted

<sup>26</sup>FTC v. Sperry & Hutchinson Co., 405 U.S. 233(1972).

<sup>27</sup>*Pacific Seafarers, Inc. v. Pacific Far E. Line, Inc.*, 404 F.2d 804 (D.C. Cir. 1968), cert. denied, 393 U.S. 1093 (1969).

<sup>28</sup>15 U.S.C. §§ 61-65 (1976).

by their governments, while United States businessmen were deterred by their government from cooperating with each other by the strict demands of the antitrust laws. The Webb-Pomerene Act exempts from the Sherman Act the activities of associations of export traders which are performed in the course of export trade. But such activities are not exempt to the extent that they are "in restraint of trade within the United States," nor may such activities restrain the export trade of domestic competitors of the associations. Whether because of these limitations or the hostile scrutiny of the antitrust enforcement agencies, or both,<sup>29</sup> the Webb-Pomerene exemption has had little impact on the nation's export trade.

Several other exemptions or defenses are of particular interest to international lawyers because they bear on the clash between the United States antitrust philosophy and the often differing philosophies of other sovereign governments. Indeed, other governments have done more than philosophized. They have, in a number of cases, quite openly organized and conducted a variety of cartels. Armed with a different economic viewpoint, many governments consider coordinated restrictions of production, sales quotas, or price-fixing to constitute not predatory commercial behavior, but the logical husbanding and maximization of precious natural resources.

Under the Foreign Sovereign Immunities Act of 1976,<sup>30</sup> which circumscribes the immunity of foreign governments to antitrust and other legal action in United States courts, the sovereign immunity defense does not extend to the "commercial" activity of a foreign state or of an entity owned by it. Whether particular activity is "commercial" or "governmental" is to be determined, under the statute, by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.<sup>31</sup> This new legislation goes a part of the way towards solving the dispute over the breadth of the sovereign immunity defense that existed for years.<sup>32</sup> But it still leaves as a fertile field for litigation the key question of when, in an age of government-controlled economies, particular government action is "commercial" or "governmental."

A related defense is that of "sovereign compulsion." Under this defense, private parties charged with United States antitrust violations plead that their conduct was compelled by a foreign government. *Interamerican Refining Corp. v. Texaco Maracaibo Inc.*<sup>33</sup> presents the reasoning behind such a defense by noting that "[w]hen a nation compels a trade practice, firms there have no choice but to obey. Acts of business become effectively acts of the

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<sup>29</sup>Two Webb-Pomerene export associations and their members were held to have engaged in nonexempt conduct and hence to have violated the Sherman Act in *United States Alkali Export Ass'n v. United States*, 325 U.S. 196 (1945).

<sup>30</sup>28 U.S.C. §§ 1602-1611 (1976 & Supp. 1979)

<sup>31</sup>*Id.* § 1603(d).

<sup>32</sup>See Joelson & Griffin, *The Legal Status of Nation-State Cartels Under United States Antitrust and Public International Law*, 9 INT'L LAW. 617 (1975).

<sup>33</sup>307 F. Supp. 1291 (D. Del. 1970).

sovereign.”<sup>34</sup> This defense does not apply when the challenged conduct is merely approved or endorsed, rather than compelled, by the foreign government.<sup>35</sup> Moreover, the Department of Justice, which does not agree with the analysis made in the *Interamerican Refining Corp.* decision, stresses that, “[a]lthough the United States courts will recognize an antitrust defense for actions taken or compelled by a foreign sovereign within its territory, such recognition will not be afforded with respect to an act inside the United States.”<sup>36</sup>

Finally, there is the “act of state” defense. The classic statement of this doctrine was in *Underhill v. Hernandez*,<sup>37</sup> in which the Supreme Court ruled that “the courts of one country will not sit in judgment on the acts of the government of another, done within its own territory.”<sup>38</sup> It was reiterated by the Supreme Court in the *Alfred Dunhill* decision in 1976.<sup>39</sup> Here also the Antitrust Division has anxiously sought to circumscribe the defense, stressing that the act must be taken by a foreign sovereign within its own territory and must be a “valid” act under the sovereign’s own law,<sup>40</sup> although this latter qualification appears to run counter to the “act of state” doctrine’s underlying rationale. Recent decisions have indicated that the courts too are prepared to construe the act of state doctrine narrowly in affording shelter to antitrust challenge. In *Timberlane Lumber Co. v Bank of America*<sup>41</sup> the Court of Appeals for the Ninth Circuit reasoned that the jurisdiction of a foreign court over a private litigation concerning a security interest did not give rise to an act of state. Similarly in *Mannington Mills, Inc. v Congoleum Corp*<sup>42</sup> the Court of Appeals for the Third Circuit ruled that the plaintiff was entitled to complain that the defendant had secured foreign patents by fraud, since the mere issuance of patents by a foreign power did not constitute an act of state which the United States courts could not examine.

### III. Current Areas of Concern and Controversy

The combination of increased international economic activity and uncertain delineation of the reach of United States antitrust law has currently given

<sup>34</sup>*Id.* at 1298.

<sup>35</sup>United States v. Watchmakers of Switzerland, [1963] TRADE CAS. (CCH) ¶ 70,600 (S.D.N.Y. 1962), *order modified*, [1965] TRADE CAS. (CCH) ¶ 71,352 (S.D.N.Y. 1965).

<sup>36</sup>GUIDE, *supra* note 4, at 54.

<sup>37</sup>168 U.S. 250 (1897)

<sup>38</sup>*Id.* at 252.

<sup>39</sup>Alfred Dunhill v. Cuba, 425 U.S. 682 (1976). *See also* Hunt v. Mobil Oil Corp., 550 F.2d 68 (2d Cir. 1977), *cert. denied*, 434 U.S. 984 (1977); Interamerican Ref. Corp. v. Texaco Maracaibo, Inc., 307 F. Supp. 1291 (D. Del. 1970); Occidental Petroleum Corp. v. Buttes Gas and Oil Co. 331 F. Supp. 92 (C.D. Cal. 1971), *aff’d*, 461 F.2d 1261 (9th Cir. 1972), *cert. denied*, 409 U.S. 950 (1972); Timberg, *Sovereign Immunity and Act of State Defenses: Transnational Boycotts and Economic Coercion*, 55 TEXAS L. REV. 1 (1976).

<sup>40</sup>GUIDE, *supra* note 4, at 54-55.

<sup>41</sup>549 F.2d 597 (9th Cir. 1976).

<sup>42</sup>595 F.2d 1287 (3d Cir. 1979) *See also* Industrial Inv. Dev. Corp. v. Mitsui & Co., Ltd., [1979-1] TRADE CAS. (CCH) ¶ 62,586 (5th Cir. 1979).

rise to significant disputes. Let us look in more detail at two of the most interesting areas of controversy: the application of United States antitrust law to the acts of foreigners abroad, and the complaint by American businessmen that our antitrust laws hamper their export success.

#### A. "Extraterritorial" Reach of United States Antitrust Laws to Activities Abroad

Few activities of the United States infuriate its friends abroad more than efforts to apply United States antitrust laws to activities carried on by foreigners outside the United States in full compliance with the relevant foreign law. That they can try to claim the benefit of some technical defense, like "act of state," is of little solace and only seems to infuriate them more. This matter of the "extraterritorial" reach of the United States antitrust laws has a long, if not particularly consistent, legal history which has not yet ended.

In the famous 1909 case, *American Banana Co. v. United Fruit Co.*,<sup>43</sup> the Supreme Court, speaking through Justice Holmes, spoke of the "general and almost universal rule . . . 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."<sup>44</sup> To apply one's own laws, the Court reasoned, would be an interference with the authority of another sovereign and contrary to the comity of nations.

Later decisions, however, eroded this concept, and in 1948, Judge Learned Hand felt able to declare in the landmark *Alcoa* case<sup>45</sup> 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; and these liabilities other states will ordinarily recognize."<sup>46</sup> This made it clear that governmental and private enforcers of the United States antitrust laws could hold foreigners liable for their activities abroad.<sup>47</sup> Relaxed concepts of personal jurisdiction, relating to due process notions, venue and service of process, made the challenge of foreign activities in United States courts quite feasible from the procedural viewpoint.

Foreign governments have resisted this intrusive doctrine by diplomatic notes and amicus curiae briefs on our shores and by determined legal resistance to the judgments and orders of our courts on their shores. For example, in the unanimous decision of the British House of Lords in *Rio Tinto Zinc Corp. v. Westinghouse Elec. Corp.*<sup>48</sup> Lord Wilberforce stated that:

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<sup>43</sup>213 U.S. 347 (1909).

<sup>44</sup>*Id.* at 356.

<sup>45</sup>*United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945)

<sup>46</sup>*Id.* at 443.

<sup>47</sup>*See, e.g.*, GUIDE, *supra* note 4, at 6 where it is noted that: "When foreign transactions have a substantial and foreseeable effect on United States commerce, they are subject to United States law regardless of where they take place."

<sup>48</sup>[1978] 2 W.L.R. 81.



The intervention of Her Majesty's Attorney-General establishes that quite apart from the present case, over a number of years and in a number of cases, the policy of her Majesty's Government has been against recognition of United States investigatory jurisdiction extra-territorially against United Kingdom companies. The courts should in such matters speak with the same voice as the executive . . . they have, as I have stated, no difficulty in doing so.<sup>49</sup>

Since 1945 at least nineteen other foreign governments have protested United States assertions of jurisdiction in international antitrust cases.<sup>50</sup> A number have passed special legislation forbidding the production of documents located in the foreign country in connection with United States antitrust litigation<sup>51</sup> or precluding the enforcement in those countries of United States antitrust judgments.<sup>52</sup> The sense of outrage has been loud and clear.

The need for more flexibility than the *Alcoa* rule affords was expressed in 1976 by the United States Court of Appeals for the Ninth Circuit in the *Timberlane* case.<sup>53</sup> It articulated a "jurisdictional rule of reason",<sup>54</sup> requiring the courts to apply not only an "effects" test,<sup>55</sup> but an appraisal of whether, as a matter of international comity and fairness, the extraterritorial jurisdiction of the United States should be asserted. This approach, the court said, would involve a weighing of a number of elements, including (among others) the extent of the foreign law or policy interest, the nationality of the parties, "the relative significance of effects on the United States as compared with those elsewhere," and "the extent to which enforcement by either state could be expected to achieve compliance."<sup>56</sup> The Court of Appeals for the Third Circuit's decision in *Mannington Mills*<sup>57</sup> adopted the *Timberlane* balancing approach for determining whether extraterritorial jurisdiction should be asserted. The opinion listed a number of factors for appraisal. These considerations were similar to those posited in *Timberlane*, which themselves were similar to those that had been articulated in the Restatement of Foreign Relations Law of the United States.<sup>58</sup> The *Timberlane* approach has been warmly embraced by the Antitrust Division as well. A speech by the Assistant Attorney General hailed the elaboration of a jurisdictional rule of reason as

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<sup>49</sup>*Id.* at 94 See also *British Nylon Spinners v. Imperial Chem. Indus.* [1952] W.L.R. 469 (C.A.), *made permanent*, [1954] 3 W.L.R. 505 (ch.).

<sup>50</sup>See, e.g., Remarks of Donald L. Flexner, Foreign Discovery and United States Antitrust Policy—The Conflict Resolving Mechanisms, 1978 Fordham Corporate Law Institute (Nov. 15, 1978); Haight, *Extracts from Some Published Material on Official Protests, Directives, Prohibitions, Comments, etc.*, in REPORT OF THE 51st INTERNATIONAL LAW ASSOCIATIONS CONFERENCE 565 (1964).

<sup>51</sup>See Note, *Foreign Nondisclosure Laws and Domestic Discovery Orders in Antitrust Litigation*, 88 YALE L.J. 612 (1979).

<sup>52</sup>See, e.g., Australian Foreign Antitrust Judgments (Restriction of Enforcement) Act, 1979.

<sup>53</sup>*Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597 (9th Cir. 1976). See also *Wells Fargo & Co. v. Wells Fargo Express Co.*, 556 F.2d 406 (9th Cir. 1977).

<sup>54</sup>549 F.2d at 613.

<sup>55</sup>*Id.* at 611.

<sup>56</sup>*Id.* at 614.

<sup>57</sup>*Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287 (3d Cir. 1979).

<sup>58</sup>RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 40 (1965).

“a long overdue replacement for the awkward ‘direct and/or substantial’ test,” with the courts “henceforth, in the interest of comity and in a judicially objective manner,” to undertake this difficult balancing process.<sup>59</sup> A recent speech by another Antitrust Division official noted that the Division has long abided by the balancing test in determining whether to prosecute and that “the interdependence of the world economy and legitimate interests of foreign sovereigns must be considered in private as well as public antitrust enforcement actions under American law.”<sup>60</sup>

The response of the Justice Department to foreign critics of the extraterritorial jurisdiction has been one of trying to preserve the interests of both antitrust enforcement and good foreign relations. Attorney General Griffin Bell emphasized the former interest in a speech before the American Bar Association in which, after acknowledging that “sometimes comity causes us to stay our hand,” he indicated that comity did not preclude extraterritorial enforcement where the antitrust investigation was “of fundamental United States interest.”<sup>61</sup> However, a subsequent speech by Associate Attorney General Egan imparted a more conciliatory message, emphasizing the central role of comity without the suggestion that it does not apply in important cases.<sup>62</sup>

The *Timberlane* approach, while logical and indeed overdue, is difficult to apply. It remains to be seen whether the district courts are willing to apply the balancing task as opposed to the mechanical *Alcoa* rule and, if they do, how successfully they will be able to balance the foreign relations issues implicitly involved. The task of private antitrust counsel will also become more complicated because in advising his client on the threshold jurisdictional issues in an international antitrust setting, he too will have to engage in this balancing process.

### B. *Are the United States Antitrust Laws Restraining Our Export Effort?*

Businessmen have consistently urged that American efforts to increase exports are restrained and deterred by the broad scope of United States antitrust enforcement.<sup>63</sup> This deterrent effect, it is argued, is a “drag” not only on exports of goods, but also on our service industries (including construction), and extends to cooperative export activities, overseas joint ventures

<sup>59</sup>Remarks, *supra* note 1, at 55.

<sup>60</sup>Remarks by Carl H. Cira, Jr., Assistant Chief of the Antitrust Division’s Foreign Commerce Section, on Future Directions in American Antitrust Law and Policy, at 12 (June 23, 1979).

<sup>61</sup>Address by Attorney General Griffin B. Bell, *supra* note 1, at 3, 7.

<sup>62</sup>Address by Associate Attorney General Michael J. Egan, note 1 *supra*.

<sup>63</sup>*See, e.g.*, ANTITRUST TASK FORCE ON INTERNATIONAL TRADE AND INVESTMENT OF THE CHAMBER OF COMMERCE OF THE UNITED STATES, FINAL REPORT ON UNITED STATES ANTITRUST LAWS AND AMERICAN EXPORTS (1974); NATIONAL ASSOCIATION OF MANUFACTURERS, INTERNATIONAL ECONOMIC AFFAIRS DEPARTMENT, THE INTERNATIONAL IMPLICATIONS OF UNITED STATES ANTITRUST LAWS: AN ISSUE ANALYSIS OF GLOBAL ECONOMIC REALITY (1974).

and consortia, foreign licensing, and even acquisition of foreign companies. The Webb-Pomerene Act,<sup>64</sup> while designed to permit export cooperation through an antitrust exemption, covers only about 2 percent of total United States exports, with between 25 to 35 Webb-Pomerene associations registered with the Federal Trade Commission.<sup>65</sup> United States business representatives have maintained that the exemption provided by the Act is too narrow and perilous to afford them antitrust protection while doing battle in the world marketplace. They point out that other developed nations impose no such antitrust restraints, but rather back export cartels and giant consortia through subsidies and other support devices. Thus, business seeks a broadening of the antitrust exemption, such as expansion of the scope of the Webb-Pomerene Act to cover exports of services.

The Antitrust Division has never been sympathetic to this viewpoint and has taken the position that business has failed to make the empirical case to establish that antitrust enforcement is substantially hampering United States export trade.<sup>66</sup> The Division maintains that exemptions, such as Webb-Pomerene, breed collusion among competitors in domestic dealings and help foreigners to justify their own restrictive export cartels. Therefore, they argue such exemptions should be repealed as misguided pieces of legislation. The Division also reiterates that it is prepared to give prompt review and a relatively sympathetic ear to the proposals of United States businessmen who feel that they need to cooperate in order to garner business abroad.<sup>67</sup>

Recently, President Carter launched a new export drive in which he pledged to curb overly broad applications of the Sherman Act which might unnecessarily inhibit United States firms from selling abroad.<sup>68</sup> He referred particularly to the uncertain legal status of foreign joint ventures and, after stating that this uncertainty could be a disincentive to exports, instructed the Justice Department, together with the Department of Commerce, "to clarify and explain the scope of the antitrust laws in this area, with special emphasis on the kinds of joint ventures that are unlikely to raise antitrust problems" and "to give expedited treatment to [business review] requests by business firms for guidance on international antitrust issues."<sup>69</sup> The President also appointed a business advisory panel to work with the National Commission for the Review of Antitrust Laws and Procedures.

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<sup>64</sup>15 U.S.C. §§ 61-65 (1976).

<sup>65</sup>Amacher, Sweeney & Tollison, *A Note on the Webb-Pomerene Law and the Webb Cartels*, 23 ANTITRUST BULL. 371-72 (1978).

<sup>66</sup>See, e.g., Remarks by John H. Shenefield, Enforcement of United States Trade Opportunities Through Antitrust Enforcement and Competition Advocacy, The National Governors Association/White House Seminar on International Trade (June 6, 1979), at 3.

<sup>67</sup>See, e.g., GUIDE, *supra* note 4, at 19-22 (Case C), wherein the Antitrust Division approves a situation involving a consortium established for the purpose of submitting a bid on an extremely large hydroelectric project in a Latin American country.

<sup>68</sup>Excerpts of Press Conference of President Carter, (Sept. 26, 1978) reprinted in [July-Dec. 1978 Transfer Binder] ANTITRUST & TRADE REG. REP. (BNA) No. 882, A-4-5, (1978).

<sup>69</sup>*Id.*

This panel, laboring under the deadlines set for the Commission, conducted a brief study and recommended that the Webb-Pomerene exemption should be retained.<sup>70</sup> It found that several industries rely heavily on the Act and concluded that the present foreign trade deficit made this an inopportune time for repeal of the Act. The National Commission took a more hostile view of the Act, finding that it "creates opportunities for significant anti-competitive spillover effects in domestic commerce" and that its basic purposes can be accomplished without antitrust immunity.<sup>71</sup> It recommended a legislative reexamination of the necessity for the exemption, with the caveat that "[b]efore American firms receive antitrust immunity for export business activities they should at a minimum be required to make a showing of need. The burden of proof justifying special treatment ought to be on those seeking such treatment."<sup>72</sup>

So the issue of whether to expand, contract, or repeal Webb-Pomerene has been dumped into the lap of the Congress. The Antitrust Division, meanwhile, has announced that it will meet with businessmen to respond to business review requests involving export projects within thirty business days after receiving the necessary information.<sup>73</sup> However, the Division reiterated at the same time that the antitrust laws do not impair our export effort and that it will not hesitate to pursue antitrust violators beyond our shores. In short, the standoff appears to be about where it has been for the last twenty years.

#### IV. Conclusions

We have seen that, in applying United States antitrust law to international transactions, yesterday's problems tend still to be today's problems. These issues have been given a greater immediacy by the coming of age of the international economy.<sup>74</sup> United States antitrust law and policy have been adapting slowly, perhaps too slowly, to these economic developments. The capacity for flexibility of the courts and the antitrust enforcement agencies will be an important factor in determining how relevant and satisfactory United States antitrust law will be in the 1980s and beyond.

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<sup>70</sup>2 NATIONAL COMMISSION FOR THE REVIEW OF ANTITRUST LAWS AND PROCEDURES REPORT, Attachment A, at 303 (Jan. 22, 1979).

<sup>71</sup>*Id.* Vol. I, at 295-306.

<sup>72</sup>*Id.* at 303.

<sup>73</sup>Remarks by John H. Shenfield, *supra* note 66, at 8.

<sup>74</sup>There are, to be sure, new efforts being made at the international level to establish norms with regard to restrictive business practices, spurred largely by the developing countries. See, e.g., Davidow & Chiles, *The United States and the Issue of the Binding or Voluntary Nature of International Codes of Conduct Regarding Restrictive Business Practices*, 72 AM. J. INT'L L. 247 (1978); Joelson, *The Proposed International Codes of Conduct as Related to Restrictive Business Practices*, 8 L. & POL. INT'L BUS. 837 (1976).