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The Webb-Pomerene Act at Home and Abroad

RICHARD A. SLOAN

For the most prolonged period of time in recent history, American corporations have been experiencing difficulties in dealing with foreign economic competition. Consequently, there has been a growing interest in finding ways to enhance the marketing strength of American firms competing with foreign firms in foreign markets. This is not the first time concern with American firms' competitive strength has been articulated; the Webb-Pomerene Act of 1918 was an attempt by Congress to vitalize American exporting firms. Since 1918, the Webb-Pomerene Act has been the subject of disagreement as to its usefulness and effectiveness in achieving its stated goal. The purpose of this article is to examine the Act's rationale and effectiveness, as well as a newly emerging issue: the status of export associations, formed pursuant to the Act, in the light of freeworld antitrust legislation and enforcement. A determination of that status is important because even if the Act remains unchanged, American export associations operating under it must still consider what antitrust issues must be dealt with abroad.

This article is divided into two parts. The first is a discussion of the history of the Act, the reasons advanced for its enactment, and the Act's performance in meeting its ends.

The second part of this article will describe briefly some of the antitrust statutes of member nations of the Organization for Economic Cooperation and Development (OECD) and the European Economic Community (EEC), as well as a study of the recently issued OECD "Guidelines for Multinational Enterprises." This article will also examine the status of Webb associations under these statutes and guidelines.

HISTORY AND PURPOSES OF THE ACT

Following World War I, the United States began to develop into a world industrial and trading power. Many people believed that foreign cartels were thwarting the growth of American business, which was then largely made up of relatively small businesses. Pursuant to recommendations made by the newly formed Federal Trade Commission (FTC), Congress carved an exception out of
the antitrust laws to permit American firms to compete more effectively with foreign cartels. The Webb-Pomerene Export Trade Act\(^2\) was the final result of this legislation. The Act was designed to permit small companies to combine among themselves to form joint export selling agencies, thereby allowing them to attain the marketing economies of scale necessary to export profitably and meet the competition of the powerful European cartels. This exception was explicitly limited by the caveat in section 2\(^3\) which prohibited associations from entering into any agreement which would intentionally enhance or depress prices in the United States of "commodities of the class exported by...the association, or which substantially lessens competition within the U.S. or otherwise restrains trade therein."

Originally, the FTC intended the Act to serve only as a method for firms to form joint selling agencies. But after a number of attempts to amend the Act and broaden the realm of permissible activities, the FTC in its "Silver Letter" issued in 1924, adopted a liberal view and permitted agreements as to price, terms of credit, information exchange, and any such agreements which may have been necessary to promote association members' interests abroad.\(^4\)

Subsequent experience has shown that the typical firm taking advantage of the Act has been neither small nor weak. Furthermore, very few associations have been organized in such a manner so as to enable members to achieve marketing economies of scale. In 1965, 77 percent of the export sales made by member firms were made in industries in which the eight-firm concentration ratios exceeded 50 percent of domestic sales.\(^5\) Although the portion of total U.S. foreign trade involved has never been significant, associations have been formed and used largely for anticompetitive purposes abroad and, more seriously, at home. In light of this record, several commentators have recommended either changing or repealing the Act.

WEBB ASSOCIATIONS AS JOINT SELLING AGENCIES

Over the five year period from 1958-1962, 47 Webb associations were registered with the FTC\(^6\), but only six of them functioned as joint selling agencies. Nine other associations functioned both to fix prices and allocate markets among its members, while five others only fixed prices; obviously, the function of these fourteen associations was not to achieve marketing economies of scale and was beyond the spirit of the Webb Act. Three other associations acted as export brokers—a plainly needless effort due to the existence of a large number of export brokers who operated without need of any special exemption from antitrust laws. Also four other associations were formed to negotiate with U.S. government agencies for the right to sell abroad through U.S. foreign aid programs.\(^7\) The other twenty associations registered during that period had either never functioned or were inactive. Therefore, of these 47 associations, only the six joint selling agencies could claim to have achieved any marketing economies of scale. Each of these six associations were in industries whose markets varied from high to moderate concentration to tight oligopoly\(^8\), and almost all members of these associations were very large in absolute terms (most of them listed among the Fortune 500 largest corporations).

In his study of three of these associations (Sulphur Export Association, Potash Export Association, Concentrated Phosphate Association), David A. Larson found that in each there had been a period of at least a few years during which the association had either been dissolved or had lain dormant. His research
indicated that in every case during the active periods of the association there had been almost complete price uniformity (via price leadership) and stability in market share at home and abroad, and that during a hiatus in association activity, price competition and the volume of sales increased. In each case, the association was resurrected seemingly in order to restore price and market share stability in both domestic and export markets. Evidently, competitive behavior in domestic markets can be traced to the export activities of at least the more active and successful Webb associations. The price leadership exercised, for example, by Sulexco was only effective when the export cartel was in operation; Texas Gulf Sulphur and Freeport Sulphur were unable to control either general market price or the market shares of Duval or Jefferson Lake, the two smaller members of the industry, during the six year period between the old and the new Sulexco. Clearly, since they were the leading world producers of sulphur, none of the member firms needed the association in order to make exports economically feasible. What could have compelled them to combine under the Webb-Pomerene Act? Perhaps they hoped to gain something through a legal cartel which could not be obtained as safely otherwise: restricted output with monopoly profits and stable, controlled foreign and domestic markets. Thus although the Webb-Pomerene Act was intended to give small firms a chance to compete abroad, its principal use apparently has been to permit open cartelization in heavily concentrated industries such as the sulphur industry. The Act specifically states that practices which intentionally enhance or depress prices of goods sold in the U.S. of the class sold by the association do not fall within the provided exception to the antitrust laws. The inference of an intention to exert control over price and other market factors is evidenced by the reorganization of Sulexco at the moment competition and declining prices began to develop and their almost immediate disappearance in both foreign and domestic markets once Sulexco began its new operations.10

The foregoing indicates that the use of the Webb-Pomerene Act, even where it arguably conforms to the intentions of Congress in 1918, has demonstrated clearly that the rationale is basically unsound. Cartels, by their very nature, must comprise a powerful and major portion of the particular industry. All else held constant, as the number of members in a cartel grows and the degree of heterogeneity of their products increases, the more difficult it will be for the group to agree on any actions to be taken, leading to an increased likelihood of cheating and finally complete breakdown. Associations such as Sulexco and the Phosphate Export Association had few members, produced homogeneous products, and hence were able to control the behavior of their members well enough to prevent breakdown of the association. A cartel composed of a sufficiently large number of firms to make an economic impact in a competitive industry (i.e., low concentration ratio) would be unwieldy and probably could not be an effective exporting tool. So, in the most meaningful sectors, the formation of a cartel by firms in highly competitive markets to promote exports would be unnecessary because of the availability of the services of export brokers, who have the business connections and expertise that a small company would need to export its products. In competitive sectors, the cost in time, energy, and money of setting up an effective sales organization is probably more than a single small firm or a small group of firms would be willing or able to absorb. Marketing economies of scale attainable by an association can probably be achieved through the use of an independent export broker, which would leave all interested firms free to compete in export markets while avoiding domestic repercussions which
may occur if the cartel is of a magnitude sufficient to exploit its domestic market power.

Traditional economic theory postulates that cartels are formed by rational profit maximizers who seek to reap higher profits by establishing monopoly pricing and restricting output. An organization which succeeds in creating that kind of cartel is neither the proper tool for promoting exports nor for combatting the power of the foreign cartels. A cartel which raises price and restricts output will cause exports to decrease—not increase. And as for the effect of this kind of cartel upon the balance of trade, total revenues fall as the cartel sets a price, as all conventional cartels do, in the more elastic portion of the aggregate demand curve. The most effective way for small firms to combat the market power of a foreign cartel is to compete with it in price, thereby increasing the temptations for cartel members to cheat, causing dissension in the ranks, and leading to the ultimate breakdown of the cartel.

One common characteristic of successful Webb associations is that none of them deal with a differentiated, non-fungible product. If price-fixing is an activity firms would normally like to engage in, especially when sanctioned by the government, why have domestic producers of consumer goods not taken advantage of the Webb Act in export markets? One reason may be that they have already successfully cartelized. Another reason may be that with most differentiated consumer goods, competition is relatively heavy in most major export markets. Since a cartel is unlikely to be successful when faced with competition, and since these firms compete less in price than in product differentiation, overt export cooperation may threaten their continual development of new, improved, and different products, as well as disturb their techniques of promotion and marketing. An industry in which success depends upon trade secrets and promotional strategy is not receptive to the cooperation necessary to establish joint marketing operations, especially when faced with meaningful competition in foreign markets. In any case, the sounder strategy for producers of differentiated goods has been to establish subsidiary companies in the foreign markets. This approach is desirable because it permits the firms to sell in foreign markets without having to contend with government-established trade barriers and without having to deal with the uncertainties of the extent of the coverage of the Webb-Pomerene Act's antitrust exemption and its unpredictable enforcement by the FTC.¹²

WEBB ASSOCIATIONS LIMITED TO SETTING PRICE AND DIVIDING MARKETS

The majority of functioning Webb associations have operated as devices through which members have set export prices and divided markets. Most firms participating in these associations have continued to export either on their own or through export brokers, with only a small percentage of their exports actually assisted in some way by the association.¹³ Since no evidence has been presented that members of these associations have been able to increase their exports through use of the Act, arguably these practices should be withdrawn from the Act's protection. There is no reason to permit this potential source of domestic collusion to exist. The Act's antitrust exemption was created solely to increase American exports. It permitted the use of practices which now, if not in 1918, are thought to be inherently dangerous to the domestic economic welfare by facilitating virtually undetectable tacit or explicit collusion in domestic
markets. Evidently, no meaningful benefits have accrued or are likely to accrue to the American economy. The Act's exemption should either be withdrawn or reshaped to produce the desired result.

When the Federal Trade Commission conducted a detailed survey of these associations from 1958-1962, members were asked, for the first time, to list separately the exports directly assisted by the Webb association from all exports which were not directly assisted. Previous data indicated that Webb associations accounted for 3½ to 5 percent of total U.S. exports; however, the new findings showed that the correct figure was just over 2 percent. This figure casts suspicion on the claim that the Webb-Pomerene Act serves as an export trade booster. Another indication of the Act's probable failure is that associations are only being used in a very limited number of products. With few exceptions, the members do not depend upon their respective Webb association for the facilitation of their exports. Instead, the associations serve principally as information exchange mechanisms which present the dangerous potential for use in a manner inconsistent with the kind of free and open competition pursued by American antitrust policy.

PROPOSALS FOR AMENDING THE ACT

Perhaps if the Act had been better conceived, the results would not have been so disappointing. Several explanations of the Act's failure to be utilized properly have been outlined in a report by the Comptroller General, "Clarifying Webb-Pomerene Act Needed to Help Increase U.S. Exports" (GAO report) published in 1973. Among the reasons advanced for the Webb-Pomerene's feeble performance are the fear of concurrent and inconsistent antitrust enforcement, the exclusion from the Act of exports of technology and services, and a general ignorance of the Act's existence.

The Webb-Pomerene Act has been criticized for not covering the formation of cartels for the export of technology and services. The GAO report noted that the U.S. engineering and construction industries have claimed difficulties in competing with foreign firms which receive government assistance and are free to combine to bid for large contracts involving high technology research and construction projects, such as hydroelectric projects in developing countries. Typically, governments which solicit bids for such projects do not want to deal with multiple bids from a single source; they want package deals which can be more easily assessed and administered. Precluded from forming Webb associations, American firms argue that they cannot safely band together to offer such package deals, causing them to fail in competition with foreign consortia. Their argument loses its strength when one considers the fact that the dangers of antitrust liability arising out of participation in one-transaction joint ventures are not very serious. Such cooperation might be desirable if it were to lead to steady sources of export income. The GAO report states that the Department of Justice has given clearance to the Department of Commerce (which, incidentally, has the task of promoting use of the Act) to promote the formation of such temporary single-transaction joint ventures in South America. So far, these consortia have been able to submit bids which are competitive with those of other countries. Such an approach may offer much better prospects than the Webb Act.

Another proposed change in the Act is to state clearly the pattern of government enforcement. Presently, the Justice Department and the FTC have concurrent jurisdiction. The FTC's enforcement has been in the form of
recommendations for change or injunctive relief, while the Justice Department's enforcement includes the possibility of imposition of criminal sanctions. Criminal sanctions might be an unfair risk for firms which operate under a statutory antitrust exemption which has never been the subject of anything more than a superficial treatment by courts. Yet, when the Sherman and Clayton acts were young and without the benefit of judicial scrutiny, no special dispensations were granted to firms whose practice might have been in violation. Whether a firm's practices will violate the antitrust laws or the Webb-Pomerene Act is simply one of the many risks of doing business. There is no compelling argument in favor of altering jurisdiction over the Act as it presently exists.

Another proposed change in the Act is to limit the size of firms which may use it. Limiting the use of the Act to firms of less than a certain size (as a function of market share or absolute asset size), would prevent large firms from using the Act as an instrument to consolidate their position of control in the industry, as Sulexco and others appear to have done. The worth of this proposal is dubious because, if the Act had actually been the answer to small firms' searches for a method to facilitate their exports, they would have resorted to it long ago. They have not done so on any significant scale. The proposal would, however, have the beneficial effect of excluding large firms. The probable result of any such amendment would be to reduce Webb-assisted exports to inconsequential levels.

In summary, the Act, while capable of amendment, cannot be salvaged in any meaningful way by any of the proposed changes. The choice then, is either to live with it as it is now or repeal it. The latter course is undoubtedly the wiser of the two.

WEBB ASSOCIATIONS AND FOREIGN NATIONAL ANTITRUST LAWS

The belief that an antitrust exemption in export trade is useful in enhancing a country's export trade generally is shared by other OECD nations. The exemptions are similar to the Webb-Pomerene Act, although there are significant differences. For instance, some indicate a less strict view of the need for competition in the various national economies; many of the practices permitted under these statutes would, in the U.S., be per se violations of the antitrust statutes. For the most part, though, the antitrust laws of these countries permit practices commonly used by Webb associations, such as export cartels.

The antitrust laws of a number of countries, including Austria, Switzerland, and Belgium, do not mention export cartels. In such situations, the only legal limit upon their activity would be indirectly through other specific antitrust proscriptions which usually are limited to behavior contrary to governmental or public interest, stated in very broad terms to allow much flexibility. In the other European countries, legislation specifically exempting export cartels from antitrust enforcement usually includes the same caveat as found in the Webb Act that the cartel must not have negative effects on domestic markets. Additionally, the definition of an export cartel is generally similar to the definition in the Webb-Pomerene Act, except for the limitations on what they can sell. In Germany, however, export cartels are only those combinations in which participation by the members must be exclusive and obligatory. Voluntary associations, where firms remain free to export on their own, are not covered by
the act. Other countries do not share the German limitation, but consider any association, whether obligatory or voluntary, as an export cartel.

The difference between the Webb-Pomerene Act and foreign provisions for export cartels is that foreign laws often allow the operation of "mixed" cartels. A mixed cartel is one which, to be effective in its export operation, must have some anticompetitive impact in the domestic market as well. All of these countries require that their mixed cartels be registered with the government, and the burden of justifying the internal impact is upon the parties to the proposed cartel in order to win government approval.

These policies concerning horizontal price-fixing are relevant to a consideration of the status of Webb associations in Europe. Only the United States, of the member countries of OECD, has invoked an absolute ban on horizontal price-fixing. Some countries have provisions which prosecute price-fixing only if it has some harmful effect on competition, indicating a "rule-of-reason" approach. Other member states will act against horizontal price-fixing only if the power is abused or if it occurs in certain narrowly-defined sectors of the economy. In practice, this limitation does not act as a significant barrier to price-fixing, and illustrates a more tolerant attitude toward price-fixing compared to the strict per se rules applicable in the United States.

The background and context of the European antitrust exemption for export cartels differ from those of the Webb-Pomerene Act. The European statutes were conceived with a built-in allowance for some limited cartel activity. These countries have historically been amenable to export and other types of cartels; providing for their continued existence in the formulation of antitrust policy indicates that they may have been to some degree a positive development. Ironically, when these countries formulated their antitrust policies, the principal model followed was the antitrust policy of the United States. Since 1918, the Webb-Pomerene Act has been a part of that body of law, indicating at least a modicum of economic nationalism showing through U.S. statutes. The antitrust goal of preserving and promoting free and open competition in the United States seems to be inconsistent with a policy of permitting the formation of export cartels—as if competitive freedom need be protected only up to the water's edge. This provision, however, could be reconciled with the historic economic practices and policies in Europe.

The effectiveness of these European cartels is difficult to ascertain due to the insufficiency of statistical information, most of it long out of date. That they are not the potent economic forces perceived by Congress in 1918 is evidenced by the fact that in the 1958-1962 survey of Webb associations, of the reasons for dissolution given by eighty of the associations disbanded between 1918 and 1955, only one of them cited the existence of powerful foreign cartels as the reason. Instead, foreign price competition was the reason most frequently given.

The European attitudes towards horizontal price-fixing and export cartels are much more permissive than the American viewpoint. Consequently, most Webb associations would not be likely to run into antitrust trouble in Europe. Most Webb associations, operating only as price-fixers and market dividers, have not been effective enough in foreign markets to arouse the concern of foreign antitrust enforcers. Rarely has a "successful" Webb association, operating as a joint selling agency, aroused considerable concern abroad. After
its reestablishment in 1958, Sulexco stablized prices, and in 1963-1964 succeeded in doubling the world price for sulphur simply by not exporting any sulphur at all. Needless to say, these actions created widespread alarm in the world market. The British responded to the situation by permitting the formation of the Sulphur Buying Consortium, a monopsony acting for all British purchasers of sulphur. The Consortium proceeded to buy more than one-half of its requirements from Mexican sources on long-term contracts, by-passing Sulexco entirely. This “successful” Webb association activity caused the formation of a countervailing monopsony power, a development whose consequences Congress in 1918 neither intended nor foresaw.  

Alternatively, the European countries could respond to excessively monopolistic behavior through their statutes prohibiting the abuse of market position. Even countries with no specific anticartel provisions could reach the cartel by finding the existence of abuse and ordering a relief which is usually injunctive. Consequently, only the most powerful Webb associations would encounter the possibility of antitrust liability in these countries. Nearly all other Webb associations have too little impact in foreign markets to be noticed by foreign antitrust enforcers.

WEBB ASSOCIATIONS AND THE EUROPEAN ECONOMIC COMMUNITY (EEC)

In addition to foreign antitrust laws, Webb associations may have to deal with a different kind of antitrust law and enforcement: the EEC’s antitrust provisions found in Articles 85 and 86 of the Treaty of Rome. As with the antitrust statutes of individual nations, only the more “successful” Webb associations would seem likely to pose any threat to desired levels of competition in the Common Market.

Article 85(1) of the Treaty of Rome is similar to Section 1 of the Sherman Act in that it prohibits combinations which affect trade between member states, and “which have as their object the prevention, restriction or distortion of competition within the Common Market.” Article 85(3), however, provides for the granting of an exemption from the article if the practice engaged in serves to improve the production or distribution of goods or the promotion of technical or economic progress, so long as consumers share fairly in the benefits of the exempted practice. Article 86 is a provision prohibiting the abuse of dominant market position, and is analogous to the monopolizing prohibition in Sherman Act Section 2, and the merger provision in Section 7 of the Clayton Act. Article 86 contains no exemption. Antitrust enforcement is entrusted to the EEC Commission, which is empowered to initiate investigations to try cases and grant exemptions to Article 85(1) under Article 85(3). In the years since the Commission began its antitrust enforcement activities, approximately thirty cases have been fully adjudicated (including appeals to the European Court of Justice, the highest court in EEC), of which only a few have resulted in assessments of money penalties and other sanctions.

Apparently, Webb associations have never been pursued for violations of EEC antitrust law, although cartel firms from other non-member nations have been prosecuted successfully. In Imperial Chemical Industries Ltd. v. E.C. Commission, a firm, chartered in a country outside the EEC, which cartelized through its wholly-owned subsidiary was found to come within the
jurisdiction of the Commission. The Court held that concerted behavior by a firm outside the EEC, which manifests itself within, constituted practices “carried on directly within the Common Market.” The Court stated that since ICI exerted complete control over its subsidiary, the two ought to be treated as a single entity, the acts of the subsidiary becoming those of the parent. Later, the Court held, in Beguelin Import Co. v. G.L. Import-Export SA, that where the parties to the agreement were situated was “no obstacle to the application of (Art. 85(1)), so long as the agreement produces its effects in the territory of the Common Market.” The cartel’s influence upon trade between member nations must be perceptible to be covered by Art. 85(1).

Webb associations operating as joint export companies are associations which, by virtue of their structure, have the power to exert a “perceptible effect” on trade within the EEC, enabling the Commission to find jurisdiction. Their conduct could be dealt with under Article 86 as abuses of market power. The other largely ineffective Webb associations could probably not cause the market disruption necessary for liability to attach to their actions.

Generally, the practices the EEC wishes to prohibit are those which are injurious to intra-EEC competition and those which contravene the EEC objective of promoting the progressive ideal of a completely integrated European economy. Hence, domestic cartels which create entry barriers to EEC markets (preventing firms from other EEC states from entering) have been found to fall within Article 85(1). By implication, export cartels causing similar results, contrary to the goal of community integration, may also be vulnerable under Article 85(1). Cooperation in extra-EEC trade results at least in exchanges of cost and price information, which facilitates cooperation, tacit or otherwise, among cartel members in markets in which they competed prior to the formation of the export cartel. These spillover effects may reduce competition, making it difficult for firms from other EEC countries to enter and compete in a particular country, a result described in the Wallpaper case as injurious to commerce between Common Market members. These kinds of internal distortions inevitably retard progress toward economic integration and aggravate nationalistic and provincial attitudes toward international competition.

The negative impacts of Webb associations in these instances add further stress to the conflict between EEC goals and myopic self-interested trading policies of the member states. Through mechanisms of price discrimination, market division, or refusals to deal, “successful” Webb associations contribute to the construction of market barriers, for example, where supply or price were made more advantageous to some buyers than to others. So far, no EEC lawsuits have been brought against Webb associations, mainly because of their failure to effect substantially foreign markets; a well-coordinated, powerful Webb association will improve significantly the likelihood of the imposition of an EEC sanction.

WEBB-POMERENE ACT AND THE OECD GUIDELINES

The recent Guidelines for Multinational Enterprises were issued by OECD in response to the sentiments of all of the members in favor of standards of behavior to which multinationals can conform. The sections on competition state, in slightly different form but with similar emphasis, the
same prohibitions and objectives found in Articles 85-86 and in the Sherman and Clayton Acts. Additionally, the Guidelines seek to improve the collection and dispersal of information relating to the existence and behavior of multinational enterprises. Improving the availability of data would assist member countries in assessing the effects of cartel behavior upon their respective economies and upon the economic performance of OECD nations collectively. Presently, only the United States and Germany have any detailed disclosure requirements; more widespread public disclosure in annual reports of some kind would be a positive change. Antitrust enforcers could probably achieve their objectives more efficiently, and countries with lax or minimal antitrust regulation might be influenced to reconsider their policies and strengthen their statutes.

Section 3 of the Guidelines addresses specifically the problems arising out of participation by multinationals in export cartels operating in the same markets as their foreign subsidiaries and affiliates. This problem arose in relation to the Sherman and Webb acts in United States v. Minnesota Mining and Manufacturing Co. The court held that the defendants could not, without violating the Sherman Act, operate jointly-owned subsidiaries abroad and at the same time operate through a Webb association to divide world markets so as to insulate all entities involved from competition.

The Webb-Pomerene Act complements the spirit of these Guidelines, by requiring information disclosure and setting standards of behavior for export cartels. Indeed, the Sherman and Webb-Pomerene Acts should be interpreted as serving the interests of free and open world-wide competition more assertively than the Guidelines. The Guidelines have the weight only of recommendations made by OECD members to multinationals operating within their territories; observance of them is voluntary and not legally actionable, except insofar as they are coterminous with local antitrust policy.

CONCLUSION

When viewed in the long-term, the Webb-Pomerene Act has achieved none of the goals set for it by Congress, and any proposals for textual change will not improve the effectiveness of the act. The principal harm flowing from the conduct exempted from antitrust laws by the Act is that large firms in concentrated industries, which have no need to cartelize to take advantage of marketing economies of scale, have transgressed the spirit but have met the literal requirements of the Act, generating in the process an intolerably high risk of serious domestic anti-competitive repercussions. The real potential for further counter-productive behavior is probably the best reason for the repeal of this Act. American firms have a growing interest in reconciling some of the statutorily generated confusion existing over how they may behave in international markets. Allowing them to resolve this doubt in their own best interests, by leaving the Webb Act intact, may aggravate problems of undue concentration, monopolistic profits, and resistance to innovation. American antitrust policy was engineered to frustrate the misuse of and concentration of economic power by the formation of cartels and monopolies. The Webb-Pomerene Act inexcusably serves to weaken that policy by allowing firms to shield themselves from liability for otherwise prohibited activities.

The exemptions from foreign antitrust laws for export cartels are also
counterproductive, if for no other reason than that they do nothing to aid in the evolution of closer economic ties among nations. The EEC is a laudable attempt to progress toward economic and political integration. Export cartels, whether or not operating within the Common Market, may still have harmful effects on the pursuit of this economic integration and should be prohibited.
FOOTNOTES

1 FTC Cooperation in American Export Trade (June 20, 1916)
6 Larson, David A., “An Economic Analysis of the Webb-Pomerene Act,” 13 J. of L. & Econ. 461. Much of the data in my analysis is drawn from this article, which utilized the most recent complete data on Webb associations, an FTC survey conducted over a period from 1958-1962.
7 This category need not be dealt with here, since this use of the Webb-Pomerene Act was eliminated in 1968 in U.S. v. Concentrated Phosphate Export Association, 393 U.S. 199, 89 S.Ct. 361, 21 L.Ed.2d 344. The Court held in that case that dealings with the U.S. government for sales to it for distribution abroad in foreign aid programs did not constitute export trade, and therefore that combinations organized for such transactions were not within the ambit of the Webb-Pomerene Act.
8 Larson, supra note 5, at 474.
9 The example of the Sulphur Export Association is perhaps the most dramatic. The association was disbanded in 1952 following investigations by the government, leaving the four producers free to pursue their own goals. During the next six years, competition developed among the four, and the domestic price of sulphur began to fall. The two smallest companies also expanded their export market share. With the advent of a serious competitive threat from new Mexican sources of sulphur, and generally falling prices, the four reorganized Sulexco. There was no new entry after that, and the prices began to rise once more, both domestically and abroad.
10 Larson, supra note 5, at 493.
11 FTC, supra note 4, at 37. “In 1962 over 80% of Webb sales involved consumer goods and services and industrial raw materials . . . .” But most of these consumer sales involved the sale of motion picture and television film packages which were by themselves the largest portion of Webb sales. These goods, however, do not have readily available substitutes (and are presumably protected by copyright), which makes the fixing of price and terms possible. The demand for American films and television films in Western Europe, where most of these exports were made, is very great, and therefore the American firms are arguably in a good position to use their Webb associations as negotiating agents to exact supracompetitive prices.
12 In the Comptroller General’s report, “Clarifying Webb-Pomerene Act Needed to Help Increase U.S. Exports” (1973), at 9-10, one of the reasons stated by some businessmen for not forming a Webb association is a fear of the unpredictable nature of enforcement of the Act. Associations have been subject in the past to concurrent oversight and enforcement by both the FTC and the Department of Justice, which frequently have different ideas and policies. If, however, there really is such a fear, it ought also to have affected all companies who have joined associations. Firms have not hesitated to take the risk of running afoul of the antitrust laws for the sake of handsome short-run gain. There is no reason for the thinking to be any different here: indeed, they have the benefit of a statutory exception which while still relatively untested in the courts, provides, on its face, a broad area of action within which most firms should be able to work, if they find it profitable to do so.
13 For example, some associations have acted as bargaining agent for the members in dealing with shippers, perhaps succeeding in getting more advantageous rates than if each firm negotiated on its own.
14 Socony-Vacuum Oil Co. v. United States, 310 U.S. 150, 60 S.Ct. 811, 84 L.Ed. 1129 (1940).
15 FTC, supra note 4, at 36. Under this split reporting method, many associations which had previously reported substantial Webb exports were unable to report that any were Webb-assisted, since these associations performed no export function.
16 FTC, id., at 41,45. In 1962 measurable Webb assistance was provided in only twelve of the product groups exported by the U.S. In only four instances was the percentage of total U.S. exports assisted by Webb associations greater than 40%. In most cases, the products assisted are industrial raw materials, or food products. In only one case was a finished consumer product found to be using the Webb Act in some way for a major part of its exports. See supra note 10. The other associations dealing in manufactured goods have dealt largely in semifinished) or highly standardized goods such as cotton gray goods or pencils.

17 see supra note 11.

18 Id., at 30.

19 There might well be some danger in a situation where the firms continue the relationship beyond the scope of the particular project for which it was formed. In such a situation, anticompetitive effects which might arise from a vertically integrated combination of economic factors are foreclosure, possible elimination of potential competition at different levels of activity, etc.

20 see supra note 11 at 13.

21 FTC, supra note 4, at 77. The Watkins Amendment.


23 Id.

24 Id., at 11-15. These countries are Canada, Denmark, France, Germany, Norway, Sweden, United Kingdom.

25 Id. These countries are Austria, Belgium, Ireland, Netherlands, Switzerland.

26 How much the export cartels actually contribute to their countries' export trade is, in most cases, not known. In Germany, however, the available statistics indicated that export cartels, at least as defined by the German statute, do not appear to account for more than 3% of annual exports, about the same as Webb associations. OECD, Export Cartels: Report of Committee on Restrictive Business Practices, 1974, at 55ff. The difference may be only that in the U.S. there is more concern about any restraint of trade actual or only possible. Therefore, if a statutory antitrust exemption such as Webb-Pomerene is not only ineffective, but susceptible to being misused, the concern is to eliminate it and the potential for harm it carries.

27 note 4 supra, at 27.

28 Larson, supra note 5, at 491-2.

29 note 21 supra, at 11-15.

30 see Appendix II infra.


32 Id.


34 Id., at 95.

35 Id., at 96.


38 "Enterprises should . . .

(3) refrain from participating in or otherwise purposely strengthening the restrictive effects of international or domestic cartels or restrictive agreements which adversely affect or eliminate competition and which are not generally or specifically accepted under applicable national or international legislation; . . ."
BIBLIOGRAPHY


Barounos, Hall, & James, EEC Anti-Trust Law, Butterworths, 1975.


