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The Ambivalence of United States Antitrust Policy Towards Single-Country Export Cartels

*Spencer Weber Waller**

The cornerstone of United States antitrust policy has been its coherent and effective attack on domestic cartel behavior. Following a period of ambiguity in the early twentieth century over the requirements for prohibiting joint activity by competitors,[1] price fixing and other forms of cartel behavior have been held to be *per se* unreasonable for nearly fifty years,[2] and have been subjected to intensive governmental scrutiny via the grand jury process and criminal prosecution. Today such behavior will be rewarded by the almost certain application of criminal sanctions and imprisonment.

The evolution of U.S. antitrust law against international cartels and cartel activities conducted outside the United States has had a more complicated history. Originally, it was held that U.S. antitrust law simply did not apply to conduct outside the United States.[3] The law soon applied substantive U.S. antitrust standards to cartel activities where at least some conduct occurred within the United States.[4] Ultimately, the law evolved away from a tortured search for conduct within our borders and came to encompass anticompetitive conduct which was both in-

* Freeborn & Peters, Chicago, Illinois; B.A. University of Michigan; J.D. Northwestern University. With appreciation and gratitude to Professor Rahl.

1 *Compare* Chicago Bd. of Trade v. United States, 246 U.S. 231 (1918) *and* Appalachian Coals, Inc. v. United States, 288 U.S. 344 (1933) *with* United States v. Trenton Potteries Co., 273 U.S. 392 (1927).

2 United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940).

3 American Banana Co. v. United Fruit Co., 213 U.S. 347, 356-59 (1909).

4 United States v. Sisal Sales Corp., 274 U.S. 268, 276 (1927).

tended to have and actually did have an effect on the United States.[5]

In the international context, the cartel remains the primary target of both public and private antitrust enforcement. Despite the multitude of writings and the failure to articulate a single standard for U.S. jurisdiction over anticompetitive conduct abroad,[6] there would appear to be virtual unanimity that a cartel composed of private firms in several nations acting without the home country's approval or compulsion would be subject to the full range of antitrust scrutiny if its conduct had a direct, substantial, and foreseeable effect on the economy of the United States or on U.S. consumers. Indeed, the shining success of U.S. antitrust law in the post-War era has been the virtual elimination of the explicit formal international cartel aimed at the United States.[7]

The very success of these enforcement efforts has led to two developments which run counter to the interests of traditional U.S. antitrust enforcement. First, as the true international cartel has faded, in its place has arisen a growing emphasis on export cartels composed of manufacturers or exporters from a single country. Second, to a great extent, the truly private cartel has been replaced by anticompetitive conduct by public or quasi-public entities either directed or compelled by their home governments.

U.S. antitrust law has a comparatively poor history of responding to the challenges posed by single-country export cartels. The U.S. response to single-country export cartels has stemmed from a perceived distinction made between the true international cartel and the single-country export cartel. While the United States has been willing to pursue antitrust investigations of true international cartels, even at the risk of alienating its closest trading partners,[8] it has shown considerable temerity in investigating single-country export cartels.

A portion of this distinction stems from the real world consequences of single-country export cartels calling into play the economic, political, and foreign relations interests of the United States, and the differing factors behind the creation of each cartel. Purely private cartels are primarily motivated by a desire to maximize profits. To accomplish this goal, private cartels coordinate prices and output, deter cheating by cartel

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[5] United States v. Aluminum Co. of Am., 148 F.2d 416, 443-44 (2d Cir. 1945) (on certification and transfer from the United States Supreme Court for lack of quorum).

[6] *See* Simon and Waller, *A Theory of Economic Sovereignty: An Alternative to Extraterritorial Jurisdictional Disputes,* 22 STAN. J. INT'L L. 337 (1986).

[7] ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, COMPETITION AND TRADE POLICIES: THEIR INTERACTION 28-29 (1984).

[8] Prominent examples of such investigations include the uranium investigation of the 1970s, and the Laker Airways and Ocean Shipping investigations of the 1980s.

members, and attempt to avoid detection from antitrust enforcement. When a foreign government is involved in the creation or implementation of a single-country export cartel, however, profit maximization may be only one of many goals being pursued by the cartel.

Such a cartel may simply be a twentieth century extension of mercantilist trade policies designed to exploit foreign markets for the benefit of national producers. On the other hand, a single-country export cartel may be used by the home government to effectuate domestic economic policies, promote employment in export sectors, obtain hard currency from abroad, or implement international agreements and understandings ranging from the prevention of dumping and countervailing duties to the resolution of international trade disputes through voluntary export restraints implemented through an export cartel.

The United States has never confronted the competitive issues raised by single-country export cartels in anything other than a contradictory, ambivalent, and conflicting manner. The inability of the United States to formulate a coherent response to this prevalent form of cartel behavior is exacerbated by the United States' use of both the Webb-Pomerene Act and the Export Trading Company Act to allow the creation of export associations which may themselves constitute export cartels. The incoherence of U.S. policy in this area has hurt the United States in its efforts both to prohibit those foreign export cartels which have anticompetitive consequences in the United States, and to persuade foreign states to abandon their support for such export cartels.

The treatment of single-country export cartels differently and more favorably than traditional international cartels is based on a dangerous and false distinction. This Article describes the failure of the United States to articulate clear and convincing reasons for its tolerance of single-country export cartels and suggests that the only real distinction among any collaborative behavior between competitors is whether the results of the collaboration are pro- or anti-competitive.

I. U.S. Antitrust Policy and the Foreign Single-Country Export Cartel

Ironically, the current U.S. antitrust enforcement policy against foreign single-country export cartels stands in contrast to the early success of the Sherman Act in combatting national export cartels.[9] By the 1970s, U.S. policy in this area had degenerated into sporadic and conflicting

[9] United States v. Sisal Sales Corp., 274 U.S. 268 (1927); United States v. Deutsches Kalisyndikat Gesellschaft, 31 F.2d 199 (2d Cir. 1929).

enforcement priorities. The harshest treatment came in the mid-1970s, when a criminal indictment was brought against an export association of Korean wig manufacturers.[10] The indictment charged the association with conspiring to violate the Sherman Act, despite evidence showing that association members represented no more than 20% of a declining market, and that their efforts had little if any effect on price.

Virtually at the same time, Assistant Attorney General Baker stated in a letter to Congress:

> We have generally followed for some years a policy against suing members of a foreign export association for conduct which the United States would permit under the Webb-Pomerene Act. We have on a number of occasions investigated whether foreign exporters have engaged in conduct, such as international market allocation or customer allocation within the United States, which would be beyond our Webb-Pomerene exemption and which might also be in excess of what they were specifically authorized to do or could be legitimately authorized to do by their governments. Besides the obvious policy and equity factors favoring this approach, we have also been influenced by questions of practicality and efficient resource allocation. It has seemed likely to us that if a foreign government is committed to the idea of controlled exports, it could probably achieve such control through direct state involvement, a liberal merger or joint venture policy, or some form of mandatory system. In light of this, it seems quite probable that if we were to sue a foreign export association, arguing that governmental authorization was an insufficient defense, the ultimate result of such a suit might well be continuation of the same conduct in even a more rigid form, as well as foreign policy controversy.[11]

In 1977, the same year as the Baker letter, the Department of Justice published its *Antitrust Guide for International Operations* ("*1977 Antitrust Guide*") which seemed to contradict the Baker comments.[12] Although the *1977 Antitrust Guide* suggested different, and perhaps more lenient, substantive rules for international conduct, it strongly challenged the notion of deference to governmental acquiescence in export arrangements. In a variety of contexts, the *1977 Antitrust Guide* took a very narrow view of the act of state doctrine and the foreign sovereign compulsion doctrine and suggested that only the clearest mandatory export arrangements aimed at the U.S. market would survive antitrust scrutiny.

In 1981, Assistant Attorney General Baxter suggested that the

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10 United States v. Korean Hair Goods Ass'n, No. 74 CR 622, No. 75 Civ. 3069 (S.D.N.Y. 1975).

11 Letter from Assistant Attorney General Donald Baker to Senator Edward Kennedy (Feb. 16, 1977), *reprinted in* Trade Reg. Rep. (CCH) No. 274, at 15-16 (Mar. 29, 1977).

12 Department of Justice, ANTITRUST GUIDE FOR INTERNATIONAL OPERATIONS 50-57 (1977), *reprinted in* Antitrust & Trade Reg. Rep. (BNA) No. 799, at E-1 (1977)[hereinafter 1977 ANTITRUST GUIDE].

United States would investigate and prosecute single-country export cartels and encouraged foreign governments to do the same. In a speech to the American Bar Association, Baxter stated, "Our government does not require the formation of export cartels, or actively supervise them as instruments of our national policy. Assuming that other nations had similar laws, we would consider it appropriate to prosecute similarly formed private cartels aimed at our market place."[13]

Most recently, the Department of Justice in 1988 issued a draft version of a new *Antitrust Guide for International Operations* ("*Draft Guidelines*"), which suggests an even stricter line policy against single-country export cartels. The *Draft Guidelines* explicitly repudiate any difference in substantive rules to be applied in the international context which may have been suggested by the earlier guidelines.[14] The *Draft Guidelines* even take the unprecedented step of suggesting that, while the government will consider the role of a foreign government in the investigation of an anticompetitive restraint, the Department of Justice does not recognize the act of state doctrine or the foreign compulsion doctrine as valid defenses in cases actually brought by the government.[15] In addition, the *Draft Guidelines* add a new hypothetical case study which indicates that a cartel arrangement formed by domestic and foreign producers under the guise of settling an import relief case would represent a *per se* violation of the Sherman Act.[16]

The final version of the *Guide* published in late 1988 suggests that the defense of foreign compulsion would be recognized as a legal defense but continues to define the defense in very narrow terms.[17] However, the *1988 Guide* continues to insist that general considerations of comity would not bar any suit where the United States has brought suit.[18]

Despite its aggressive rhetoric, the Department of Justice has not initiated any new cases aimed at the activities of single-country export cartels in recent years. Its latest enforcement venture constituted a 1982 consent decree aimed at a Japanese buying cartel accused of depressing the price of U.S. exports of Tanner Crab from Alaska.[19]

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13 W. Baxter, Remarks before the ABA International Law Section in Washington, D.C., Antitrust in an Interdependent World (Sept. 29, 1981.)

14 Department of Justice, *Antitrust Guidelines for International Operations*, 53 Fed. Reg. 21,584 (1988) [hereinafter *Draft Guidelines*].

15 *Id.* at 21,596 n.118.

16 *Id.* at 21,616-17.

17 Department of Justice, *Antitrust Enforcement Guidelines for International Operations*, 4 Trade Reg. Rep. (CCH) ¶ 13, 109.10, at 20,613-14 (Nov. 10, 1988) [hereinafter *1988 Antitrust Guidelines*].

18 *Id.* at 20,612.

19 United States v. C. Itoh & Co., C-82-810 (D.Wa. 1982)(consent decree), 1982-83 Trade Cas. (CCH) ¶ 65,010.

Furthermore, private antitrust enforcement has not filled the gap to create a uniform policy aimed at single-country export cartels. The *Zenith*[20] case represented the most significant opportunity in private litigation to resolve questions in this area. In *Zenith*, the plaintiffs attacked the conduct of a Japanese export association for televisions and other consumer electronic products, contending that the Japanese television industry had engaged in a lengthy conspiracy to monopolize the U.S. market through concerted price cutting, dumping, and actual predation. After fourteen years of pre-trial proceedings, the Supreme Court dismissed the case for lack of proof of an anticompetitive conspiracy, thereby passing up an opportunity to make law in this vital area. The lack of direct evidence in support of the plaintiffs' claims, and the range of economic evidence presented by the defendants that the alleged conspiracy was economically irrational, led the Court to assume that the alleged conspiracy did not exist.

II. The United States' Use of Export Cartels

The attitude of the United States toward the legality of export cartels is further complicated by the existence of long-standing exemptions to U.S. antitrust law which permit joint and collaborative activities between competitors in the export market which otherwise would be *per se* unreasonable and unlawful if engaged in by competitors in domestic commerce. While U.S. law is essentially permissive, the net effect is the creation, via legislation, of a statutory vehicle for U.S. firms to form lawful export cartels. The United States has permitted export associations pursuant to the Webb-Pomerene Act[21] on an uninterrupted basis since 1918. In addition, perceived substantive and procedural weaknesses in the Webb-Pomerene Act led Congress to pass the Export Trading Company Act[22] in 1982, and to restrict further U.S. jurisdiction over export activities pursuant to the Foreign Trade Antitrust Improvements Act[23] of the same year. The Department of Justice generally has read these exemptions narrowly, and has often opposed them as antithetical to the antitrust philosophy of the United States. Nevertheless, both the Webb-Pomerene Act and the Export Trading Company Act have been widely approved by policymakers eager to address growing U.S. trade imbalances and placate the fears in the business community that restrictive

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20 Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986).
21 The Webb-Pomerene Act is codified at 15 U.S.C. §§ 61-65 (1982).
22 The Export Trading Company Act of 1982 is codified at 15 U.S.C. §§ 4001-4021 (1982).
23 The Foreign Trade Antitrust Improvements Act is codified at 15 U.S.C. §§ 6a, 45(a)(3) (1982).

antitrust laws have hampered the ability of U.S. businesses to compete with foreign firms not subject to the same restrictions.

From the cartelist's point of view, the Webb-Pomerene Act has not been a significant advancement. Only a limited number of Webb-Pomerene associations currently exist, and their ability to cartelize and exploit export markets has been hampered by the reporting requirements of the Webb-Pomerene Act, the limitation of Webb-Pomerene associations to trade in commodities rather than services, ambiguous case law, and past Department of Justice prosecutions of members of Webb-Pomerene associations which have exceeded the scope of the Act's protection. The hostility toward the activities of Webb-Pomerene associations and the narrow construction of that Act were reflected in the Department of Justice's *1977 Antitrust Guide*, which stated that the Department would continue to prosecute anticompetitive export activity which had a significant spillover effect into the domestic economy or which significantly foreclosed export opportunities of U.S. nationals.

The Export Trading Company Act and the Foreign Trade Antitrust Improvements Act broadened the opportunity for collusive behavior of U.S. firms in export markets in two significant ways. First, the Export Trading Company Act provided a vehicle for joint export activity by furnishing significant immunities and limitations from the reach of U.S. antitrust law upon application and approval by the Department of Commerce and the Department of Justice. Second, the Foreign Trade Antitrust Improvement Act codified jurisdictional limits protecting export restrictions from U.S. antitrust jurisdiction for collusive export activities, unless there was a direct, substantial, and foreseeable effect on U.S. import commerce. This attitude is reflected in the Department of Justice's 1988 *Antitrust Guidelines*, which state that the Department's sole enforcement concern will be the potential "spillover" effect of any export restraints on the U.S. domestic economy.[24]

The precise limits of the Export Trading Company Act on the promotion of U.S. export cartels remain unclear. The process of disclosure implicit in the application and approval requirements of the Act may well deter potential cartelists from using it as a vehicle for their export activities. In addition, applicants for export trading company certificates of review remain subject to the conflicting bureaucratic interests of the Department of Commerce in the promotion of exports, and the Department of Justice in the enforcement of competition goals. Accordingly, of

[24] *1988 Antitrust Guidelines*, *supra* note 17, at 21,610. In contrast, the 1977 ANTITRUST GUIDE, *supra* note 12, at 7, sets forth the Department of Justice's former policy of also condemning export restraints which foreclosed significant U.S. export markets and opportunity.

the approximately ninety export trading company certificates of review previously issued, few of the certificates appear to cover actual collusive activities among competitors. To date, the Department of Justice has brought no cases attacking the activities of export trading companies,[25] and it apparently has no interest in further scrutinizing export restraints, except for those limited circumstances of bid rigging and price fixing in connection with the purchase of U.S. sponsored or subsidized foreign aid destined for export abroad.[26]

The conflict between U.S. policy aimed against restraints on imports into the United States and the permissiveness of antitrust policy with respect to the jurisdictional and substantive legal limits on collusive export activity from the United States is best illustrated in *Daishowa International v. North Coast Export Co.*[27] The *Daishowa* case concerned the activities of several U.S. wood chip manufacturers which formed a Webb-Pomerene export association in 1974. In the same year, the U.S. association entered into a contract to sell wood chips to Daishowa, a Japanese paper producer. Daishowa instituted a breach of contract action in federal court following a repudiation of the price term of the wood chip contract. In the course of discovery, the U.S. association uncovered evidence of a potential conspiracy between Daishowa and other major Japanese paper manufacturers to offset the association's market power. The U.S. association counterclaimed against the Japanese purchasers on the theory that the Japanese purchasers had been operating as a monopsony, fixing the price for export wood chips and boycotting the U.S. association for failure to accept their trading conditions.

In its reply, Daishowa moved to strike the antitrust counterclaims on the grounds that Daishowa was entitled to an implied reciprocal exemption from U.S. antitrust law for cooperative conduct with other Japanese purchasers in transactions with an exempt Webb-Pomerene association. Daishowa further argued that the doctrine of comity presented alternative grounds for dismissing the antitrust claims for lack of subject matter jurisdiction. The court's decision to let the antitrust counterclaims stand suggests that U.S. antitrust law insists that foreign exporters or purchasers act competitively in the international market,

[25] The principal private antitrust litigation relating to Export Trading Companies has been limited to an examination of the procedures for approving an application for a certificate of review. Horizons Int'l, Inc. v. Baldridge, 811 F.2d 154 (3d Cir. 1987).

[26] United States v. Concentrated Phosphates Export Ass'n, 393 U.S. 199 (1968); United States v. Standard Tallow Corp., 1988-1 Trade Case (CCH) ¶ 67,913 (S.D.N.Y. Jan. 28, 1988) (consent decree).

[27] 1982-2 Trade Cas. (CCH) ¶ 64,774 (1982).

while U.S. Webb-Pomerene and export trading company laws permit U.S. exporters to act collusively in the same markets.

The principal limitations on the conduct of Webb-Pomerene associations and export trading companies are not found in U.S. law at all, but rather in the competition laws of other countries adversely affected by the activities of the U.S. export restraints. The European Economic Community ("EEC") recently provided the first test of the principal that neither the Webb-Pomerene Act, nor the Export Trading Company Act will provide the U.S. participants with any immunity from foreign competition laws. In the *Wood Pulp* case,[28] the European Commission investigated and prosecuted the activities of an international cartel of wood pulp producers, which included the members of a U.S. Webb-Pomerene association. Despite lobbying from the U.S. wood pulp producers, the United States did not publicly or actively intervene in the European Commission's investigation or prosecution. Ultimately, the European Court of Justice found that the U.S. members of the Webb-Pomerene association had infringed the competition provisions of the Treaty of Rome through concerted action with respect to the price of wood pulp sold in the EEC, but interestingly enough absolved the U.S. Webb-Pomerene association of wrongdoing.

III. Export Cartels as a Tool of United States Trade Policy

The final complication comes in the U.S. government's promotion of arrangements conducive to foreign single country export cartels as a mechanism for resolving certain bilateral trade disputes. Beginning in the 1960s, the executive branch has negotiated and promoted a series of voluntary restraint agreements and voluntary export restraints as a means of solving certain intractable and politically sensitive trade problems. The executive branch turned to voluntary export restraints as an alternative to inflexible congressional quotas which would have been damaging to both U.S. economic interests and foreign policy concerns. As the executive branch has gained experience in negotiating and implementing voluntary export restraints, the Antitrust Division of the Department of Justice has been placed in the unusual and difficult position of defending the antitrust consequences of administration trade policy. In addition, the Antitrust Division often has guided foreign governments and producers so that the export restraints can be implemented while

[28] A. Ahlström Osakeyhitiö v. Commission, 4 Common Mkt. Rep. (CCH) ¶ 14,491 (Sept. 27, 1988).

minimizing the fear of antitrust prosecution or private treble damage litigation.

The implementation of three particular voluntary restraint agreements illustrates this increasing sophistication. In the late 1960s, increasing foreign imports threatened the steel industry. In anticipation of certain congressional action which would have established stringent quotas for imported steel, the U.S. government concluded a series of voluntary export restraints with European steel producers. While negotiating these voluntary restraint agreements for steel, the U.S. government bypassed their governmental counterparts, and instead held meetings directly with foreign steel producers and accepted letters of intent from foreign private producers addressed to the U.S. State Department. Under these voluntary restraint agreements, the State Department monitored compliance with the terms set forth in the letters of intent. Ultimately, the voluntary restraint agreements were expanded and strengthened to include producers of approximately 85% of the steel imported into the United States.

The U.S. government's negotiations with private producers were ultimately challenged in court, but were upheld in *Consumers Union of United States, Inc. v. Rogers*.[29] The plaintiff in *Consumers Union* charged that the executive branch and the individual governmental officials negotiating the steel agreements had acted beyond the scope of their delegated powers, and that the resulting agreements constituted a *per se* violation of the Sherman Act. The plaintiff further contended that the existing congressional trade legislation had preempted the president's powers in the field and constituted the sole mechanism for relief against imports. Ultimately, the plaintiff dismissed the antitrust portion of its claim, and the case was submitted on cross-motions for summary judgment as to the president's authority in the field of international trade.

The district court upheld the steel agreements, concluding that nothing in the existing trade legislation preempted the president's authority in the field of foreign affairs. The court noted that the president, although authorized to negotiate voluntary limitations on steel imports, had no authority to give assurances of immunity from antitrust liability to any private person or firm participating in the voluntary restraint agreements. Upon appeal, the decision was affirmed with the court relying on the "precatory" nature of the voluntary restraints, which were characterized as mere letters of intent lacking binding effect on the Congress or the executive branch.

[29] 352 F. Supp. 1319 (D.D.C. 1973), *aff'd sub nom*, Consumers Union of United States, Inc. v. Kissinger, 506 F.2d 136 (D.C. Cir. 1974).

Keeping in mind the lessons of *Consumers Union*, the executive branch approached the trade crisis involving automobiles from Japan in the early 1980s in a significantly different fashion.[30] Following an unsuccessful attempt by domestic manufacturers to limit Japanese imports pursuant to Section 201 of the Trade Act of 1974, the Carter administration concluded that it required a specific grant of authority from Congress as a prerequisite to negotiating with the Japanese government. Against a background of proposed legislation which would have established formal quotas, the Reagan administration conducted a series of meetings with Japanese officials to resolve the crisis.

The solution came in the form of an announcement by the Japanese Ministry of International Trade and Industry ("MITI"). MITI announced what it described as a unilateral action, creating a system of quotas which would restrict the number of Japanese automobiles entering the United States. The Japanese ministry issued directives as to the number of automobiles to be exported. The manufacturers were required to submit reports to the Japanese government of their exports for a determination of whether any manufacturer had exceeded the limits set forth in the government directives. The MITI announcement contained threats that mandatory export licensing would be instituted in the event of any violation of the export ceilings.

Shortly after this announcement, the Japanese government submitted a formal letter to the United States setting forth the voluntary export restraint and the legislative basis for each of the enactments under Japanese law. In response, Attorney General Smith accepted the assertion that MITI had the authority to enforce the quotas under Japanese law and concluded, "in these circumstances we believe that the Japanese automobile companies' compliance with export limitations directed by MITI would properly be viewed as having been compelled by the Japanese government, acting within its sovereign powers." On this basis, the letter concluded that the export restraints would not give rise to violations of U.S. antitrust law.

Most recently, the U.S. government issued similar assurances to the Japanese government in connection with the creation and implementation of an agreement limiting the price and quantity of semiconductors exported from Japan to the United States in connection with the settlement of dumping proceedings brought by U.S. manufacturers. This most recent voluntary export restraint may be on the firmest footing, in terms of the executive branch's authority under both the trade laws and anti-

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[30] *See generally* Waller, *Redefining the Foreign Compulsion Defense in U.S. Antitrust Law: The Japanese Auto Restraints and Beyond*, 14 LAW & POL'Y INT'L BUS. 747 (1982).

trust laws, with all parties concerned acting in compliance with the substantive and procedural requirements for the suspension of dumping cases under U.S. trade laws.

Although the legality of such ad hoc arrangements and other similar voluntary restraints under the trade and antitrust laws is by no means a settled issue, the executive branch has continued to issue similar comfort letters to foreign governments which have adopted voluntary export restraints at the request or urging of the United States. In addition, the 1988 *Antitrust Guidelines* have added a new hypothetical case that explicitly exempts private parties who comply with governmentally negotiated voluntary export restraints.[31]

The implied immunities for the creation of voluntary export restraints pursuant to the mechanisms set forth in U.S. trade law and the substantive defenses provided by the act of state doctrine and the foreign sovereign compulsion doctrine have combined to give the executive branch a powerful tool for resolving certain trade disputes. As a result, however, the role and nature of the Antitrust Division in the field of international commerce has changed from that of investigator and prosecutor to that of counselor and advisor to the president for the execution of agreements motivated by concerns other than the enforcement of competition policy. The widespread use of such agreements also raises the danger that foreign firms acting under the umbrella of voluntary restraint agreements will enter into collateral agreements allocating quotas and customers, thereby creating additional anticompetitive consequences beyond those imposed by their governments.

IV. Practical Difficulties in the Investigation and Prosecution of Single-Country Export Cartels

Apart from the question of governmental attitudes toward the existence of export cartels aimed at the United States, there are a variety of considerations which increase the difficulty of detecting, investigating, and prosecuting or litigating against foreign single-country export cartels. Such export activity is typically difficult to detect because of the lack of empirical evidence and public information regarding foreign governmental policies. Most countries simply take the position that their own competition laws do not extend to export activities, and as a result, require little or no reporting of export cartels. For countries that are members of the Organization for Economic Co-Operation and Development ("OECD"), only Japan, Germany, the United Kingdom, and the

31 *1988 Draft Guidelines, supra* note 17, ¶ 12,109.95, at 20,641.

United States have mechanisms for registering export agreements.[32] Even this data can be deceiving given the fact that there may be no requirement of compulsory notification when export agreements are abandoned and no requirements for reporting export cartels or agreements which do not include any restrictions on domestic commerce. Information about export cartels for other OECD countries is very limited and is almost non-existent for countries outside of the organization.[33]

The lack of transparency in governmental policies toward export cartels is exacerbated by the fact that in most cases, the prime actors and evidence are located abroad and are seldom subject to traditional detection and discovery mechanisms provided for in U.S. governmental investigations and private litigation. In addition, one would expect that members of a single-country export cartel aimed at the United States would have greater homogeneity and common business and cultural traditions. Such homogeneity makes the operation of the cartel even more effective and less subject to cheating, defection, and detection. Moreover, single-country export cartel activity may be too sophisticated for U.S. consumers to detect and too expensive for them to litigate. While the middlemen and importers may be in the best position to take action against such collusive behavior, they may also have the strongest incentive not to do so for fear of retaliation and boycotts by the producers upon whom they depend.

The final set of hurdles for an antitrust enforcer fighting against single-country export cartels consists of the international jurisdictional considerations and substantive defenses which apply in the areas of foreign commerce antitrust. A successful plaintiff will have to come forward with evidence demonstrating a substantial effect on U.S. commerce to meet the varying formulations of subject matter jurisdiction under the variety of comity and interest balancing requirements in use by the federal courts. In addition, the plaintiff will have to obtain personal jurisdiction over the corporations or individuals involved in the export restraints aimed at the U.S. market.

If the export cartel represents more than just the private anticompetitive conduct of private individuals, the plaintiff will have to confront the possible application of the act of state doctrine or the foreign compulsion defense, which may cause a U.S. court either to abstain from accepting jurisdiction or to immunize the conduct in question. Finally,

[32] OECD COMMITTEE OF EXPERTS ON RESTRICTIVE BUSINESS PRACTICES, EXPORT CARTELS 22-24 (1974).

[33] *Id.*; COMPETITION AND TRADE POLICIES: THEIR INTERACTIONS, *supra* note 7, at 14-15, 27-38.

the court must take into account the existence of foreign blocking statutes if the plaintiff is relying upon discovery mechanisms for obtaining the evidence to prove an antitrust violation.

V. Towards a Consistent Enforcement Policy

While the impediments to consistent enforcement of antitrust standards against all export cartels are formidable, the incentives are significant as well. There is no economic distinction between cartel activities on the basis of national origin. A single-country export cartel with market power over a particular commodity poses the same threat to U.S. consumers as an international cartel with the same control over production and price. If the market power of the cartel or the level of its imports is *de minimus* with regard to the United States, the cartel may well escape scrutiny due to the limits of U.S. jurisdiction or due to the decisions of government and private litigants not to invest scarce legal resources. However, there is no economic or legal basis for excluding a cartel from the application of U.S. antitrust law simply because its participants share a common nationality or country of origin.

Furthermore, the potential that a foreign government has knowledge of or is involved in an export association is not sufficient cause for a *de facto* exemption. To automatically equate the existence of an export cartel with a favorable national policy is a serious mistake. The home nation of the export cartel may be anything from wildly enthusiastic to overtly hostile to the idea of export cartels in general or to the existence of a particular cartel. For example, at one extreme, certain countries will formally or informally require exporters to participate in price or quantity restrictions. However, other countries merely permit the existence of such cartels and are neutral towards their operation. Other countries, while not affirmatively condoning the existence of export cartels, find that their own national competition laws do not apply to pure export restrictions. Finally, a given export cartel may be illegal or may exceed the bounds of its lawful existence and be subject to civil or criminal consequences in its own country. Deference to a foreign governmental command to firms engaged in export activity may be appropriate in a particular case, but it is only one factor to take into account in formulating U.S. antitrust policy, and it is not grounds alone for a special and specious exemption.

The idea of the notification and registration of export cartels on an international basis is equally tempting but flawed. Transparency is a valued goal, but it is of use, first and foremost, as a tool in the detection and eradication of anticompetitive restraints and should not be used as a jus-

tification for their perpetuation.[34] The creation of a special exemption for notified export cartels aimed at the United States would require a wholesale rewriting of the Sherman Act in a manner providing foreign cartelists with a politically impractical advantage over their domestic lawbreaking counterparts. Finally, the legitimization of a system of competing national export cartels would represent a return to dangerous forms of mercantilism and beggar-thy-neighbor policies which have long since been abandoned in the field of international trade and should not be resurrected in the guise of antitrust policy.

Even on a cynical level, such a notion does not necessarily benefit the United States. There is no reason to think that U.S. export cartels are better or more effective than those of other nations. In fact, it would appear that the United States would be a net loser in such a game. With the United States comprising less than one-third of global economic activity, the limited monopoly rents extracted by U.S. export cartels in all likelihood would be greatly outweighed by the accompanying harm to U.S. consumers.

The likely spillover effects of U.S. export cartels in the domestic economy make this trade-off even less attractive. The internationalization of the economy suggests that U.S. export cartels with the ability to restrict production and price in export markets eventually will adversely affect the U.S. economy as well. U.S. consumers are the biggest losers, if the facilitation of traditional domestic cartels through information exchanges among producers of homogenous goods is factored into the equation.

The response to collusion and anticompetitive behavior is more enforcement rather than less enforcement. The United States, after awakening the world to the need for competition law and the dangers of cartels, has resurrected such behavior under a national rather than an international guise. Concerns over the proper limits of jurisdiction are appropriate, as is the need for sensitivity to the mandatory commands of foreign states within their legitimate spheres. However, none of these factors mandates or even suggests the abandonment of the United States as a vigilant policeman where cartel conduct adversely affects the interests of U.S. producers and consumers. If the watchword of the new antitrust learning is indeed economics, then the negative economic effects of a cartel remain the paramount concern of U.S. antitrust law, regardless of nationality.

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[34] The experience of the General Agreement on Tariffs and Trade in achieving greater transparency and greater legitimacy for certain types of trade restrictions suggests an example to be avoided.

There is nothing inconsistent about the vigorous promotion of competition and a sensible recognition of the legal and practical limits of national jurisdiction and enforcement power. The inconsistency arises when jurisdictional limits become an excuse for the promotion of cartels aimed abroad. This inconsistency injures both the credibility of U.S. competition policy and the will of the United States to enforce its laws.

The real prospect for a successful U.S. competition policy has been the promotion of competition law itself. A community of vigilant antitrust enforcers represents the best hope for the reduction of all cartels. The adoption of international codes relating to competition issues, whether they are themselves effective and binding legal regimes, have added legitimacy to the international application of national competition codes. The legitimization of competition law and its spread among the industrialized and newly industrialized nations holds out the prospect of a mutually reinforcing check on all cartel behavior. Cases like the EEC's *Wood Pulp*, and governmental actions like the United States' principled and balanced response to the *Wood Pulp* decision constitute the best hope that the national export cartel will eventually join its discredited cousin, the traditional international cartel, as an improper distortion of competition in international trade subject to universal condemnation and prohibition.