REPORT TO THE CONGRESS

Clarifying Webb-Pomerene Act Needed To Help Increase U.S. Exports

B-172255

Federal Trade Commission
Department of Commerce
Department of Justice

BY THE COMPTROLLER GENERAL OF THE UNITED STATES

AUG. 22, 1973

COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

B-172255

To the President of the Senate and the
Speaker of the House of Representatives

This is our report on the need for clarifying the Webb-Pomerene Export Trade Act of 1918 to help increase U.S. exports.

We made our review pursuant to the Budget and Accounting Act, 1921 (31 U.S.C. 53), and the Accounting and Auditing Act of 1950 (31 U.S.C. 67).

We are sending copies of this report to the Chairman, Federal Trade Commission; the Secretary of Commerce; the Attorney General of the United States; the President's Council on International Economic Policy; and the Director, Office of Management and Budget.

Comptroller General
of the United States

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Abbreviations

GAO	General Accounting Office
FTC	Federal Trade Commission
NCA	National Constructors Association

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D I G E S T

WHY THE REVIEW WAS MADE

In 1971 the United States had a $2 billion trade deficit, its first in this century, and in 1972 this deficit rose to about $6.4 billion. Within the past year and a half, the dollar has been devalued twice against the currencies of other nations, and there is urgent need to improve the U.S. trade balance.

The Webb-Pomerene Export Trade Act of 1918 permits U.S. companies to form associations to compete more effectively in foreign markets. GAO reviewed activities under this act to determine its effectiveness in serving the business community and expanding exports.

FINDINGS AND CONCLUSIONS

About 260 export trade associations, which include about 4,000 companies, have been organized under the permissive provisions of the Webb-Pomerene Act. Such associations represent a diminishing proportion of export trade, declining from a 1930 peak of 19.5 percent of U.S. exports to about 3.5 percent in 1971. (See p. 9.)

The Webb-Pomerene Act provides qualified exemptions from prosecution under U.S. antitrust laws for associations formed for the purpose of, and actually engaging in, export trade when such associations do not interfere with domestic commerce. (See pp. 5 and 6.) Many Government and business officials believe that the full potential of the Webb-Pomerene Act in expanding exports has not been realized. Uncertainty over possible antitrust implications is a major impediment to realizing that potential, even though the purpose of the act was to provide qualified exemption from antitrust prosecution. (See pp. 9 to 11.)

Associations must register with the Federal Trade Commission (FTC) which can investigate suspected interference in domestic commerce and recommend that associations adjust their practices. If associations fail to comply with FTC recommendations, it can refer its findings and recommendations to the Department of Justice for actions as may be deemed necessary. However, independent of FTC, Justice can bring a suit against an association under the antitrust laws without the association's first being given an opportunity to adjust its practices. (See pp. 6 and 7.)

Government officials have stated that it is exceedingly difficult to predict the possible effects on domestic commerce resulting from an association's activities. This fact, and the fear of criminal prosecution, is an impediment to formation of export trade associations. (See p. 10.)

Industry representatives currently operating Webb-Pomerene associations said that the act was useful in aiding export operations. Others were interested but indicated fear of possible criminal prosecution under U.S. antitrust laws. (See pp. 9 to 11.)

Neither Commerce, which has assumed responsibility for promoting export trade associations, nor FTC has aggressively promoted the Webb-Pomerene Act or encouraged businesses to form associations because of the antitrust implications. Consequently, some industry representatives are unaware of the act and its potential for their firms. (See pp. 10 and 13.)

Another factor inhibiting formation of export associations under the act is that the types of exports within its scope are limited. The "goods, wares, or merchandise" provision of the act has been interpreted as precluding export of services and intangible items, such as blueprints, franchises, and patents. This limited interpretation is becoming increasingly significant in view of the accelerating growth of service industries. (See pp. 10 to 12.)

Although it is difficult to measure the export potential that clarifying the antitrust aspects of the act might have, many Government and business officials expressed the belief that the export opportunities inherent in larger combinations could be significant. GAO could not evaluate their validity but the following statements indicate that substantial potential exists for expanding exports through trade associations. (See pp. 11 to 13.)

--Members of the National Constructors Association estimated an increase in sales of as much as $2 billion annually if they could export as a Webb-Pomerene association.

--An electronics industry official said that U.S. industry would be a passive spectator in incredibly large markets unless it banded together to compete on an equal basis with foreign trading companies.

Pitfalls inherent in allowing cooperative effort among export trade associations must be carefully weighed. Attempts could be made to exploit the domestic market or to unfairly affect domestic firms operating in foreign trade. The pitfalls have been considered, and safeguards have been provided for in the act. Further, the Department of Justice Antitrust Division found that any abuses of the act could be readily dealt with. (See pp. 14 and 15.)

GAO's review indicated that U.S. exports could be increased if provisions of the Webb-Pomerene Act were clarified and modified. Expanding the items eligible for export and clarifying the respective roles of Justice and FTC would create an environment in which U.S. firms could join together to provide a complete package, including financing, technology, equipment, and commodities, in competing for large-scale projects abroad.

RECOMMENDATIONS

This report has no recommendations for action by the executive agencies.

AGENCY ACTIONS AND UNRESOLVED ISSUES

FTC and Commerce officials generally agreed on the potential of the Webb-Pomerene Act for increasing U.S. exports and made recommendations to clarify and strengthen it. (See apps. I and II.)

Justice doubted that the act would expand the export potential, that U.S. industry was at a competitive disadvantage in world markets, and that the act was meant to include other types of exports. (See app. III.)

GAO evaluation of these comments is on pages 17 and 18.

MATTERS FOR CONSIDERATION BY THE CONGRESS

The Webb-Pomerene Export Trade Act of 1918 has not been effective in inducing companies to form associations to compete in foreign markets. Because of uncertainty over possible antitrust implications, clarifying the provisions of the Webb-Pomerene Act would help create an environment in which U.S. firms might more readily join together and present a complete package, including financing, technology, equipment, and commodities, in competing for large-scale projects abroad.

Two bills (S. 1483 and S. 1774) introduced in the Congress include legislative modifications which, if enacted, will increase prospects for realizing the full potential of the Webb-Pomerene Act in expanding U.S. exports. Senate bill 1483 introduced in April 1973 provides for export of technical know-how, services, and facilities; the exemption of associations from treble damages and criminal prosecutions; and provides authority to FTC to take whatever actions it deems proper for the failure by associations to comply with the intent of the Export Trade Act. Some of the pertinent features of Senate bill 1774, introduced in May 1973 for the administration, provide that:

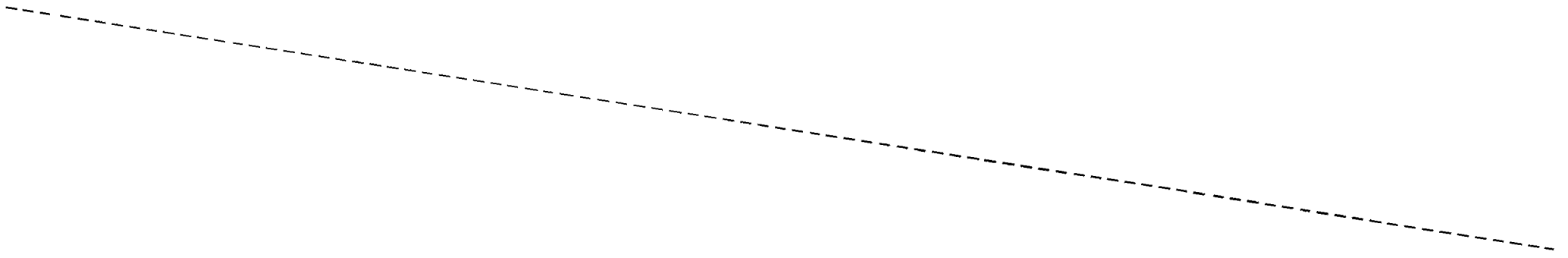
--FTC be given exclusive authority, with certain exceptions, over association activities until it has exhausted available remedies, such as investigating association activities and recommending adjustment of such activities.

--Justice be prohibited, with certain exceptions, from bringing suits under the antitrust laws against an association for its export trade unless FTC recommends such action.

--The act be expanded to include services and certain technology-related items.

The matters in this report may be of assistance to the Congress in its deliberations on the proposed legislation.

Tear Sheet



CHAPTER 1

INTRODUCTION

The Webb-Pomerene Export Trade Act of 1918 (15 U.S.C. 61-65) was intended to benefit U.S. exporters by allowing companies to form export trade associations, with qualified exemption from antitrust litigation, to effectively compete in world markets and thereby to enhance the U.S. position in international trade. The Federal Trade Commission (FTC) is responsible for administering the provisions of this act; the Department of Commerce has assumed responsibility for promoting formation of associations among U.S. industries; and the Department of Justice has authority to intervene when association activities are deemed in restraint of trade within the United States or of export trade of any domestic competitor of such associations.

LEGISLATIVE HISTORY AND INTENT OF WEBB-POMERENE ACT

FTC, in its June 30, 1916, report to the Congress, recognized the importance of American foreign commerce and the need to understand world trade competition of American exporters and pointed out that:

> "* * * other nations have marked advantages in foreign trade from superior facilities and more effective organizations."
>
> * * * * *
>
> "* * * doubt and fear as to legal restrictions prevent Americans from developing equally effective organizations for overseas business and that foreign trade of American manufacturers and producers, particularly the smaller concerns, suffers in consequence."

To enable U.S. business to more effectively compete with foreign business in international trade, the Webb-Pomerene Act provided certain exemptions from U.S. antitrust laws. The Senate Interstate Commerce Committee report on the act stated:

"* * * Since the beginning of the European war, the allies have even organized buying agencies for the benefit of their Government and their people. Our merchants and manufacturers must meet this situation. Very few of them can compete single-handed with these great combinations. Our belief is that it is necessary to permit our businessmen to form similar organizations or associations so as to enable them to meet foreign competitors on a more equal footing. In this way they will be able to reduce the selling cost and keep in closer touch with the demands of the foreign market."

Three principal goals of the act, as stated in the report, were to (1) promote and increase U.S. export trade, (2) encourage and expand the exports of small business, and (3) provide a means of effective competition with foreign cartels or combinations.

The Webb-Pomerene Act provides qualified exemptions for export trade associations from the prohibitions of the Sherman Antitrust Act of 1890 and the Federal Trade Commission and Clayton Acts of 1914 as long as such associations do not interfere with domestic commerce. The antitrust exemptions apply to associations formed for the sole purpose of engaging in export trade and actually engaging solely in export trade, provided such associations are not in restraint of trade within the United States; are not in restraint of the export trade of any domestic competitor; do not enter any agreement or do any act which artificially or intentionally enhances or depresses prices within the United States, or which substantially lessens competition, or otherwise restrains trade, within the United States.

To be eligible for the antitrust exemptions of the act, an association must register with FTC and provide such information as may be required regarding their operations.

The act provides that FTC investigate association activities if it has reason to believe that such activities are in restraint of trade within the United States as provided above and that FTC recommend that such an association adjust its activities. If such an association fails to comply with the recommendations, FTC shall refer its findings and recommendations to the Attorney General of the United States for such action as he may deem proper.

However, the Department of Justice is not precluded from bringing a suit against an association independent of FTC and prior to FTC's recommending an adjustment of an association's practices. Such suits can be brought against an association without its being aware of violating the act and without its having an opportunity to adjust its activities.

COMPETITION FROM FOREIGN CARTELS

As a rule, foreign businessmen are much freer to cooperate and join forces to compete in international trade than are U.S. businessmen. For example, in 1970 the United Nations reported over 300 foreign cartels operating overseas in competition with U.S. firms; in 1971 the Organization for Economic Cooperation and Development reported over 500 foreign cartels.

Foreign cartels, often aided by their governments, effectively meld their activities into strong competitive forces, particularly in bidding on major construction contracts. It is not uncommon for certain foreign governments to actually direct the merger of several private business interests into one entity to restrict possible competition among these companies. The Organization for Economic Cooperation and Development in its 1971 report, "Comparative Summary of Legislations on Restrictive Business Practices," pointed out that there was a lack of definite restrictions on export cartels in 15 major trading nations.

Justice questioned the number and significance of foreign cartels. (See app. III.) We learned from discussions with numerous U.S. Government and industry representatives and from studies of export operation documents that over 300 foreign cartels had had a significant impact on U.S. firms competing abroad. An industry committee on engineering and construction services of the National Export Expansion Council described this competition by stating that:

> "The Canadians, in a joint government-industry effort are seeking to export entire projects with financing included. The Japanese, unhampered by antitrust restrictions, have formed, with government support, several industry associations to compete for engineering and construction contracts outside Japan. The Associations ensure that there

is no ruinous intra-industry competition and provide a systematic approach to project bidding. The Japanese Government even goes so far as to compensate Japanese contractors for loss due to failure in meeting the performance guarantee on foreign plants due to mistakes in engineering design."

The competition in foreign markets imposes heavy burdens on U.S. firms attempting to cope with the complexities of international trade. General overhead, sales organizations, freight and insurance rates, and other items may be within the financial capacity of some; but others often find these too costly.

SCOPE OF REVIEW

We held discussions with officials of the Department of Commerce, Department of Justice, and FTC and examined documents at these agencies. We talked with trade association officials and with representatives of firms operating in Webb-Pomerene associations, firms interested in doing so, and those unaware of the Webb-Pomerene provisions.

CHAPTER 2

THE WEBB-POMERENE ACT

AS A MEANS OF INCREASING U.S. EXPORTS

The need to increase U.S. exports has never been greater in U.S. history than it is today, but the full potential for expanding exports by applying provisions of the Webb-Pomerene Act is not being realized. Even though the intent of the Webb-Pomerene Act was to aid U.S. businesses to compete with foreign firms by permitting them to form export trade associations, it has not been effective in doing so. Although many factors may be involved, the predominant ones appear to be the lack of clarity regarding antitrust implications and types of permissible exports.

About 260 associations, including about 4,000 companies, have been organized under the permissive provisions of the Webb-Pomerene Act. At the peak of activity in 1930, 57 registered associations had export sales of about $660 million, or about 19.5 percent of U.S. exports; by 1971 the number had decreased to 38 registered with about $1.5 billion in exports, or about 3.5 percent of U.S. exports.

Over the years, Webb-Pomerene associations have accounted for about 4 percent of U.S. total exports. Association exports have more than doubled since 1930, but they represent a diminishing proportion of export trade, although U.S. balance-of-payments problems suggest the need for an ever-increasing export effort.

INDUSTRY RELUCTANCE TO USE THE ACT

Associations can benefit from the permissive provisions of the Webb-Pomerene Act, providing their activities do not adversely affect the domestic market or domestic firms operating in foreign trade. According to members of existing associations, the provisions of the act were essential to their exporting operations and were considered a great boon to expanding exports of the individual firms. However, U.S. firms in general have been reluctant to engage in international trade under the provisions of the act because of what some manufacturers and producers term "confusing legislation and fear of Government litigation." Uncertainty over possible antitrust litigation has deterred American businessmen from

forming associations and thus has reduced the act's usefulness in aiding U.S. businesses to compete in foreign markets and expanding exports. The uncertainties have also discouraged Commerce and FTC from promoting export activities under Webb-Pomerene provisions.

Several factors contribute to the uncertainties. Export trade is defined in the act as "solely trade or commerce in goods, wares, or merchandise." However, this provision has been generally interpreted as precluding export by associations of technical know-how and related items. In addition, Government officials have stated that it is very difficult to predict, before formation of an association, what the possible effect might be on domestic business or world trade. This fact, coupled with Justice's authority to pursue criminal prosecution under the antitrust laws regardless of whether FTC has first made an investigation and recommended, as provided for in the act, that the association adjust its practices, creates in U.S. business a fear of antitrust prosecutions and thus acts as an impediment to formations of export trade associations.

An FTC official reported that there were constant inquiries about forming associations under Webb-Pomerene guidelines, but very few companies followed through to actually form them. The official associated this hesitancy with a feeling that the qualified exemptions from antitrust actions accruing under the act are assumed, not certain. Aside from the actual incidence of litigation, the threat of its possibility is so imbued in the minds of U.S. exporters that they are reluctant to apply their full resources to such an activity.

The following remarks of chemical industry officials demonstrate this industry's fear of forming Webb-Pomerene associations:

"As attorney for my company I feel there are legal loopholes."

"We won't mess with it because it's too risky."

"The Department of Commerce may be encouraging it, but it can't offer guarantees of immunity from the Justice Department."

At a time when suits were pending against two chemical firms, one association officer stated that there must have been a dozen industries interested in forming associations under Webb-Pomerene guidelines but that they would not act in the face of such uncertainty.

Thus, it is apparent that this environment has not been conducive to expanding exports through extensive use of Webb-Pomerene associations. Clarifying the items eligible for export and clarifying and formalizing the respective roles of Justice and FTC appear to be essential to realizing the intent of the act in aiding U.S. business.

POTENTIAL FOR INCREASED EXPORTS

Government and industry officials believe that Webb-Pomerene associations offer a means for expanding exports by aiding U.S. businesses to compete in international commerce if the uncertainties in operating under the act were eliminated. Although the potential for increasing exports by this means and the effects of the uncertainties involving antitrust implications and types of exports cannot be quantified, they appear to be significant. A 1970 committee on engineering and construction services stated that:

> "The United States engineering and construction industry can compete effectively against foreign firms, provided the same ground rules apply to United States and foreign firms. If U.S. firms do not receive Government assistance equal to that given their foreign competitors, the U.S. engineering and construction industry could well find itself almost eliminated from the international market in five to ten years."

One electronics industry official stated that the United States stood an excellent chance of losing the high-technology game it taught the world unless the Nation's antitrust laws were amended to foster commerce with countries where "they don't know about antitrust laws." Although he recognized the antitrust laws as good laws for preventing economic concentration at home, he pointed out that, in countries like Japan, manufacturers, banks, and government ministries have teamed up to go after lucrative world markets. He believed that antitrust laws should not apply when our industries compete with those of other countries.

Members of the National Constructors Association (NCA) are engaged principally in the export of technical know-how, including diagrams, plans, schedules, specifications, drawings, and blueprints. An important adjunct of its export of such technology is the potential corollary export of capital goods and products.

Increasing difficulties in competing against government-assisted foreign consortia on major construction projects led some NCA members to apply to FTC in 1967 for permission to form a Webb-Pomerene association. NCA officials estimated that they spent 2 years and approximately $100,000 on plans for a merger; but because of complications encountered in seeking a timely qualified exemption from possible antitrust prosecution, they did not proceed with their plans.

According to Justice, the primary question was whether technology consisting of know-how, blueprints, drawings, construction plans, etc., came within the statutory definition in the Webb-Pomerene Act of goods, wares, and merchandise. After examining the legislative history of the act and judicial interpretations of similar terms in other statutes, Justice tentatively concluded that the Congress intended these words to be used in their usual sense and they could not be expanded to include technology. Justice said it expressed this view to FTC after NCA members applied for clearance of proposed export plans. (See app. III.)

NCA officials estimate that lost technology exports, including related sales of equipment, spare parts, and supplies, would amount to as much as $2 billion a year. These officials expressed the opinion that, if U.S. business were allowed to package its talent by forming associations, these associations could develop new export opportunities. They emphasized that the unrealized potential in developing new undertakings was an important and incalculable loss to the U.S. export effort.

A trade association official who was not familiar with the act indicated strong interest in the Webb-Pomerene provisions. He stated that Webb-Pomerene associations could facilitate introducing products into markets that individual companies in his group would not enter otherwise because of overhead costs.

Although we cannot evaluate the validity of the various statements on expansion of exports, the statements indicate that export trade associations could provide potential for increasing exports.

A renewed promotional effort by FTC and Commerce would likely identify additional export opportunities. Several years ago Commerce accepted the responsibility for promoting the formation of associations. However, it has since taken the position that it will not actively promote the Webb-Pomerene provisions because of their ambiguity. We were told that Commerce did not wish to encourage industry to form associations which might be subject to Government prosecution. Consequently, some industry representatives are unaware of the act and its potential for their firms.

Currently, Commerce, with clearance from Justice officials, is promoting the formation of consortia on a limited basis to bid on specific major projects totaling over $3-1/2 billion in South America. Commerce officials state that U.S. bids on these projects are competitive with those of other countries and that U.S. consortia stand a good chance of winning contracts on these projects. If the expertise had not been pooled for these projects, they added, U.S. bids would not have been competitive nor would any single U.S. enterprise be able to participate in other huge prospective projects totaling billions of dollars in other parts of the world.

One Colombian Government official, dealing with a U.S. team, stated that his government did not want to receive numerous bids for various phases of a project, but wanted one contractor to do all the work. Under these circumstances, Commerce officials saw the opportunity for U.S. industries to effectively compete for projects in South America. This is representative of the strategy necessary for the United States to be competitive in these markets.

The importance of cooperative ventures with other countries which involve the export of U.S. technology and management services is stated in a 1972 Committee for Economic Development study, "A New Trade Policy Toward Communist Countries."

> "* * * a new aspect, of U.S. economic relations with the East is beginning to emerge. Some

> U.S. companies are now considering whether it may be possible to make satisfactory arrangements with Moscow for cooperative ventures to develop certain fuels and minerals in the Soviet Union. There is a possibility that similar arrangements might eventually be made with China. Both countries have large unexploited supplies of these resources which will require vast amounts of capital, technology, and managerial know-how for their development. Such cooperative ventures would involve coproduction arrangements in which U.S. business firms could provide the capital, technology, and management needed, while receiving payment in the product over a considerable number of years."

The potential benefits in terms of increased exports of technology and the easing of a projected U.S. energy crisis by importing energy resources are evident.

POSSIBLE DISADVANTAGES TO DOMESTIC INDUSTRY

The potential export benefits from an increase in Webb-Pomerene associations must be carefully weighed against the potential disadvantages to domestic business. Of primary concern is the danger that associations established ostensibly for international trade might apply their resources on the domestic front with consequent adverse effects to domestic enterprises and to the best interests of the consumer.

A Justice study and our discussions with FTC officials indicate that exploitation of the domestic market and the unfair advantage against competing domestic firms can be adequately policed under existing provisions of the Webb-Pomerene Act.

The Attorney General's Antitrust Commission reported in 1955 that "abuses of the act could be readily dealt with by either the Federal Trade Commission or the Justice Department." Recently, a spokesman for a potential Webb-Pomerene association suggested that procedures for creating new associations might be supervised by Justice lawyers and other officials, as appropriate, to guard against prohibited activities.

Thus, it appears that association activities can be adequately monitored under the act. However, the ground rules under which association activities are to be monitored will have to be clarified and officially promulgated if U.S. businesses are to be receptive to the permissive exemptions under the act.

CHAPTER 3

CONCLUSIONS, AGENCY COMMENTS AND OUR EVALUATIONS, AND MATTERS FOR CONSIDERATION BY THE CONGRESS

CONCLUSIONS

The Webb-Pomerene Export Trade Act, by certain permissive antitrust exemptions, was intended to provide a means of placing U.S. exporters on an equal, competitive footing with foreign business combines and to allow small U.S. enterprises to share in foreign markets. However, the potential of the act has not been, and will not be, fully realized until the antitrust implications have been clarified and the goods, wares, and merchandise provision expanded to specifically include technology-related items.

Although it is difficult to measure the export potential that clarifying the antitrust aspects of the Webb-Pomerene Act might have, indications are that it could be significant. The Secretary of Commerce expressed the opinion that the U.S. antitrust statutes presented a major impediment to America's ability to compete in world trade. Because of antitrust implications, neither Commerce nor FTC has aggressively publicized the activities possible under the Webb-Pomerene Act or encouraged businesses to form associations. Consequently, some industries are unaware of the potential benefits of forming Webb-Pomerene associations.

On balance, it seems desirable to create a more favorable climate for increasing exports while recognizing that care must be exercised to minimize their possible adverse impact in the domestic marketplace.

To provide an environment favorable to businesses banding together to compete more effectively against foreign competition in international trade, as intended by the Webb-Pomerene Act, the respective roles of Justice and FTC in monitoring association activities must be clearly defined and promulgated. The act now provides that FTC shall investigate association activities suspected to be in restraint of trade within the United States, recommend that associations adjust their practices if so needed, and refer the matter to Justice for appropriate action if associations fail to do so. If it were a matter of record that FTC would exhaust

these remedies before Justice initiated litigation, industries' fear of being prosecuted without first being given a chance to adjust their practices should be alleviated. We believe such a procedure would remove a major impediment to realizing the act's full potential in expanding exports and still leave FTC and Justice with their full powers in dealing with restraints of trade in the United States.

In the past the goods, wares, and merchandise provision of the act has been interpreted to preclude the export of certain technology-related items. To aid U.S. industry, especially in providing "package deals," the definitions of export items should be expanded to specifically include architectural, engineering, training, financing, and project or general management services.

AGENCY COMMENTS AND OUR EVALUATIONS

FTC supports efforts to revise the Webb-Pomerene Act to enhance its potential for increasing U.S. exports and has made suggestions to make this potential a reality. In its view, modifying the statute to clarify FTC's authority to undertake its own enforcement action under the Federal Trade Commission Act would be beneficial. This, together with legislative exemption of Webb-Pomerene associations from possible criminal prosecution under the Sherman Act and from treble-damage action under the Clayton Act and preservation of the Department of Justice's traditional authority to bring civil suits, would balance enforcement needs and remove impediments to the act's effectiveness. (See app. I.)

We believe a preferable alternative to FTC's suggestion is to leave legal enforcement action with Justice but clarify the ground rules for bringing such action.

Commerce supports clarifying the goods, wares, and merchandise provision of the act. (See app. II.)

Justice did not agree that U.S. businesses were at a disadvantage in world markets or were reluctant to enter world markets due to fear of Government litigation and cited a 1967 FTC report which indicated that Webb-Pomerene associations, for various reasons, might not have significant potential for promoting exports. (See app. III.) Without debating the indications in the 1967 FTC report, we believe the critical U.S. export situation demands a positive

approach--encouraging the formation and operation of Webb-Pomerene associations--so that the full potential of the Webb-Pomerene Act in promoting exports can be realized.

FTC and Commerce officials responsible for regulating and monitoring U.S. domestic and foreign commerce recognized the export potential under the Webb-Pomerene Act and thought that our report fairly portrayed the difficulties encountered. They support efforts to revise the act so that associations could operate under an environment which would potentially increase this country's exports and would provide a means of effective competition with foreign cartels or combinations in foreign markets, as intended by the Webb-Pomerene Act. (See apps. I and II.)

We noted that the FTC report "Webb-Pomerene Associations, A 50 Year Review," stated that the purpose of the act was "to strengthen the competitive position of American producers in markets that foreign monopolies dominated." One Government official concerned with the declining U.S. competitive position in the world market agreed that there was potential for the Webb-Pomerene Act and saw this method as a far better alternative than instituting a Government-funded program to subsidize industry.

Other Government officials and members of industry agree that the act offers potential in meeting the challenge of foreign monopolies and are most eager that its provisions be clarified. These officials state that industry exhibits a very real fear regarding possible prosecution of Webb-Pomerene Associations, and, in their opinion, this uncertainty has decreased use of the act.

MATTERS FOR CONSIDERATION BY THE CONGRESS

The Webb-Pomerene Export Trade Act of 1918 has not been effective in inducing companies to form associations to compete in foreign markets. Because of uncertainty over possible antitrust implications, clarifying the provisions of the Webb-Pomerene Act would help create an environment in which U.S. firms might more readily join together and present a complete package, including financing, technology, equipment, and commodities, in competing for large-scale projects abroad.

Two bills (S. 1483 and S. 1774) introduced in the Congress include legislative modifications which, if enacted, will increase prospects for realizing the full potential of the Webb-Pomerene Act in expanding U.S. exports. Senate bill 1483 introduced in April 1973 provides for export of technical know-how, services, and facilities and for the exemption of associations from treble damages and criminal prosecutions and provides authority to FTC to take whatever actions it deems proper for the failure by associations to comply with the intent of the Export Trade Act. Some of the pertinent features of Senate bill 1774, introduced in May 1973 for the administration, provide that:

--FTC be given exclusive authority, with certain exceptions,[1] over association activities until it has exhausted available remedies, such as investigating association activities and recommending adjustment of such activities.

--Justice be prohibited, with certain exceptions,[1] from bringing suit under the antitrust laws against an association for its export trade unless FTC recommends such action.

--The act be expanded to include services and certain technology-related items.

The matters in this report may be of assistance to the Congress in its deliberations on the proposed legislation.

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[1]FTC would not have exclusive jurisdiction when an association's conduct does not conform with its registration and has the purpose or effect of substantially lessening competition, restraining U.S. domestic or import trade, or substantially restraining exports by domestic nonmembers.

FEDERAL TRADE COMMISSION
WASHINGTON, D. C. 20580

MILES W. KIRKPATRICK
CHAIRMAN

September 19, 1972

Mr. O. V. Stovall
Director
International Division
General Accounting Office
Washington, D.C. 20548

Dear Mr. Stovall:

This is with reference to your letter of August 8, 1972, transmitting a draft report on the export expansion potential of the Webb-Pomerene Act of 1918. You have requested my comments on the observations, conclusions and recommendations expressed in the draft report and indicate that copies of the proposed report also have been sent to the Attorney General and the Department of Commerce for their review and comment.

Preliminarily, I might state that we were aware that the General Accounting Office was conducting a study of the Webb-Pomerene Act and that conferences were held with members of the Commission's staff involved in administering the Act. Public files at the Commission have been examined by your representatives and a number of registered Webb-Pomerene association members and potential members have been contacted by your staff to explore the effectiveness of the export trade association as a vehicle for marketing American goods abroad.

We understand the importance of increasing our exports at this time, particularly in light of the trade deficit just experienced by the United States for the first time since 1893. We are aware that the United States' share of the world market for manufactured goods has decreased and we agree with the tenor and substance of the report that the Webb-Pomerene Act has probably not been as effective as it might have been in encouraging or facilitating increased U.S. export activity. We support efforts to revise that Act so that Webb export trade associations may be able to increase this country's exports and aid in achieving the Department of Commerce's goal for a $50 billion export increase.

Mr. O. V. Stovall

On January 25, 1972, I testified before the Senate Subcommittee on Foreign Commerce and Tourism on S. 2754, The Export Expansion Act of 1971. In my testimony, I noted my reservations concerning the use of antitrust exemptions as a means of increasing export trade. I questioned whether past experience had given us sufficient reason to expect very significant benefits to come from such exemptions. The potential of this cooperative type approach, in any event I suggested, could be most effectively developed and strengthened by amendments to the Webb-Pomerene Export Trade Act, rather than legislation of the sort outlined in S. 2754. I recommended that Congress should eliminate the criminal sanctions under the Sherman Act and treble damage provisions under the amended Clayton Act and an expansion of the coverage of the Act beyond "goods, wares and merchandise" to which it is presently limited. This latter recommendation would permit registration of members of organizations such as the National Constructors Association (NCA) referred to at page 4 of your report. Obviously, some of these recommendations could be partly implemented without legislation, but at this point in the Act's history, legislative action would be very helpful.

[See GAO note.]

GAO note: The deleted comments pertain to matters discussed in the draft report but omitted from the final report.

Mr. O. V. Stovall

[See GAO note on p. 22.]

A preferable and more efficient solution, in my view, would be a modification of the statute to clarify the Commission's authority to undertake its own enforcement actions under the Federal Trade Commission Act. This, together with legislative removal of criminal and treble damage sanctions and preservation of the traditional authority of the Department of Justice to proceed civilly under Section 4 of the Sherman Act would balance enforcement needs with removal of impediments to the Act's effectiveness.

Sincerely yours,

Miles W. Kirkpatrick
Chairman

THE ASSISTANT SECRETARY OF COMMERCE
Washington, D.C. 20230

MAR 16 1973

Mr. O. V. Stovall, Director
International Division
United States General Accounting
Office
Washington, D.C. 20548

Dear Mr. Stovall:

This is in response to your letter of last August transmitting a draft report on the export expansion potential of the Webb-Pomerene Act of 1918, and requesting this Department's comments on the observations, conclusions and recommendations in the report.

The draft report describes the lack of success of the Webb-Pomerene Act in increasing U.S. exports and certain difficulties which users and potential users of the Act have encountered. The report concludes that the fear of antitrust litigation and criminal prosecution deters businessmen and companies from forming Webb-Pomerene Associations

[See GAO note on p. 22.]

In the report's Appendix, relating to the history of the Act, we question the accuracy of the statement on page 11 that "/a/ny product produced in the U.S. and sold abroad, whether tangible or not, was considered part of export trade" and within the statutory words "goods, wares, and merchandise." It is our understanding that intangible property is not within the statutory words "goods, wares, and merchandise."

In any event, we believe the report should contain a recommendation that the Act be clarified so as to include services, patent licenses, leases, franchises, insurance, technological know-how, and other intangible property among the activities that Webb-Pomerene Associations may lawfully conduct.

Finally, we believe the background section of the report, relating to bidding on major foreign construction contracts, could be strengthened. Specifically, we believe the report on page 1 should mention the fact that foreign buyers often do not want a number of bids, but one or two at most from U.S. companies.

Sincerely,

M. van Gessel
Deputy Assistant Secretary
for International Commerce

ASSISTANT ATTORNEY GENERAL
ANTITRUST DIVISION

Department of Justice
Washington, D.C. 20530

SEP 19 1972

Mr. O. V. Stovall
Director
International Division
U.S. General Accounting Office
Washington, D. C. 20548

Dear Mr. Stovall:

The Attorney General has referred your letter and the enclosed draft report on the Webb-Pomerene Act to this Division for reply. The following comments are directed to your draft report.

The report suggests that American companies are at a disadvantage in world trade because of foreign cartels and the fact that foreign companies have more freedom to cooperate. On this premise the Webb-Pomerene Act appears to offer advantages in meeting foreign competition.

[See GAO note on p. 22.]

We would be interested in the source, and a breakdown of the figure of 300 foreign cartels referred to in your Report (p. 1). The term "cartel" is often used abroad to designate rather small groups with insignificant market power. For example, Japan has very short-lived "recession cartels" in some industries lasting only a few months. Some cartels to accomplish

things such as joint research by small companies which would probably not be illegal here are required to be registered in some foreign countries. Actually, there are now strong laws in most industrial countries which ban restrictive arrangements among competitors such as price-fixing and market division. It should also be noted that where there is no effect on U.S. trade, American companies can freely participate in cooperative foreign groups, but on the other hand foreign as well as U.S. companies may incur U.S. antitrust liability for activities which do adversely affect U.S. trade.

[See GAO note on p. 22.]

The Federal Trade Commission, however, after an extensive investigation, issued a 113 page report in 1967 which concluded that:

> Nothing in the changing environment of American involvement in international economic activity justifies an expectation that the Webb-Pomerene Act will assume increased significance as an instrument to promote overall U.S. exports.*/

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*/ FTC, Economic Report, Webb-Pomerene Associations: A 50-Year Review (1967) at 69.

Further, the Commission in questioning Webb associations as to reasons for dissolution of such associations did not find that the cause was either foreign cartels or fear of antitrust prosecution. The most frequently stated reason was an inability to compete with foreign producers which in most cases meant an inability to meet foreign price competition. The next most frequent reason was the difficulty occasioned by foreign governmental restrictions, tariffs, etc. Only one association cited the actions of a foreign agency or cartel as the reason for dissolution. */ The Report suggested that the antitrust scrutiny presently demanded of such associations under the Webb Act was not for the purpose of inhibiting such associations but that "These issues have been decided in the context of an effort to prevent the effects of collusive export practices from spreading to the domestic economy." **/

The FTC Report noted these factors which have served to limit the usefulness of Webb associations: large scale advantages can be readily obtained in other ways, e.g. through use of an export agent handling a number of non-competing lines; many export products are differentiated in nature rendering joint programs unsuitable or unwanted by producers whose competitive position is built on differentiation; and negotiation advantages associated with joint export are not of great importance partly because the U.S. Government often assumes a negotiating role for exporters, and partly because membership coverage in a particular product is rarely enough to give an advantage over non-member firms. ***/

The Report also agreed with an earlier conclusion that in most industries a specialized export firm had more to offer a small exporter than a Webb association. Only in special circumstances did the FTC staff find that businessmen would view the Webb Act as offering significant advantages: where there was a standardized product, produced

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*/ FTC Report at 26.

**/ FTC Report at 69.

***/ FTC Report at 64.

by a few firms from a resource base which yields a comparative advantage over producers in other parts of the world. */

The FTC Report further pointed out that the pattern of Webb association exports differed significantly from the pattern of total U.S. exports. **/ The leading U.S. export products are technically complex and differentiated products from capital intensive industries. Four out of five export products have been industrial machinery, electrical equipment, motor vehicles or aerospace products. None of these products are represented in Webb association exports. On the other hand 80% of Webb assisted sales have been consumer goods and industrial raw materials. Thus the Report concluded that technically advanced and diversified products would increasingly provide the basis for any comparative advantage that the United States might expect to maintain in international trade but that the products deriving from such advantages did not appear well suited to exploitation through Webb-Pomerene association activity. ***/

As we have indicated to your staff, the example on page 4 of the Report is, in our view, inaccurate and misleading. The Report refers to a National Constructors Association (NCA) effort to form a Webb association, and cites its officials as indicating that "because of complications encountered in seeking the qualified exemption from possible antitrust prosecution, they did not proceed with their plans." As a result they estimated losing "technology exports, including related sales of equipment, spare parts and supplies" of $2 billion a year.

The primary question involved in that matter was whether technology consisting of know-how, blueprints, drawings, construction plans and the like, comes within the statutory definition in the Webb Act of "goods, wares

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*/ FTC Report at 65.

**/ FTC Report at 37.

***/ FTC Report at 66.

or merchandise." After examining the legislative history of the Webb Act and judicial interpretation of similar terms in other statutes (there being no case in point under the Webb Act), we tentatively concluded that Congress intended these words to be used in their usual sense and that they could not be expanded to include technology. The courts have strictly construed the term "commodity," for example, in the Robinson-Patman Act. See Export Liquor Sales, Inc. v. Ammex Warehouse Co., 426 F.2d 251 (6th Cir. 1970) (lease of realty held not a commodity); Baum v. Investors Diversified Services, Inc., 409 F.2d 872 (7th Cir. 1969) (mutual fund shares held not commodities); and LaSalle Street Press, Inc. v. McCormick & Henderson, Inc., 293 F.Supp. 1004 (N.D. Ill. 1968) (patented process held not a commodity). We expressed this view to the Federal Trade Commission at their request after an application had been made to the Commission by members of the NCA for clearance by it of proposed export plans. We were not asked for our opinion on the legality of any proposed joint venture plan apart from the Webb Act.

[See GAO note on p. 22.]

[See GAO note on p. 22.]

We appreciate the opportunity to comment on your draft report.

Sincerely yours,

Thomas E. Kauper

THOMAS E. KAUPER
Assistant Attorney General
Antitrust Division

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*/ United States v. United States Alkali Export Assn., 325 U.S. 196 (1945).

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