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Transnational Production Joint Ventures and United States Antitrust Law: Evaluating the Proposed National Cooperative Production Amendments

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NOTES

Transnational Production Joint Ventures and United States Antitrust Law: Evaluating the Proposed National Cooperative Production Amendments†

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I. INTRODUCTION

The explosion of the United States trade deficit in the last decade or so[1] has produced a bumper crop of self-appointed experts offering various cures for the competitive decline of key domestic industries. Among their less obvious diagnoses is that the United States government strangles domestic businesses through the antitrust laws, which forbid industrial cartels that might be better able to match the competitiveness of the Japanese.[2] For good or ill, the Bush Administration has hewn a path fairly

1. The United States merchandise trade balance ballooned from -$24.2 billion in 1980 to -$152.1 billion in 1987, an increase of 528%, before recovering slightly in 1988. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 804 (110th ed. 1990).

2. Among the foremost proponents of this position is Professor George C. Lodge of the Harvard Business School. *See, e.g.*, George C. Lodge, *It's Time for an American Perestroika*, ATL. MONTHLY, Apr. 1989, at 35. Those opposed to this position disparage its proponents as "corporateers," who "start with the assumption that any American business corporation ought to be able to do pretty much what it wants to do, especially if it is encountering offshore competition." Robert G. Harris & Lawrence A. Sullivan, *Horizontal Merger Policy: Promoting Competition and American Competitiveness*, 31 ANTITRUST BULL. 871, 882 (1986).

close to this corporatist orthodoxy,[3] and Congress has also appeared willing to loosen the hold of antitrust laws on United States industry in some circumstances.[4]

Congress has recently considered another proposal to ease United States antitrust laws in order to improve the international competitiveness of domestic industries.[5] The proposed National Cooperative Production

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The contention that international competitiveness requires minimal antitrust enforcement is not new. Forty years ago, the United States Supreme Court rejected the argument of the Timken Roller Bearing Company that their conduct should be immune from condemnation under the Sherman Act because it was "reasonable in view of current foreign trade conditions." Timken Roller Bearing Co. v. United States, 341 U.S. 593, 599 (1951). *See infra* notes 54-58 and accompanying text for a discussion of the *Timken* case.

3. The United States Department of Commerce has been among the most important hotbeds of corporatism in recent years, most notably so under the late Secretary Malcolm Baldridge. Harris & Sullivan, *supra* note 2, at 872 n.5; *see also* Malcolm Baldridge, *Two Areas of Antitrust Law in Need of Reform*, 1983 DET. C.L. REV. 1035. In the Bush Administration, Vice President Dan Quayle said that "[t]o make America more competitive, we are also going to have to reexamine our antitrust policies, many of which may be anachronistic in this age of global competition." Vice President Dan Quayle, Remarks Before the National Foreign Trade Council and the National Association of Manufacturers Coalition for Employment Through Exports 5 (June 20, 1989), *quoted in* Harvey M. Applebaum, *Antitrust and the Omnibus Trade and Competitiveness Act of 1988*, 58 ANTITRUST L.J. 557, 566 (1989). Other examples of adherence to the corporatist view abound:

> [T]he presence of foreign competition increases society's desire to reduce false positives by government enforcers.... [A]n overly interventionist enforcement policy will quickly fall into disfavor if it hampers the ability of domestic firms to increase their efficiency and so their ability to compete with foreign rivals. . . . [O]ne can argue that in the late seventies popular support for our antitrust laws had begun to erode precisely because of the perception that they unduly hampered the ability of American firms to compete.

Internationalization of Antitrust—Antitrust Division Chief's Views, 7 Trade Reg. Rep. (CCH) ¶ 50,019, at 48,588 (1989); *see also* Walter Adams & James W. Brock, *Joint Ventures, Antitrust, and Transnational Cartelization*, 11 NW. J. INT'L L. & BUS. 433, 435-36 (1991) (quoting remarks of Bush Administration officials); Y.S. Lanneaux, Recent Development, 32 HARV. INT'L L.J. 245, 250-51 (1991) (discussing the United States agreement during its Structural Impediments Initiative with Japan to pursue various modifications in its antitrust laws). For further discussion of the antitrust implications of the Structural Impediments Initiative, see *infra* note 140 and accompanying text.

4. *See, e.g.*, Export Trading Company Act, § 306, Pub. L. No. 97-290, 96 Stat. 1233, 1243 (1982) (codified at 15 U.S.C. § 4016 (1988)); National Cooperative Research Act, Pub. L. No. 98-462, 98 Stat. 1815 (1984) (codified at 15 U.S.C. §§ 4301-4305 (1988)). The National Cooperative Research Act (NCRA) lays the foundation upon which Congress proposes to erect the National Cooperative Production Amendments. For a detailed discussion of the NCRA, see *infra* part III.B.

5. This Note is being prepared for publication before the convening of the 103d Congress. The new Congress, however, may choose to consider legislation substantially similar to that discussed herein, especially considering the bipartisan support previous versions of the legislation have received in the House of Representatives.

Amendments[6] (Amendments) are designed to encourage United States businesses to engage in transnational joint ventures with foreign rivals to produce new products.

This Note evaluates the Amendments as presently formulated, in light of the historical leniency with which United States antitrust law has treated transnational joint ventures, and concludes that the proponents of the Amendments have not made their case. Proponents seek to graft the Amendments onto an earlier piece of legislation, the National Cooperative Research Act (NCRA),[7] but the supporting literature analogizing from the NCRA is inapposite. Transnational production joint ventures pose risks to the United States domestic market that research joint ventures do not. While proponents of the Amendments have largely dismissed these risks as inconsequential, this Note seeks to take such risks seriously.

Finally, this Note considers several possible alternatives to the Amendments. The best option would remake the Amendments in the image of Article 85 of the European Community's Treaty of Rome.[8] Such an approach would, like the present draft of the Amendments, foster production joint ventures beneficial to consumers. This proposal also improves upon the present draft of the Amendments in two respects. First, it provides more of the business certainty claimed to justify the Amendments, and second, it more effectively protects consumers from ventures harmful to them.

II. THE JOINT VENTURE

To say that two or more businesses have formed a "joint venture" is to say very little. The label "joint venture," standing alone, says nothing about the risks a cooperative business arrangement may pose to competition and, therefore, nothing about its evaluation under the antitrust laws of the United States.[9] A brief overview of what arrangements constitute joint ventures for the purpose of antitrust analysis will clarify the issues examined later in this Note.

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6. S. 940, 102d Cong., 1st Sess. §§ 401–402 (1991), *microformed on* Sup. Docs. No. Y 1.4/1:102-1-144 (U.S. Gov't Printing Office); H.R. 1604, 102d Cong., 1st Sess. (1991), *microformed on* Sup. Docs. No. Y 1.4/6:102-1-172 (U.S. Gov't Printing Office).

7. 15 U.S.C. §§ 4301–4305 (1988).

8. *See infra* part V.C.

9. HERBERT HOVENKAMP, ECONOMICS AND FEDERAL ANTITRUST LAW § 4.3, at 111 (1985). "[T]he term is of little use in categorizing structure or conduct with particular market consequences." Robert Pitofsky, *Joint Ventures under the Antitrust Laws: Some Reflections on the Significance of* Penn-Olin, 82 HARV. L. REV. 1007, 1007 (1969), *reprinted in* 15 J. REPRINTS FOR ANTITRUST L. & ECON. 181 (1984); *see generally* 7 PHILLIP E. AREEDA, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶ 1478 (1986).

A. *Definitions of Joint Venture*

Two business firms may engage in a wide variety of collaborative conduct, any of which might loosely be termed a "joint venture." At one extreme is the merger. The two firms cease to be separate economic entities; "one . . . survives and the other disappears."[10] A merger of competitors, called a horizontal merger, produces greater antitrust concern than a merger of a customer with its supplier, termed a vertical merger, because the former reduces the number of competitors in the market by one and increases the market share of the surviving firm.[11] Less susceptible to challenge under antitrust laws are vertical mergers, which produce neither of those competitive threats.[12]

At the other extreme is the cartel, a simple agreement among competitors not to compete on price or on price-related marketing policies.[13] The members of a cartel "coordinate their activities, but . . . remain under separate ownership and control,"[14] unlike the parties to a merger. Cartels almost completely lack any redeeming economic virtue such as the creation of new productive capacity or realization of economies of scale[15] and are therefore "declared illegal per se—that is, illegal on their face . . . ."[16]

Joint ventures occupy the middle ground between mergers and cartels.[17] Like a merger, a joint venture may allow its members to "achieve certain economies, either by allowing them to do something at a lower cost, or else by permitting them to do something for themselves that they would otherwise purchase on the marketplace or do without."[18] Like a cartel, a joint venture can be used for "price-fixing, output restriction, . . . monopoly-creating market division[,]"[19] or for simply pressuring a reluctant co-venturer into compliance with whatever course of action the

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10. BLACK'S LAW DICTIONARY 988 (6th ed. 1990).

11. HOVENKAMP, *supra* note 9, § 11.1.

12. *Id.* §§ 7.3–7.4. *But see* LAWRENCE A. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST § 210 (1977) (discussing several possible anticompetitive effects of vertical mergers).

13. *See* BLACK'S LAW DICTIONARY 215 (6th ed. 1990).

14. SULLIVAN, *supra* note 12, § 59, at 152.

15. For a discussion of the economic effects of cartelization, see 2 PHILLIP E. AREEDA & DONALD F. TURNER, ANTITRUST LAW ¶ 405 (1978).

16. Robert Pitofsky, *A Framework for Antitrust Analysis of Joint Ventures*, 74 GEO. L.J. 1605, 1605 (1986).

17. *Id.* at 1605–06.

18. HOVENKAMP, *supra* note 9, § 4.3, at 111. "[J]oint ventures, like mergers, frequently allow substantial efficiencies of integration to be achieved without the disappearance of one or more of the business partners." Pitofsky, *supra* note 16, at 1606.

19. HOVENKAMP, *supra* note 9, § 4.3, at 111.

other venturers wish to pursue.[20] The wide range of possible conduct between the extremes of merger and cartelization, however, limits the usefulness of the observation that joint ventures share some of the characteristics of each.[21]

A particular subspecies of joint venture has attracted most of the scholarly attention over the last few decades. This type of venture involves two parent organizations jointly incorporating a new firm, in which they each participate as half owners.[22] By excluding cases in which both the parents and the resulting venture are all foreign[23] or all United States corporations, an analysis of joint ventures presents four possibilities.

First, two United States firms could jointly incorporate a foreign firm.[24] If the foreign firm then operates solely in the foreign market, the United States parent corporations risk potential antitrust liability only if the venture produces a "direct and substantial effect on U.S. foreign commerce."[25] Conduct occurring wholly outside the United States is within

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20. The power of a group of cartel-minded venturers over an uncooperative co-venturer stems from their ability to reduce the value of the co-venturer's stake in the venture:

> Firms producing competing goods at independent plants might form a joint venture as a means of increasing punishment threats and therefore the amount of self-enforcing collusion. A joint venture member, for example, might breach a cartel agreement by producing more than its cartel quota at its independent plant. The cartel might then use its voting power deliberately to mismanage the joint venture. . . . [M]ismanagement will . . . lower the value of the breaching firm's capital contribution [to the joint venture corporation] . . . .

Ian Ayres, *How Cartels Punish: A Structural Theory of Self-Enforcing Collusion*, 87 COLUM. L. REV. 295, 311 (1987).

21. Pitofsky, *supra* note 16, at 1606.

22. Pitofsky, *supra* note 9, at 1007. "Since separate incorporation permits the partners to limit their liability to the assets of the new venture, it is the method generally employed." Mark R. Joelson & Joseph P. Griffin, *Multinational Joint Ventures and the U.S. Antitrust Laws*, 15 VA. J. INT'L L. 487, 490 (1975) (footnote omitted), *reprinted in* 15 J. REPRINTS FOR ANTITRUST L. & ECON. 403 (1984). In reality, no one has ever counted the number of joint ventures involving two parents with equal ownership shares, leaving no way to judge the merit of the focus on such structures in academic literature. However, it appears that transnational joint ventures in which United States parent corporations own 50% or less of the venture substantially outnumbered those in which United States corporations had a majority interest. *See* KAREN J. HLADIK, INTERNATIONAL JOINT VENTURES: AN ECONOMIC ANALYSIS OF U.S.-FOREIGN BUSINESS PARTNERSHIPS 10-11, 41 (1985).

23. *See infra* note 34.

24. Joelson & Griffin, *supra* note 22, at 490.

25. 2 WILBUR L. FUGATE, FOREIGN COMMERCE AND THE ANTITRUST LAWS § 11.1, at 211 (4th ed. 1991). The "direct and substantial effect" doctrine is a jurisdictional prerequisite to, not a substitute for, the ordinary determination of anticompetitive effect which gives rise to antitrust liability. Antitrust liability does not attach merely on a finding that a "direct and substantial effect" on United States commerce has occurred, for even lawful conduct can produce such an

the reach of United States antitrust law if it "has or is intended to have [a] substantial effect within . . . [United States] territory."[26] Another formulation of the same principle holds that extraterritorial conduct is actionable under United States law "if a principal purpose of the conduct . . . is to interfere with the commerce of the United States, and the . . . conduct has some effect on that commerce."[27] The required effect on United States commerce can be found completely within the United States or in the nation's export trade.[28] Absent some effect on United States

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effect.

Of course, just because there is an effect on the United States economy sufficient to bring a particular foreign business practice within the reach of the United States antitrust laws does not necessarily indicate that the United States can or will attack the practice. First, United States antitrust enforcement authorities may face political or diplomatic obstacles to challenging conduct occurring within the borders of a foreign sovereign. *See* KURT R. MIROW & HARRY MAURER, WEBS OF POWER: INTERNATIONAL CARTELS AND THE WORLD ECONOMY 220–24 (1982). Second, in what might become a future trend, the United States recently concluded an agreement with the European Economic Community providing in part that either party may ask the other to challenge an action affecting its commerce but occurring within the other party's borders. Competition Laws Co-Operation Agreement 1991, Sept. 23, 1991, U.S.-E.E.C., arts. 4–6, [1991] 4 C.M.L.R. 823.

26. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 402(1)(c) (1986) [hereinafter RESTATEMENT (THIRD) OF FOREIGN RELATIONS]; *see also id.* § 402 cmt. d. This principle is often traced to Judge Learned Hand's opinion in the *Alcoa* case, United States v. Aluminum Co. of Am., 148 F.2d 416, 443–44 (2d Cir. 1945) (holding the Sherman Act applicable to conduct occurring outside the borders of the United States which affects the foreign commerce of the United States).

However, "even under *Alcoa* there must be both an intent to affect and an actual effect on U.S. foreign or interstate commerce." Joelson & Griffin, *supra* note 22, at 496 n.43. *See generally* 2 FUGATE, *supra* note 25, § 11.4; Russell J. Weintraub, *The Extraterritorial Application of Antitrust & Security Laws: An Inquiry into the Utility of a "Choice-of-Law" Approach*, 70 TEX. L. REV. 1799 (1992); Russell J. Davis, Annotation, *Extraterritorial Application of Federal Antitrust Laws to Acts Occurring in Foreign Commerce*, 40 A.L.R. FED. 343, § 3 (1978 & Supp. 1991).

The Second Circuit's decision in *Alcoa* carries the weight of a United States Supreme Court decision, since it decided *Alcoa* under a statute, now 28 U.S.C. § 2109 (1988), lodging conclusive power over certain cases in a specially constituted circuit court of appeals when the Supreme Court is unable to raise the requisite six-Justice quorum. *See* CHARLES A. WRIGHT, THE LAW OF FEDERAL COURTS § 105, at 730–31 & nn.36–37 (4th ed. 1983).

27. RESTATEMENT (THIRD) OF FOREIGN RELATIONS, *supra* note 26, § 415(2). *But see* Wilbur L. Fugate, *The New Justice Department Antitrust Enforcement Guidelines for International Operations—A Reflection of Reagan and, Perhaps, Bush Administration Antitrust Policy*, 29 VA. J. INT'L L. 295, 300–03 (1989) (criticizing the *Restatement's* formulation of the "effects doctrine" as inconsistent with United States statutes and court decisions). The Export Trading Company Act of 1982 codified the "effects test" in 15 U.S.C. § 6a (1988), which makes the Sherman Act inapplicable to conduct not having a "direct, substantial, and reasonably foreseeable effect" on United States commerce. *See* PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 236'a (1991 Supp.).

28. 1 AREEDA & TURNER, *supra* note 15, ¶ 234b, at 255.

commerce, though, foreign companies owned by United States enterprises will be immune from antitrust liability in the United States.

Second, a United States firm and a foreign firm could jointly incorporate a United States firm.[29] This arrangement with a domestic firm poses more pronounced antitrust risks because it is unnecessary to question whether a United States firm's conduct affects commerce in the United States.

Third, a United States firm and a foreign firm could jointly incorporate a foreign firm.[30] United States firms must utilize this arrangement to gain access to some foreign markets, especially markets of less developed countries (LDCs), because some foreign governments impose local-participation requirements on foreign direct investment.[31] For that reason and others, these types of arrangements are among the most popular forms of transnational joint ventures.[32]

Finally, two foreign firms could jointly incorporate a United States firm.[33] As with the United States–foreign arrangement, the venture's effect on United States commerce will never be questioned, and liability for the foreign parent corporations is a real possibility.[34]

B. *Types of Joint Ventures*

Much of the literature in this area divides joint ventures into two categories, "research and development" and "production and marketing," reflecting the purposes for which the ventures were formed.[35] Yet if such a framework was ever adequate to analyze the competitive effect of joint ventures, it has certainly failed the test of time. Splitting those two

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29. Joelson & Griffin, *supra* note 22, at 490.

30. *Id.*

31. *See id.* at 491. Regarding the perceived importance of local ownership requirements, see PAUL W. BEAMISH, MULTINATIONAL JOINT VENTURES IN DEVELOPING COUNTRIES 33–34, 35 (1988).

32. For reasons United States firms might choose to penetrate a foreign market in this manner, see Joelson & Griffin, *supra* note 22, at 491–92. Joelson & Griffin's data from the mid-1970s found that over two-thirds of all transnational joint ventures involved a United States firm joining a foreign partner to create a venture in the foreign country. *Id.* app. at 538.

33. *Id.* at 490.

34. Joelson & Griffin also provide a fifth possibility—that two foreign firms could jointly incorporate a foreign firm. *Id.* In spite of this possibility, when no United States entity is a party to the joint venture, the effect of the venture on United States commerce seems more tenuous, and accordingly there should be fewer occasions for a challenge to such a venture under United States antitrust law. Of course, a foreign joint venture formed to export goods to the United States could have the requisite effect.

35. *See, e.g.*, THOMAS V. VAKERICS, ANTITRUST BASICS §§ 10.02–10.03 (1986).

categories into four—"research," "product development," "production," and "marketing"—better facilitates examination of the different competitive risks posed by each type of joint venture.[36]

Economic theory and federal antitrust law conceptualize production as a vertical process, with abstract research at the "top," successive stages of production in the "middle" in descending order, and final retail sales to ultimate consumers at the "bottom."[37] Competitors at any particular stage in the production process stand in a "horizontal" relationship with each other, while buyers and sellers stand in a "vertical" relationship.[38]

The prevailing belief holds that cartelization of a "lower" level in the production process poses a greater threat to consumers than does cartelization of a "higher" level. For example, if a monopoly develops in the realm of pure research, many competing firms may still purchase the monopolist's research results. Those competitors may then develop, produce, and market different products to consumers.[39] If a monopoly develops in the retail sale of a product, though, it deprives consumers of all alternatives—they must buy from the monopolist or do without. For that reason, the Supreme Court has frequently sided with challengers who use antitrust laws to attack joint sales agencies among competitors and has held these arrangements unlawful.[40]

It is fairly well settled that cooperative research poses minimal threats to competition.[41] At the other extreme, cooperative marketing is recog-

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36. Although the NCRA covers joint "research and development" ventures, 15 U.S.C. § 4301(a)(6) (1988), the proposed Amendments sanction only cooperative production, not marketing, implicitly recognizing the four-part division proposed here. *See infra* note 146 and accompanying text.

37. *See generally supra* notes 11–12 and accompanying text.

38. A firm that internalizes a business transaction by expansion or merger in which it might have participated as a buyer or seller has "vertically integrated." *See* ROGER D. BLAIR & DAVID L. KASERMAN, LAW AND ECONOMICS OF VERTICAL INTEGRATION AND CONTROL 11 (1983).

39. *See* Thomas A. Piraino, Jr., *Beyond Per Se, Rule of Reason or Merger Analysis: A New Antitrust Standard for Joint Ventures*, 76 MINN. L. REV. 1, 7–8 (1991) ("The parties to a research and development joint venture can, for example, compete in the ultimate production and sale of products that use the venture's technology.").

40. *See, e.g.*, NCAA v. Board of Regents, 468 U.S. 85 (1984) (invalidating cooperative marketing arrangement under the rule of reason); Arizona v. Maricopa County Medical Soc'y, 457 U.S. 332 (1982) (invalidating cooperative marketing arrangement under the per se rule); *see also* Joseph F. Brodley, *Joint Ventures and Antitrust Policy*, 95 HARV. L. REV. 1521, 1555 & nn.107–110 (1982), *reprinted in* 15 J. REPRINTS FOR ANTITRUST L. & ECON. 281 (1984); *cf.* Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc., 441 U.S. 1, 23 (1979) (upholding cooperative marketing arrangement "where [an] agreement on price is necessary to market the product at all.").

41. "[T]he closer . . . [any] joint activity is to the basic end of the research spectrum . . . the more likely it is to be acceptable under the antitrust laws." ANTITRUST DIVISION, U.S. DEP'T OF JUSTICE, ANTITRUST GUIDE CONCERNING RESEARCH JOINT VENTURES 3 (1980), *reprinted in*

nized as so dangerous to competition that courts have held it illegal per se—that is, illegal on its face without further inquiry into the precise competitive effects of a particular arrangement. In the four-part schema sketched out above, research joint ventures may be least detrimental to consumers, with product-development ventures posing some threat to competition, production ventures creating a stonger threat to competition, culminating in a level of presumptive illegality in marketing joint ventures.

The traditional analysis easily acknowledges that production joint ventures pose a greater threat to competition than research joint ventures. As a practical matter, though, many cooperative business arrangements, even if labeled a joint venture, will not fall neatly into any of the four previously enumerated categories. For example, in the case of *United States v. Ivaco, Inc.*,[42] one of the Justice Department's few recent challenges to a production joint venture, the court noted that the defendants' cooperative activities under the venture might include research as well as production.[43]

Antitrust & Trade Reg. Rep. (BNA) No. 992, at 1, 2 (spec. supp. Dec. 4, 1980) [hereinafter DOJ RESEARCH JOINT VENTURE GUIDE]; HOVENKAMP, *supra* note 9, § 4.3 & at 114 n.13. *But see* SULLIVAN, *supra* note 12, § 105 (discussing possible pro- and anticompetitive effects of cooperative research).

42. 704 F. Supp. 1409 (W.D. Mich. 1989).

43. *Id.* at 1417 n.4. The court rejected the defendants' argument that the joint venture was necessary in order to develop a new technology to compete with a foreign firm. *Id.*

III. JOINT VENTURES UNDER UNITED STATES ANTITRUST LAW

A. *Background*

1. Applying the Clayton Act to Joint Ventures

Justice Clark's opinion in *United States v. Penn-Olin Chemical Co.*[44] laid to rest any suspicion that the Clayton Antitrust Act[45] did not apply to joint ventures and discussed the possible anticompetitive effects of joint ventures in admirable detail. The case involved a challenge by the Government to a joint venture created by two large chemical companies for the production of sodium chlorate.[46] Each of the parent companies, Pennsalt Chemicals Corporation and Olin Mathieson Chemical Corporation, owned fifty percent of the stock of the joint venture and was equally represented on the venture's board of directors.[47] Either Pennsalt or Olin Mathieson could have entered the sodium chlorate market alone and made a profit, but it was doubtful that either could have succeeded if both had entered.[48] Since only one firm could have profitably entered the sodium chlorate market, the lower court found that it made no competitive difference whether that firm was Pennsalt, Olin Mathieson, or their joint venture and accordingly upheld the joint venture arrangement.[49]

The Supreme Court, on direct appeal from the trial court, disagreed. The Court held that the fatal flaw in the joint venture arrangement was its elimination of the potential competition that Pennsalt and Olin Mathieson

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44. 378 U.S. 158 (1964) (5–4 decision). The majority vacated the opinion of the court below, which had upheld the Penn-Olin joint venture, and remanded the case. The four dissenters disagreed with the majority, but also disagreed with each other about why the majority was wrong. Justices Black and Douglas would have held the venture illegal as a horizontal market division arrangement without remanding the case to the district court. *See id.* at 177–83 (Black, J., dissenting). Justice Harlan saw nothing wrong with the arrangement and would have upheld it, rather than give the Government a second chance to win its case in the district court. *See id.* at 183 (Harlan, J., dissenting). Justice White dissented without opinion. *See generally* Pitofsky, *supra* note 9.

45. Specifically, § 7 of the Clayton Act, 15 U.S.C. § 18 (1988). This portion of the Clayton Act is normally applied to mergers, not joint ventures. SULLIVAN, *supra* note 12, § 202. Although, "[o]verall, the same considerations apply to joint ventures as to mergers . . . ." *Penn-Olin*, 378 U.S. at 170.

46. *Penn-Olin*, 378 U.S. at 161–67.

47. *Id.* at 163.

48. *Id.* at 172–73.

49. United States v. Penn-Olin Chem. Co., 217 F. Supp. 110, 130–31 & n.25 (D. Del. 1963), *rev'd*, 378 U.S. 158 (1964).

would have posed to each other.[50] Had either Pennsalt or Olin Mathieson entered the sodium chlorate market alone, its behavior would have been kept in check by "the potential competition of the corporation that might have remained at the edge of the market, continually threatening to enter."[51]

The proposed Penn-Olin joint venture might have produced several other anticompetitive effects. For example, it was considered impossible that the joint venture would ever compete with Pennsalt or Olin Mathieson,[52] whereas an independent company might. More subtly, the risk existed that the parent corporations, accustomed to cooperating in the management of the joint venture, might extend their cooperation into other areas of business until they were in effect no longer competitors.[53]

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50. *Penn-Olin*, 378 U.S. at 173–74. *But see* HOVENKAMP, *supra* note 9, § 12.4, at 329 (describing the "potential competition" doctrine as "a relic of an earlier era."). Professor Hovenkamp reasons that "[p]otential competition is really actual competition assessed from the supply side rather than the demand side. . . . A firm's knowledge that its price increase will flood the market with new sellers is competition just as 'actual' as its knowledge that a price increase will cost a loss of many customers." *Id.* at 328.

Professor Hovenkamp apparently discards any distinction between making a threat and effectuating it. Consider the many practical differences between that competition, even on the supply side, one might call "potential" and that one might call "actual." An actual competitor of a supplier may already produce substantially similar products exhibiting a high cross-elasticity of demand with the supplier's own. A potential competitor, though, may not operate in the supplier's market at all and may not have the ability to bring a substantially similar product to market without some sizeable and risky investment in new productive capacity, thus posing a far more remote threat to the supplier. The reduced immediacy of the supply competition in the latter scenario renders its competition "potential" rather than "actual." Professor Hovenkamp appears to assert that a firm is not a "potential competitor" if its entry into actual supply competition with a seller is something other than a swift, immediate "flood [of] the market" with competing products. *Id.* Such a definition reads "potential" out of "potential competition" altogether.

51. *Penn-Olin*, 378 U.S. at 173.

52. The Court described the competition-dampening effect of the Penn-Olin venture as follows:

> If the parent companies are in competition, or might compete absent the joint venture, it may be assumed that neither will compete with the progeny in its line of commerce. Inevitably, the operations of the joint venture will be frozen to those lines of commerce which will not bring it into competition with the parents, and the latter, by the same token will be foreclosed from the joint venture's market.

Id. at 169.

53. *See* Pitofsky, *supra* note 9, at 1013–14. Pennsalt and Olin Mathieson had entered into a sweeping cooperation agreement before creating the joint venture. The agreement essentially provided that "each party would advise the other of any plans independently to enter the market before it would take any definite action on its own." *Penn-Olin*, 378 U.S. at 180 (Douglas, J., with whom Justice Black joins, dissenting).

2. Applying the Sherman Act to Joint Ventures

Thirteen years before its decision in *Penn-Olin*, the Supreme Court in the *Timken* case[54] ruled that a transnational joint venture could be condemned under the Sherman Act.[55] The Timken Roller Bearing Company, a United States corporation, entered into a series of agreements with its partially owned subsidiaries British Timken, Ltd., a British corporation, and Societe Anonyme Française Timken, a French corporation.[56] The Court found that the agreement contained four anticompetitive purposes:

> [T]he contracting parties have (1) allocated trade territories among themselves; (2) fixed prices on products of one sold in the territory of the others; (3) cooperated to protect each other's markets and to eliminate outside competition; and (4) participated in cartels to restrict imports to, and exports from, the United States.[57]

The Court rejected Timken's contention that the agreements should be permitted, since they simply amounted to a joint venture of the firms. Instead the Court stated that it found no support for "the proposition that agreements . . . to suppress competition . . . can be justified by labeling the project a 'joint venture.'"[58]

3. The Modern Treatment of Transnational Production Joint Ventures

A controversial decision by the Federal Trade Commission (FTC) in 1984 broke sharply from the *Penn-Olin* rationale and upheld a transnational

54. Timken Roller Bearing Co. v. United States, 341 U.S. 593 (1951), *overruled by* Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 777 (1984).

55. 15 U.S.C. §§ 1-7 (1988).

56. In the *Copperweld* case, the Court held that there could be no "conspiracy" between a corporation and its wholly owned subsidiary, and hence no violation of § 1 of the Sherman Act. 467 U.S. at 777. The *Timken* Court held that the two foreign firms conspired with the United States firm which partly owned them. It is unclear whether *partial* ownership is sufficient to confer the *Copperweld* immunity from § 1 liability. *See* HOVENKAMP, *supra* note 9, § 4.2, at 92 n.1. *But see* Leaco Enters., Inc. v. General Elec. Co., 737 F. Supp. 605, 608-09 (D. Or. 1990) (granting summary judgment for defendant accused of conspiring with its 91.9%-owned subsidiary, on the grounds that the parent and partly owned subsidiary shared a "unity of purpose"). Nevertheless, no challenge to the *Timken* Court's recognition that the Sherman Act applies to joint ventures has materialized.

57. *Timken*, 341 U.S. at 596.

58. *Id.* at 598 (Black, J.).

production joint venture between General Motors and Toyota.[59] Apparently rejecting the *Penn-Olin* Court's statement that "the same considerations apply to joint ventures as to mergers,"[60] the Chairman of the FTC justified the venture on the grounds that it was "a limited production joint venture, not a merger of GM and Toyota."[61] Nonetheless, the venture raised serious competitive questions because it allowed GM and Toyota, ostensible competitors, to exchange a tremendous amount of information related to each company's price structure.[62] Such information exchanges between competitors can facilitate collusion, especially in highly concentrated markets.[63] In spite of these competitive risks, the FTC upheld the venture, a sign that the FTC, at least, is already willing to approve transnational production joint ventures even when they contain elements acknowledged by the Supreme Court and most commentators to invite collusion.

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59. General Motors Corp., 103 F.T.C. 374 (1984) (3-2 decision). The FTC's decision upholding the GM-Toyota venture probably generated as much profit for the publishers of law journals as it did for the two automobile manufacturers. *See generally* John E. Kwoka, Jr., *International Joint Venture: General Motors and Toyota, in* THE ANTITRUST REVOLUTION 46 (John E. Kwoka, Jr. & Lawrence J. White eds., 1989); Symposium, *Perspectives on the General Motors-Toyota Joint Venture,* 31 WAYNE L. REV. 1163 (1985); Richard F. Nelson, *The GM-Toyota Joint Venture and its Implications Under the National Labor Relations Act,* 1984 DET. C.L. REV. 647; Robert C. Weinbaum, *Production Joint Ventures: The GM-Toyota Experience,* 58 ANTITRUST L.J. 709 (1989); Brad Begin, Note, *The GM-Toyota Joint Venture: Legal Cooperation or Illegal Combination in the World Automobile Industry?,* 19 TEX. INT'L L.J. 699 (1984); Paul C. Curnin, Note, *United States Antitrust Law and Industrial Policy: International Joint Ventures and Global Competition After GM-Toyota,* 9 FORDHAM INT'L L.J. 257 (1986); Christopher J. Jaekels, Note, *International Joint Ventures and Antitrust Policy: FTC Puts GM and Toyota in the Driver's Seat,* 4 WIS. INT'L L.J. 64 (1985); Sean D. Murphy, Note, *International Joint Ventures in the United States: The GM-Toyota Deal,* 22 COLUM. J. TRANSNAT'L L. 505 (1984).

60. United States v. Penn-Olin Chem. Co., 378 U.S. 158, 170 (1964).

61. *General Motors,* 103 F.T.C. at 386 (Miller, Comm'r).

62. *See id.* at 390 (Pertschuk, Comm'r, dissenting).

63. HOVENKAMP, *supra* note 9, § 4.3, at 116–20; *see also* United States v. Container Corp. of Am., 393 U.S. 333 (1969) (noting increased competitive risks posed by information exchanges in concentrated markets); *General Motors,* 103 F.T.C. at 393 (Bailey, Comm'r, dissenting) (noting that the market in which the GM-Toyota venture was to operate was "at best moderately concentrated, and at worst highly concentrated.").

Recently, however, some courts have expressed the view that information exchanges are worrisome only when accompanied by other evidence of price-fixing. *See In re* Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig., 906 F.2d 432, 447 n.13 (9th Cir. 1990), *cert. denied,* 111 S. Ct. 2274 (1991).

B. *The National Cooperative Research Act of 1984*

Congress proposes to incorporate the Amendments into the framework of the National Cooperative Research Act of 1984 (NCRA).[64] The NCRA was designed to encourage those types of joint ventures least likely to threaten consumers, those devoted to research and product development.[65]

1. The Economics of Cooperative Research

The Department of Justice (DOJ), the nation's chief antitrust enforcement agency, has never brought suit against a research joint venture unless it was simply a transparent scheme to divide markets.[66] Further, the courts have strongly supported cooperative research arrangements except when they contain unreasonable restraints on competition.[67]

The economic benefits of cooperative research arrangements chiefly derive from the avoidance of free-rider problems. If a firm individually develops a new technology, its competitors can cheaply duplicate its results through reverse engineering, industrial espionage, or other means, without bearing the same costs as the firm that performed the original research.[68] Joint ventures provide a mechanism for spreading the costs of the research among those who will eventually benefit from the new developments, while also effectively reducing free riding.[69]

Free-rider problems are not a characteristic of all economic activity or of all research. Free riding will occur only where the item or knowledge produced is a public good—a good which, after it has been produced, is impossible to deny to any who would consume it.[70] When those who do not pay for the good cannot obtain it, free riding cannot occur. Because free riders more readily appropriate the products of basic research, as

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64. 15 U.S.C. §§ 4301-4305 (1988).

65. *See generally supra* note 37 and accompanying text.

66. DOJ RESEARCH JOINT VENTURE GUIDE, *supra* note 41, at 2.

67. *But see* Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 299-304 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980) (research joint venture condemned for multi-firm agreement not to disclose results to outsiders), *cited in* HOVENKAMP, *supra* note 9, § 4.3, at 114 n.13.

68. *See* HOVENKAMP, *supra* note 9, § 4.3.

69. *Id.* at 114.

70. *See* THE MIT DICTIONARY OF MODERN ECONOMICS 347-48 (David W. Pearce ed., 3d ed. 1986). Some commonly cited examples include public highways, national defense, and lighthouses. A defining characteristic of, for example, toll roads and private security forces is that they are *not public* goods, although they may otherwise be similar to public highways or national armed forces.

distinguished from applied research or product development, measures to protect basic research will reduce free riding.[71]

Moreover, when cooperative research and development is permitted, economic theory suggests that the total amount of research spending in the economy will be greater than if firms must fund their research and development (R&D) alone.[72] Recognition of this principle has lead to the creation of such successful ventures as MCC[73] and Sematech.[74]

Supporters of cooperative research have also justified it with a second, more dubious economic theory. This theory extends the arguments of Joseph Schumpeter, an Austrian economist who believed that only large, monopolistic firms could afford to undertake R&D.[75] Schumpeter believed that, because a purely competitive market drives economic profits to zero, only firms able to insulate themselves from competition would have any capital to fund large-scale R&D.[76]

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71. *See* Barry Bozeman, Albert Link & Asghar Zardkoohi, *An Economic Analysis of R & D Joint Ventures*, 7 MANAGERIAL & DECISION ECON. 263 (1986).

72. *Id.* at 265.

73. Microelectronics and Computer Technology Corporation.

74. For skeptical views of Sematech's relevance in improving the competitiveness of United States firms *vis-à-vis* foreign firms, see ROBERT B. REICH, THE WORK OF NATIONS: PREPARING OURSELVES FOR 21ST-CENTURY CAPITALISM 160–61 (1991); Richard Brandt, *The Bad Boy of Silicon Valley*, BUS. WK., Dec, 9, 1991, at 64.

75. Schumpeter expressed this view as follows:

> [T]here are superior methods available to the monopolist which either are not available at all to a crowd of competitors or are not available to them so readily: for there are advantages which, though not strictly unattainable on the competitive level of enterprise, are as a matter of fact secured only on the monopoly level, for instance, because monopolization may increase the sphere of influence of the better, and decrease the sphere of influence of the inferior, brains, or because the monopoly enjoys a disproportionately higher financial standing.

JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM, AND DEMOCRACY 101 (3d ed. 1950).

> [T]he perfectly competitive arrangement displays wastes of its own. The firm of the type that is compatible with perfect competition is in many cases inferior in internal, especially technological, efficiency. If it is, then it wastes opportunities. It may also in its endeavours to improve its methods of production waste capital because it is in a less favorable position to evolve and to judge new possibilities.

Id. at 106. Schumpeterian theory and its role in the antitrust analysis of R&D joint ventures is brilliantly analyzed in Daniel M. Crane, *Joint Research and Development Ventures and the Antitrust Laws*, 21 HARV. J. ON LEGIS. 405, 416–18 (1984). A cogent discussion of the Schumpeterian position is also available in 2 AREEDA & TURNER, *supra* note 15, ¶ 407.

76. *See* Crane, *supra* note 75, at 416. Some scholars have interpreted Schumpter's position more sympathetically:

> Extensive though Schumpeter's criticisms of anti-monopoly policy may be, they do

Whether viewed as a way to permit supposedly healthy monopolization or simply a way to overcome the free-rider problems inherent in basic research, the policy prescription for cooperative research remains the same. Research joint ventures deserve encouragement and protection from excessively harsh antitrust liability, which in turn will internalize the costs of research in the firms which benefit therefrom and increase the total level of research spending in the economy.

2. The Passage and Effects of the Act

Businesses had perceived some antitrust risk in forming research and development joint ventures and refrained from doing so, contributing in Congress' opinion to the United States growing trade deficit.[77] By passing the NCRA,[78] Congress primarily sought to reassure businesses that the government viewed research and development joint ventures as beneficial and would not oppose them with antitrust lawsuits.[79] The NCRA provides several ways in which firms contemplating research and development joint ventures can reduce their potential antitrust liability.

> *not* presuppose that innovation is *caused* by monopoly power or large size. His targets are those economists who regard perfect competition as the ideal form of industrial organization; there are many such economists to this very day. And his thesis . . . is that the replacement of perfect competition by modern capitalism brings *both* monopoly power *and* innovation; the two are quite inseparable, according to Schumpeter. Reverting to perfect competition, on the other hand, which is the natural goal of anti-monopoly policy, would only serve to prevent useful innovation.

Peter J. Hammond, *Must Monopoly Power Accompany Innovation?*, *in* LECTURES ON SCHUMPETERIAN ECONOMICS: SCHUMPETER CENTENARY MEMORIAL LECTURES, GRAZ 1983, at 45, 50–51 (Christian Seidl ed., 1984). Schumpeter says either that monopoly is a necessary and sufficient condition for innovation to occur, or monopoly is neither necessary nor sufficient for innovation, but "modern capitalism" causes both monopoly and innovation. Either analysis yields the same policy prescription: to foster innovation, it is necessary to weaken the antitrust laws.

77. *See* S. REP. No. 427, *supra* note 79; *see also* H.R. CONF. REP. No. 1044, 98th Cong., 2d Sess. 7 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3131, 3131.

78. Pub. L. No. 98-462, 98 Stat. 1815 (1984) (codified at 15 U.S.C. §§ 4301–4305 (1988)).

79. S. REP. No. 427, 98th Cong., 2d Sess. 1–3 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3105, 3105–07. The NCRA was one of many measures Congress enacted in the early 1980s to foster cooperative research. For an overview of recent federal efforts to encourage cooperative research, see generally Dianne Rahm, *Federal Efforts to Enhance U.S. International Competitiveness: The Encouragement of Domestic Cooperation*, 18 POL'Y STUD. J. 89 (1989).

(a) The Rule of Reason Standard

The heart of the Act, section 3, requires courts to judge any research and development joint venture under the rule of reason standard rather than the more rigid per se approach.[80] The rule of reason requires the court to consider and evaluate any procompetitive justifications a firm may offer for its conduct.[81] Therefore, all challenged joint ventures will have an opportunity to offer justifications for their conduct, justifications which section 3 of the NCRA requires the courts to seriously consider. According to the statute's terms, this section applies in all cases and is not limited to cases in which firms have completed a business notification filing.[82]

(b) Attorneys' Fees

Section 5 of the NCRA[83] provides that the court shall award the costs of the lawsuit, including reasonable attorneys' fees, to "substantially prevailing" plaintiffs in an antitrust challenge to a research and development joint venture.[84] Courts may also award "substantially prevailing" defendants their costs and attorneys' fees if the plaintiff's "claim, or . . . conduct during the litigation . . . was frivolous, unreasonable, without foundation, or in bad faith."[85] An award of costs and attorneys' fees to the substantially prevailing party applies not only to challenges under federal antitrust laws, but also to challenges brought under "any State law similar to the [federal] antitrust laws."[86] The award of costs and fees may be offset, in whole or in part, if the substantially prevailing party is itself guilty of any conduct "the court finds to be frivolous, unreasonable, without foundation, or in bad faith."[87] As with section 3,[88] section 5, by its own terms, also applies in all cases and is not limited to cases in which businesses have completed a notification filing.

80. 15 U.S.C. § 4302 (1988). 15 U.S.C. § 4301(a)(6) defines the term "joint research and development venture." Section 4301(b) defines the term again by listing what it excludes.

81. *See* HOVENKAMP, *supra* note 9, § 4.4; SULLIVAN, *supra* note 12, §§ 63-67.

82. *See infra* part III.B.2.c.

83. 15 U.S.C. § 4304 (1988).

84. *Id.* § 4304(a)(1).

85. *Id.* § 4304(a)(2).

86. *Id.* § 4304(a).

87. *Id.* § 4304(b).

88. *See supra* part III.B.2.a.

(c) Business Notification

The remainder of the NCRA, sections 4 and 6, establish a notification system under which businesses can limit their liability by notifying federal antitrust enforcement agencies of their plans to engage in a research and development joint venture.[89] The parties to the venture can submit a statement to the DOJ and to the FTC identifying the parties to the joint venture and the "nature and objectives" of the venture.[90] The NCRA prescribes no particular form or procedure for this notice; the parties retain substantial discretion in deciding what information to include and how to include it.[91] Once the federal enforcement agencies receive the notice, one of them must file a statement in the Federal Register within thirty days which identifies the parties and describes the "area of planned activity" of the venture.[92] To protect the venture from unfair prying by competitors, the published notice need only be "in general terms,"[93] and the agencies' notification files are exempt from disclosure under the Freedom of Information Act.[94]

The popularity of the business notification system has increased in recent years, with 95 notices filed in 1989, 123 in 1990, and 146 in 1991.[95] As a practical matter, the FTC plays no role in the notification process; the DOJ publishes all notices in the Federal Register.[96]

A completed notification filing invokes the protections of section 4 of the NCRA.[97] The most important protection conferred limits recoverability to *actual damages* sustained in actions by the federal government, states, or private parties in actions under federal or state antitrust laws, rather than allowing the trebling of damages.[98]

Current United States law preserves the treble-damages principle inherited from the seventeenth-century Statute of Monopolies,[99] which

89. *Id.* §§ 4303, 4305.

90. *Id.* § 4305(a)(1)-(2).

91. Antitrust Div., U.S. Dep't of Justice, National Cooperative Research Act Implementation, 49 Fed. Reg. 50,121, 50,122 (1984).

92. 15 U.S.C. § 4305(b) (1988).

93. *Id.*

94. *Id.* § 4305(d). The relevant section of the Freedom of Information Act is 5 U.S.C. § 552 (1988).

95. Search of WESTLAW, FR file (Mar. 22, 1992). The author has made no attempt to separate initial filings from those that merely *amend* an earlier filing.

96. *Id.*

97. 15 U.S.C. § 4305(c) (1988).

98. *Id.* § 4303(a)-(c).

99. Statute of Monopolies, 1623, 21 Jam., ch. 3, § 4 (Eng.), *microformed on* The Statutes of the Realm, Reel 3 (Trans-Media Publishing Co.).

entitles successful antitrust plaintiffs to recover three times the amount of their actual damages.[100] Even the United States Government may recover treble damages when it is "injured in its business or property" by an antitrust violation.[101] While commentators have advanced various rationales for awarding victorious plaintiffs treble damages, the prevailing interpretation states that treble damages reflect a one-in-three chance that antitrust violations will be detected and successfully prosecuted.[102] Because violators of antitrust laws may count on being held accountable for their actions only one time in three, the theory goes, tripling violators' liability serves to roughly equalize anticompetitive conduct and antitrust liability. Filing under section 4 of the NCRA prevents damages from being trebled, reducing by two-thirds the potential liability businesses face for engaging in anticompetitive research and development joint ventures.

3. Criticisms of the Act

The government tends not to sue research and development joint ventures, and, when others sue them, the courts treat them leniently.[103] Therefore, what need could have existed for a legislative declaration for lenient treatment of research and development joint ventures? The legislative history suggests that, even though businesses faced no real risk of liability, businesses *believed* that forming cooperative research ventures actually threatened antitrust liability, and that this erroneous belief had a sufficiently chilling effect on cooperative research to justify the passage of the NCRA.[104] Yet why should Congress' job include legislating away businesses' groundless, irrational fears, forcing Congress to play "pan-industrial psychologist"?[105]

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100. 15 U.S.C. § 15 (1988). *See generally* 2 AREEDA & TURNER, *supra* note 15, ¶ 331; HOVENKAMP, *supra* note 9, § 15.6; SULLIVAN, *supra* note 12, § 246.

101. 15 U.S.C.A. § 15a (West Supp. 1991). Treble damages were not available in suits by the government until 1990, but were added by the Antitrust Amendments Act of 1990, Pub. L. No. 101-588, § 5, 104 Stat. 2879 (1990). If the rationale for treble damages to compensate for the difficulty of detecting antitrust violations, then it should make no difference to a defendant's liability that the government, rather than a private party, uncovered the wrongful conduct.

102. HOVENKAMP, *supra* note 9, § 15.6; *see also* Herbert Hovenkamp, *Treble Damages Reform*, 33 ANTITRUST BULL. 233, 238 (1988).

103. *See supra* notes 66–67 and accompanying text.

104. S. REP. No. 427, *supra* note 79, at 2–3, *reprinted in* 1984 U.S.C.C.A.N. at 3106.

105. "Congress undertook the role of pan-industrial psychologist in response to nothing more than *perceptions* that the 'antitrust laws' discouraged a form of commercial activity in a way prejudicial to successful American participation in international trade." John A. Maher & Nancy J. LaMont, *National Cooperative Research Act of 1984: Cartelism for High-Tech Ventures (and Others?)*, 7 DICK. J. INT'L L. 1, 2–3 (1988) (footnote omitted). This perception has apparently

Second, if Congress's concern about the United States lackluster performance in the global economy[106] is genuine, it seems odd that they did not limit NCRA benefits to domestic firms.[107]

Third, the rule of reason standard required in all antitrust cases involving a research and development joint venture[108] does nothing to reassure businesses that courts will uphold their cooperative research activities against challenge. If anything, the reverse is true—per se rules deal in certainties, while the rule of reason permits a court to weigh numerous effects, some procompetitive and some anticompetitive. "If Congress wanted to send a signal to encourage R&D joint ventures, codification of the rule of reason probably does not send that signal."[109]

Fourth, the rule that "substantially prevailing" parties can recover their costs and attorneys' fees satisfied no one. The NCRA provides no definition of "substantially prevailing." Those politically disposed to favor defendants in antitrust lawsuits oppose this extra incentive for plaintiffs to bring suit.[110] Conversely, those disposed to favor antitrust plaintiffs see the possibility of plaintiffs being held liable for the costs and fees of successful defendants as deterring meritorious suits along with frivolous ones.[111]

Fifth, some view the business notification process as invasive and dangerous, because publication of the notice will draw the attention of

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lingered for some time without the luxury of any basis in fact. "The allegation that businessmen feel discouraged goes to their state of mind and is obviously impossible to verify or to refute. On the other hand, the known facts tend to refute any concrete assertion about the inhibitory effect of the antitrust laws." Letter from Thomas E. Kauper, Ass't Att'y Gen., Antitrust Div., U.S. Dep't of Justice, to Arch N. Booth 4 (Apr. 26, 1974), *reprinted in* Antitrust & Trade Reg. Rep. (BNA) No. 663, § F, at 1 (1974), *quoted in* Joelson & Griffin, *supra* note 22, at 489.

106. *See* S. REP. No. 427, *supra* note 79, at 1–4, *reprinted in* 1984 U.S.C.C.A.N. at 3105–08; *id.* at 25, 1984 U.S.C.C.A.N. at 3121 (Hatch, Laxalt, Simpson, East, and Denton, Sens.) ("An increase in such [joint R&D] activity is necessary for the health of both our domestic economy and our international trade. Those who engage in joint R&D activity are serving the Nation's best interests."); *id.* at 29–31, 1984 U.S.C.C.A.N. at 3124–26 (Biden, Sen.).

107. Maher & LaMont, *supra* note 105, at 4–5 (noting that the word "National" in the name of the NCRA is a misnomer since it "signifies neither that NCRA encourages only domestic 'cooperative research' nor that benefitted cooperators need be American nor that benefits of such research will be peculiar to American enterprises nor that there will be value to the American economy as distinguished from a world economy.").

108. *See supra* part III.B.2.a.

109. David L. Foster, Gregory L. Curtner & Elizabeth C. Dell, *The National Cooperative Research Act of 1984 as a Shield from the Antitrust Laws*, 5 J.L. & COM. 347, 354 (1985); *see also id.* at 355–61, 364–65.

110. S. REP. No. 427, *supra* note 79, at 25–26, *reprinted in* 1984 U.S.C.C.A.N. at 3121–22 (Hatch, Laxalt, Simpson, East, and Denton, Sens.); *id.* at 27–28, 1984 U.S.C.C.A.N. at 3123 (Dole, Sen.).

111. *Id.* at 32–34, *reprinted in* 1984 U.S.C.C.A.N. at 3126–28 (Metzenbaum, Sen.).

potential competitors who might otherwise not have known of the venture's existence.[112] Those fearful of governmental intrusion into their affairs greet skeptically the NCRA's invitation to voluntarily send the government information on their business plans.[113]

Sixth, even if the notification procedures are complied with, "detrebling" of damages is a perverse remedy. In effect, the NCRA attempts to encourage lawful conduct by *decreasing* the penalties for unlawful conduct.[114] The threat of treble damages should remain as a deterrent against anticompetitive conduct unless its supporting rationale no longer applies. One argument against treble damages might suggest that because the notification system raises the odds of detecting an antitrust violation above one in three, treble damages are no longer necessary to equalize antitrust liability with anticompetitive conduct. Nevertheless, using the NCRA notification scheme to justify "detrebling" of damages has two flaws. First, the character of the notice, describing in general terms the "nature and objectives" of a venture, leaves the parties substantial discretion to decide what to include, and does not aid in detecting antitrust violations.[115] Second, only the government has full access to what little information the parties must provide. An injured private party would probably be much more willing to press an antitrust suit against its antagonist,[116] especially considering the ponderous process the government follows in deciding whether to sue.[117] These private parties, who might have the greatest incentive to challenge a harmful venture, have only the government's published notice of the venture "in general terms" and cannot compel the release of further information from the government's files.[118] The original rationale for treble damages—that the difficulty in detecting antitrust violations justifies disproportionate punishment when they are detected—remains intact, further undermining the rationale of the "detrebling" function of the NCRA.

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112. Foster, Curtner & Dell, *supra* note 109, at 355 ("[I]t is not clear that venturers will conclude that [notification filing's] potential as a shield from treble damages outweighs the potential harms of filing.").

113. *See id.* at 355 n.49.

114. *Id.* at 361–62; *see also id.* at 362 ("Granting protections to law violators may in practice, however, serve to benefit not those joint venturers who inadvertently engage in anticompetitive activity, but those who consciously decide to break the law and take the potential of single damages into account as a cost of doing business.").

115. *See supra* notes 90–91 and accompanying text.

116. For example, the GM-Toyota joint venture upheld by the FTC in 1984, see *supra* notes 59–63 and accompanying text, had to be narrowed somewhat because of a suit brought by Chrysler. *See Chrysler Settles Suit over Link of GM, Toyota*, WALL ST. J., Apr. 15, 1985, at 2.

117. *See infra* part III.C.

118. *See supra* notes 92–94 and accompanying text.

The seventh and perhaps best argument against the NCRA is its irrelevancy. While the NCRA might have substantially modified some areas of antitrust law,[119] it has never perceptibly influenced the antitrust treatment of R&D joint ventures. No court has cited the NCRA to support the purpose for which it was enacted,[120] and no courts have ever cited the heart of the NCRA, section 3, for any reason at all. Nearly a decade has passed since the ostensibly urgent passage of the NCRA, and the world still awaits its first substantive application to any case.

C. *The Department of Justice's 1988 Antitrust Guidelines for International Operations*

In 1988, the DOJ issued its Antitrust Enforcement Guidelines for International Operations.[121] The Guidelines denote the DOJ's official position and describe the circumstances under which it will or will not bring an antitrust lawsuit against an international business arrangement.

The DOJ has had decidedly mixed success with its efforts to promulgate Guidelines in the recent past, earning criticism from Congress and commentators, and indifference from the courts. Because the 1985 Vertical Restraints Guidelines diverged so sharply from settled law, Congress vigorously condemned them by saying the guidelines "do not have the force of law, do not accurately state current antitrust law, and should not be considered by the Courts of the United States as binding or persuasive, and should be recalled by the Attorney General."[122] Even commentators sympathetic to the DOJ's position conceded that

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119. *See* Maher & LaMont, *supra* note 105, at 3–4, 13–24 (1988) (arguing that the NCRA extends the rule of reason into new areas of antitrust jurisprudence).

120. *See* California v. ARC Am. Corp., 490 U.S. 93, 101 n.5 (1989) (citing § 4303(c) of the NCRA as an example of a federal statute preempting comparable state laws); United States v. Western Elec. Co., 675 F. Supp. 655, 662 n.30 (D.D.C. 1987) (analogizing from the NCRA to define the word "manufacture"). Courts have also cited the NCRA twice for its provisions involving attorneys' fees and twice for its provisions involving sanctions. *See* Marek v. Chesny, 473 U.S. 1, 46 (attorneys' fees); United States Football League v. National Football League, 887 F.2d 408, 412 n.2 (2d Cir. 1989) (attorneys' fees); Coghlan v. Starkey, 852 F.2d 806, 817 n.21 (5th Cir. 1988) (sanctions); Farguson v. MBank Houston, N.A., 808 F.2d 358, 360 n.1 (5th Cir. 1986) (sanctions). All of the above cases cite the NCRA in dicta; no part of the NCRA has ever provided the rule of decision on which any court has based its holding.

121. ANTITRUST DIVISION, U.S. DEP'T OF JUSTICE, ANTITRUST ENFORCEMENT GUIDELINES FOR INTERNATIONAL OPERATIONS (1988), *reprinted in* 16 JULIAN O. VON KALINOWSKI, BUSINESS ORGANIZATIONS: ANTITRUST LAWS AND TRADE REGULATION app. 3 (1991), *and in* 55 Antitrust & Trade Reg. Rep. (BNA) No. 1391 (Nov. 17, 1988), *and in* WORLD COMPETITION L. & ECON. REV., Mar. 1989, at 105.

122. H.R. REP. No. 399, 99th Cong., 1st Sess. 1 (1985).

> [t]he overwhelming impression created by the DOJ vertical merger Guidelines is that the DOJ does not intend to waste much time chasing vertical mergers. The "theories" to which it gives the most attention are really nontheories, never used by courts before and sometimes not even well developed in academic literature. Established judicial theories of vertical mergers are all but forgotten. . . . [M]ost of the factual predicates for the new theories are so implausible that they will seldom or never occur.[123]

The "nontheories" of the DOJ's 1982 and 1984 Merger Guidelines received a tepid response from commentators[124] and courts. The Tenth Circuit declined to apply the Guidelines in an important merger case, remarking that the Guidelines "are more useful for setting prosecutorial policy than delineating judicial standards."[125] The United States Court of Appeals for the D.C. Circuit, in an opinion by then-Judge Clarence Thomas, noted that the Government's presentation of its market share data under the auspices of the Merger Guidelines could not alone establish the Government's case.[126]

The DOJ's initial draft of its 1988 Guidelines also bore little resemblance to existing law. After harsh criticism by the American Bar Association, the DOJ changed the 1988 Guidelines to bring them marginally more in line with current precedent.[127] The DOJ concedes that its 1988 Guidelines do not accurately state existing law, but contends that they are still valuable since they provide businesses with notice of the DOJ's international enforcement posture.[128] Consequently, the Guidelines are of little use to attorneys advising clients who wish to undertake an international business transaction, since private plaintiffs, state attorneys general, or the FTC

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123. HOVENKAMP, *supra* note 9, § 7.4, at 212–13.

124. Two FTC employees found no empirical support for the Merger Guidelines' use of particular values of the Herfindahl-Herschman Index to establish presumptions of market concentration or deconcentration. *See* Noel D. Uri & Malcolm B. Coate, *The Department of Justice Merger Guidelines: The Search for Empirical Support*, 7 INT'L REV. L. & ECON. 113 (1987); *see also* Louis B. Schwartz, *The New Merger Guidelines: Guide to Governmental Discretion and Private Counseling or Propaganda for Revision of the Antitrust Laws?*, 71 CAL. L. REV. 575 (1983).

125. Monfort of Colo., Inc. v. Cargill, Inc., 761 F.2d 570, 579 (10th Cir. 1985), *rev'd on other grounds*, 479 U.S. 104 (1986); *accord* Prater v. United States Parole Comm'n, 802 F.2d 948, 954 (7th Cir. 1986) (en banc) ("[I]f the Justice Department issues guidelines for the enforcement of a federal statute that it administers (as it did in the 1984 Department of Justice Merger Guidelines, for example), this is the performance of an interpretive function that every law enforcement agency has; it is not the enactment of a law.") (Posner, J.).

126. United States v. Baker Hughes, Inc., 908 F.2d 981, 992 (D.C. Cir. 1990).

127. *See generally* Fugate, *supra* note 27.

128. *See id.* at 297–98.

might successfully bring suit against transactions the DOJ has stated it will ignore.[129] Despite these shortcomings, the Guidelines contain helpful statements describing the DOJ's approach in evaluating a transnational joint venture. The remote chance that the DOJ will ever bring suit diminishes whatever potential liability that remains for transnational joint ventures after the NCRA.

The DOJ conducts a three-step evaluation of transnational joint ventures, invoking a possible fourth step only if the first three steps have revealed sufficient anticompetitive potential. The first step measures the effect of the joint venture in the relevant operational market. The test is a simple one: "if the participating firms would have been allowed to merge outright" under the DOJ's highly permissive merger analysis, the DOJ automatically approves the venture and the analysis ends.[130]

If the DOJ would have challenged the merger, the analysis proceeds to the second step. At this stage the inquiry turns to the effect of the venture in "spillover markets, those not the immediate subject of the agreement but ones in which the parties are actual or potential competitors and which might conceivably be affected by the transaction."[131]

If the second stage of the investigation reveals an effect in spillover markets, the investigators proceed to the third part of the test. The third stage of the analysis examines any resulting vertical restraints, other than vertical price restrictions.[132] Again, "[g]iven the [DOJ's] generally positive attitude towards vertical non-price restraints, this step will rarely

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129. Donald I. Baker & Bennett Rushkoff, *The 1988 Justice Department International Guidelines: Searching for Legal Standards and Reassurance*, 23 CORNELL INT'L L.J. 405, 406 (1990); James R. Atwood & Charles Lister, *International Antitrust Enforcement in the George Bush Administration: The Enforcement Guidelines and Beyond*, WORLD COMPETITION L. & ECON. REV., Mar. 1989, at 5; Robert G. Shimp, Comment, *A Critical Review of the Justice Department's 1988 Antitrust Guidelines for International Operations*, 14 N.C. J. INT'L L. & COM. REG. 287, 289-90 (1989).

The DOJ and the FTC could eliminate some of the uncertainty inherent in the present International Guidelines if they jointly issued a new set of guidelines, reassuring businesses planning a venture that neither federal antitrust agency would challenge conduct within the guidelines' limits. The 1992 Horizontal Merger Guidelines recently issued by the DOJ and FTC provide some hope that future joint guidelines may be forthcoming. *See* Antitrust Div., U.S. Dep't of Justice & Federal Trade Comm'n, 1992 Horizontal Merger Guidelines, 57 Fed. Reg. 41,552 (1992), *reprinted in* Antitrust & Trade Reg. Rep. (BNA) No. 1559 (spec. supp. Apr. 2, 1992), *and in* 4 Trade Reg. Rep. (CCH) ¶ 13,104 (May 5, 1992).

130. Baker & Rushkoff, *supra* note 129, app. a at 430; *see also* Atwood & Lister, *supra* note 129, at 20.

131. Atwood & Lister, *supra* note 129, at 20-21.

132. As to the law and economics of vertical restraints generally, see HOVENKAMP, *supra* note 9, §§ 9.1-9.4.

present a problem."[133]

If and only if the first three steps have identified anticompetitive effects associated with a venture, the analysis proceeds to the fourth step which allows an examination of any procompetitive efficiencies that may offset the harms of the venture. As a matter of law, courts have generally been unreceptive to an "efficiency defense,"[134] but the DOJ apparently will not wait for the courts to permit the efficiency defense. Therefore, the Guidelines incorporate the defense as a matter of prosecutorial discretion.

Under the Guidelines, few transnational joint ventures, no matter how anticompetitive their effects, face any real risk of prosecution by the DOJ. In a way, the DOJ has already accomplished exactly what the National Cooperative Production Amendments hope to achieve—a lessening of any antitrust barriers to joint ventures although the effect indisputably eliminates competition.

IV. THE PROPOSED NATIONAL COOPERATIVE PRODUCTION AMENDMENTS

A. *The Positions of the Administration and Congress*

1. The Executive Branch

The last two administrations have expressed rather different opinions on the desirability of the Amendments. Reagan Administration officials assured Congress at the time of the NCRA's passage that the government would not use the NCRA as a basis for any further weakening of the nation's antitrust laws.[135] Nevertheless, the Bush Administration's antitrust enforcers said that the NCRA would provide a good framework

133. Atwood & Lister, *supra* note 129, at 21 (footnote omitted).

134. HOVENKAMP, *supra* note 9, § 11.2; Fugate, *supra* note 27, at 328 & n.258. "Possible economies cannot be used as a defense to illegality." FTC v. Procter & Gamble Corp., 386 U.S. 568, 580 (1966).

135. At the time the NCRA was passed, the chief of the Antitrust Division wrote to Sen. Howard Metzenbaum and stated that "I am writing to assure you that I do not view the passage of S. 1841 [the Senate NCRA bill] . . . to be a precedent for any future measure designed to reduce the treble damage antitrust remedy as it applies to any other type of conduct." Letter from J. Paul McGrath, Ass't Att'y Gen., Antitrust Div., U.S. Dep't of Justice, to Sen. Howard M. Metzenbaum, July 30, 1984, *reprinted in* 130 CONG. REC. S9519 (July 31, 1984), *quoted in* Foster, Curtner & Dell, *supra* note 109, at 370 n.119. "Both Congress and the Justice Department emphasized that the [National Cooperative Research] Act would not be a precedent for future revisions or exemptions in the antitrust laws." Foster, Curtner & Dell, *supra* note 109, at 370 (footnote omitted).

for easing any antitrust burden on production joint ventures.[136] Other Bush Administration officials led the charge for the passage of the Amendments.[137] Echoing justifications offered for the NCRA,[138] the Bush Administration insisted that the uncertain legality of cooperative production ventures confuses businesses, resulting in a chilling effect that undermines United States competitiveness.[139]

In fact, the Bush Administration elevated the Amendments to the level of foreign policy. In its recent Structural Impediments Initiative with Japan, the government made a commitment to reduce the antitrust penalties for transnational production joint ventures.[140] Although that commitment was made during 1990, the Bush Administration never succeeded in passing a cooperative production bill through Congress.[141]

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136. *Production Joint Ventures—Antitrust Division Views*, 7 Trade Reg. Rep. (CCH) ¶ 50,024 (1989).

137. The Secretary of Commerce and the Attorney General sent an early version of the Amendments to Congress in early 1991. *Administration Transmits Legislation on Limited Immunity for Joint Ventures*, DAILY REP. FOR EXECUTIVES, Apr. 30, 1991, at A-9, *available in* LEXIS, Legis Library, Drexec File. In keeping with the Department of Commerce's general uneasiness with antitrust enforcement, see *supra* note 3, it seems appropriate that one of the most vocal advocates of the Amendments is a Commerce Department attorney. *See* Alden F. Abbott, *Joint Production Ventures: The Case for Antitrust Reform*, 58 ANTITRUST L.J. 715 (1989).

138. *See supra* notes 104–05 and accompanying text.

139. *Bush Administration Unveils Proposal to Encourage Production Joint Ventures*, DAILY REP. FOR EXECUTIVES, May 9, 1990, at A-13, *available in* LEXIS, Legis Library, Drexec File.

140. Mitsuo Matsushita, *The Structural Impediments Initiative: An Example of Bilateral Trade Negotiation*, 12 MICH. J. INT'L L. 436, 444 (1991); Lanneaux, *supra* note 3, at 250–51; *Key Elements of U.S.-Japan Structural Impediments Initiative Joint Report Released by the Office of the U.S. Trade Representative*, DAILY REP. FOR EXECUTIVES, June 29, 1990, at M-8, *available in* LEXIS, Legis Library, Drexec File.

141. Some attributed this failing to the Administration's poor performance in finding Senate cosponsors for the legislation. Sherry R. Sontag, *The Look-Alike Antitrust Bills*, NAT'L L.J., May 21, 1990, at 21.

2. The Legislative Branch

Six versions of the Amendments have been introduced since 1990, but none has yet emerged from Congress.[142] These bills differed from each other primarily in technical detail, but the Administration's antitrust enforcers have described them as substantially identical.[143] The Amendments have fared noticeably better in the House of Representatives than in the Senate. The House passed one version of the Amendments in 1990,[144] but corresponding Senate bills have never emerged from the Senate Judiciary Committee.[145]

B. What the National Cooperative Production Amendments Would Do

The core of the Amendments would extend all NCRA provisions to production, but not marketing, joint ventures.[146] The Amendments themselves, however, contain a few interesting variances from the NCRA. First, Congress has apparently acknowledged the criticism that the NCRA did nothing to help United States firms compete because its protections extended to domestic and foreign firms alike.[147] The House bill provides that

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142. S. 940, *supra* note 6, §§ 401–402; S. 1163, 102d Cong., 1st Sess. (1991), *microformed on* Sup. Docs. No. Y 1.4/1:102-1-187 (U.S. Gov't Printing Office); H.R. 1604, *supra* note 6; H.R. 4611, 101st Cong., 2d Sess., 136 CONG. REC. H3099 (daily ed. June 5, 1990), *microformed on* Sup. Docs. No. Y 1.4/6:101-110 (U.S. Gov't Printing Office); S. 2692, 101st Cong., 2d Sess. (1990), *microformed on* Sup. Docs. No. Y 1.4/1:101-124 (U.S. Gov't Printing Office); S. 2765, 101st Cong., 2d Sess. § 401 (1990), *microformed on* Sup. Docs. No. Y 1.4/1:101-156 (U.S. Gov't Printing Office).

143. *Rill Urges Senate Judiciary to Approve Bill Permitting Joint Production Ventures*, DAILY REP. FOR EXECUTIVES, July 18, 1990, at A-16, *available in* LEXIS, Legis Library, Drexec File.

144. H.R. 4611, *supra* note 142.

145. The Senate Judiciary Committee has long served as a final resting place for bad legislation, as one contemporary of the author of the Sherman Act noted:

> I never have a bill in which I feel any interest referred to this mausoleum of Senatorial literature, the Judiciary Committee, without feeling that I have attended a funeral. . . . [T]he country has found out that when we desire the death of a bill and are not particularly anxious to put ourselves on record as having directly struck the blow which caused the demise, we refer it to the Judiciary Committee, where it sleeps the last sleep known to the literature of the Senate.

21 CONG. REC. 2610 (1890) (Vance, Sen.), *quoted in* 2 WINFIELD S. KERR, JOHN SHERMAN: HIS LIFE AND PUBLIC SERVICES 203–04 (1908).

146. S. 940, *supra* note 6, § 402(b); H.R. 1604, *supra* note 6, § 2(b).

147. *See supra* notes 106–07 and accompanying text.

> [t]he amendments to [the NCRA] made by the National Cooperative Production Amendments of 1991 shall not apply with respect to any activity in connection with the production of a product, process, or service by a joint venture if at any time *more than 30 percent*, in the aggregate, of the beneficial ownership of the voting securities and equity of such joint venture is *controlled by foreign entities. Any facilities operated by such joint venture shall be located within the United States* or its territories.[148]

The corresponding portion of the Senate bill provides that

> [t]he amendments to [the NCRA] made by the National Cooperative Production Amendments of 1991 shall not apply with respect to any activity in connection with the production of a product, process, or service by a joint venture if at any time *substantially all such activities are not conducted within the United States* or its territories.[149]

Problems exist in both versions of the bill. The House and Senate versions both deny their protections to joint ventures that conduct activities abroad—the House version would require *all* production facilities of the joint venture to be located in the United States, while the Senate version would require only "substantially all" of the joint venture's production facilities to be located in the United States. The Senate bill does not define "substantially all," and the House bill places a cap of thirty percent on foreign ownership or control of the venture. Consequently, if a United States corporation enters into a production joint venture with a Japanese corporation, a fifty-fifty ownership stake for each parent violates the House version of the Amendments, but the Senate version permits this division. To avoid the problem altogether, the parties could arrange alternative capital structures for the venture, reducing the foreign parent's participation to any statutory maximum while effectuating the parties' intent in creating the joint venture.[150] Under either bill, however, the venture could not operate entirely in Japan. If the venture operated ninety-nine production facilities in the United States and one in Japan, the House version of the bill would still not protect it, although this arrangement should meet the Senate bill's "substantially all" requirement.

Neither bill applies any of these restrictions to research and devel-

148. H.R. 1604, *supra* note 6, § 2(f) (emphasis added).

149. S. 940, *supra* note 6, § 402(f) (emphasis added).

150. Any detailed discussion of transnational venture capital or financing arrangements is outside the scope of this Note.

opment joint ventures; both speak only of the extensions to the NCRA to cover production joint ventures. The NCRA, then, is subject to the same criticism now as before, that its protections should not be available to foreign businesses if Congress intends to give United States firms a competitive advantage.[151]

Second, the Amendments would require a court, in evaluating a challenge to a production joint venture, to consider potential competition worldwide in assessing the joint venture's effect within the relevant market. Measuring the venture's effect in commerce requires defining the relevant market, ordinarily a two-step process which must define both a product market and a geographic market.[152] The Amendments would reduce that analysis to one step, since the statute would define the relevant geographic market as global.[153] Obviously any firm will appear to have much less market power if it is measured against every competitor in the world rather than just those within a smaller area. A global market comparison will reduce the apparent market power of production joint ventures in the market in which they will operate, which increases the chances that the venture will receive approval under the first step of the DOJ's analysis.[154]

C. *Why the National Cooperative Production Amendments Should Fail*

While collaboration among competitors at the level of abstract research may pose little threat to consumers, in some markets the anticompetitive risks of production joint ventures have already materialized in the form of global cartelization.[155] The oligopolies dominating the petroleum, automobile, and airline industries in the United States owe much of their strength to the competition-insulating effect of multiple interlocking transnational production joint ventures.[156] Production joint ventures seem at first blush inherently more dangerous than research and development joint ventures. Therefore, to compensate for the seemingly greater risks from a production joint venture, the Amendments' proponents could justify equal treatment for these two classes of ventures only if the justifications for production joint ventures were even stronger than those advanced for research and development joint ventures.[157]

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151. *See supra* notes 106–07 and accompanying text.
152. *See* HOVENKAMP, *supra* note 9, §§ 3.1–3.6; 2 AREEDA & TURNER, *supra* note 15, ch. 5C.
153. S. 940, *supra* note 6, § 402(d); H.R. 1604, *supra* note 6, § 2(d).
154. *See supra* note 130 and accompanying text.
155. *See supra* notes 37–40 and accompanying text.
156. *See* Adams & Brock, *supra* note 3, at 438–81.
157. *See supra* notes 68–76 and accompanying text.

None of the justifications supporting the NCRA applies to production joint ventures. NCRA supporters argued that research joint ventures were needed to keep competitors from appropriating the results of expensive research projects, eliminating the free-rider effect.[158] However, it is difficult to imagine a parallel effect in *production* that needs eliminating. As previously noted, free riding can only occur with public goods, goods which cannot be kept from any consumer once they are produced,[159] and which government usually provides.[160] Production joint ventures are only necessary to the extent that government fails to provide some public good, a necessity never discussed, much less proved, in literature supporting the Amendments.[161]

Some believe economist Joseph Schumpeter's work supports the NCRA, in particular, Schumpeter's opinion that only monopolistic firms could generate sufficient profit to fund research projects.[162] First, Schumpeter's position is incorrect—monopolies *do not* do more or better research.[163] But even if Schumpeter's thesis is accepted, he never contended that only monopolies are capable of producing a product efficiently. Schumpeterian analysis, regardless of whether it justifies cooperative research, does not address cooperative production, and therefore cannot be invoked to support the Amendments.

1. Facilitating Cartelization

A basic tenet of contemporary antitrust theory states that high levels of domestic concentration pose little threat to consumers, because competition from foreign firms will defeat any attempt by a domestic monopolist

158. HOVENKAMP, *supra* note 9, § 4.3; *see supra* notes 68–71 and accompanying text.

159. *See supra* notes 70–71 and accompanying text.

160. CAMPBELL R. MCCONNELL, ECONOMICS 93–94 (10th ed. 1987).

161. *See, e.g.*, Abbott, *supra* note 137.

162. *See supra* note 70.

163. "[C]ontrary to much of the conventional wisdom, innovative activity is apparently hindered, not promoted, in concentrated markets . . . . [I]n fact, small firms tend to have the innovative advantage in industries consisting of predominantly large firms." ZOLTAN J. ACS & DAVID B. AUDRETSCH, INNOVATION AND SMALL FIRMS 147 (1990); *see also* Wesley M. Cohen, Richard C. Levin & David C. Mowery, *Firm Size and R&D Intensity: A Re-Examination*, 35 J. INDUS. ECON. 543 (1987); *cf.* Crane, *supra* note 75, at 416–18. Even Schumpeter's defenders acknowledge an advantage for smaller firms. "The reason why monopolies usually find innovation easier is that they have no free riders to deal with; where the free rider problem is overcome by suitable industry-wide cooperation, a competitive industry benefits just as much as a monopoly, and in fact somewhat more." Hammond, *supra* note 76, at 55–56 (citing Kenneth J. Arrow, *Economic Welfare and the Allocation of Resources for Invention*, *in* THE RATE AND DIRECTION OF INVENTIVE ACTIVITY: ECONOMIC AND SOCIAL FACTORS 609 (1962)).

to increase prices.[164] If domestic firms freely engage in transnational production joint ventures, though, two anticompetitive effects result. First, the potential competition between the domestic firm and the foreign firm in the joint venture's market shrinks. Second, and equally problematic, is the ability of the domestic venturer to decrease the competitive pressure the foreign venturer might have brought to bear against cartelization of the domestic firm's market. When foreign competition no longer provides an effective check on intra-national cartelization, high levels of domestic concentration once again become worrisome.[165] The supporting literature of the Amendments has yet to seriously address these dual risks of inter- and intra-national cartelization.

2. Reducing Product Differentiation

Consumers benefit from having a wide range of different products available for purchase.[166] When many firms independently produce many products, substantial product differentiation can occur even if the firms start from the same basic research.[167] When competing firms form a production joint venture, however, the venture may lack the means or the incentive to produce as many varieties of products as its parent firms would if they had remained in competition. Production joint ventures threaten to harm consumers by reducing product differentiation—a threat which

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164. "Effective foreign competition serves as a more expedient and efficient check on competitive abuses by domestic firms than U.S. antitrust enforcers can ever hope to be." *Internationalization of Antitrust—Antitrust Division Chief's Views*, 7 Trade Reg. Rep. (CCH) ¶ 50,019, at 48,588 (May 16, 1989). The idea that foreign firms limit the conduct of domestic ones can be traced at least back to Judge Learned Hand's opinion in *Alcoa*. *See* United States v. Aluminum Co. of Am., 148 F.2d 416, 426 (2d Cir. 1945) ("It is entirely consistent with the evidence that it was the threat of greater foreign imports which kept 'Alcoa's' prices where they were, and prevented it from exploiting its advantage as sole domestic producer[.]").

165. *See* WALTER ADAMS & JAMES W. BROCK, ANTITRUST ECONOMICS ON TRIAL: A DIALOGUE ON THE NEW LAISSEZ-FAIRE 56–61 (1991). A comparative statistical study of the United States and France found that French firms were exposed to three times the intensity of foreign competition with which United States firms had to contend. William J. Adams, *Does Exposure to International Trade Justify Relaxed Antitrust Treatment of Mergers?*, 9 NW. J. INT'L L. & BUS. 589, 591 (1989). "It is precisely because so many American producers are naturally or artificially protected from competition through international trade that vigor must be restored to United States regulation of mergers." *Id.* at 593–94.

166. *See* MCCONNELL, *supra* note 160, at 603–04. As to the implications of product differentiation for antitrust policy, *see* HOVENKAMP, *supra* note 9, § 11.6, at 307–08.

167. *See* Gene M. Grossman & Carl Shapiro, *Research Joint Ventures: An Antitrust Analysis*, 2 J.L. ECON. & ORG. 315, 327 (1986) ("A competitive product market can coexist with a highly concentrated research market.").

research joint ventures do not pose.[168]

3. Slowing Development of New Products

A final concern involves the ability of production joint ventures to slow the pace of product development. Competing firms have an obvious incentive to introduce new and better products before their competitors introduce innovations of their own. Production joint ventures provide an ideal vehicle for firms which wish to slow the pace of innovation, because the participants in the venture can delay the release of new products without fear that their co-venturers will beat them to market with a profitable new release. Consequently, firms in a production joint venture can enjoy the revenues from their most profitable product lines without incurring high, continuous product development costs, while depriving consumers of the new products which would be produced in the venture's absence.[169]

V. ALTERNATIVES TO THE NATIONAL COOPERATIVE PRODUCTION AMENDMENTS

In their present form, the Amendments exchange a high likelihood of harm to consumers for a speculative, unsubstantiated perception of enhanced competitiveness of United States industries in the world economy. Consumers certainly would not benefit from such an exchange. They face the disheartening prospect of paying higher prices for a reduced selection of products and slower innovation. In the short term, businesses forming production joint ventures would benefit by effectively acquiring increased market power, leading to higher profits. In the long term, however, competition from firms not parties to the joint venture might undercut it, reducing the benefits to the venturers.[170] In light of these concerns, some alternatives to the Amendments should be considered.

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168. *Id.* at 334.

169. *Id.*; *see* United States v. Automobile Mfrs. Ass'n, Inc., 307 F. Supp. 617 (C.D. Cal. 1969), *aff'd sub nom.* City of New York v. United States, 397 U.S. 248 (1970).

170. A joint venture substantially identical to a cartel might prevent this long-term scenario by raising entry barriers to keep competitors from the market.

A. *Do Nothing*

Given the harmful effects of the Amendments, perhaps Congress should choose the wisest course and leave the law as it currently stands. First, the NCRA has thus far proved to be essentially irrelevant,[171] and there is scant cause to believe that extending its coverage will extend its impact. Second, the Supreme Court interprets the antitrust laws of the United States to allow conduct which benefits consumers even though the conduct involves otherwise suspect behavior.[172] Existing law legitimizes pro-consumer production joint ventures.[173] Businesses that wish to undertake a venture beneficial to consumers need no new assurances; those that wish to undertake a venture harmful to consumers deserve none.

Unfortunately, complete inaction violates the United States diplomatic pledge to Japan to reform United States production joint venture law,[174] and even if that was ill-advised it was nonetheless made. The forces of legislative inertia may also be at work. The introduction of so many substantially similar bills in each recent session of Congress might indicate that it is too late to prevent *some* legislating.[175]

B. *Establish Per Se Rules*

If Congress is serious about reducing the alleged uncertainty of businesses regarding production joint ventures, it should forgo codifying the rule of reason. The rule of reason requires only that courts balance the pro- and anti-competitive effects of a challenged transaction and decide which effects predominate.[176] This approach certainly provides little *ex ante* reassurance to businesses that wish to know whether they can safely enter into a planned venture.[177] Rather than leaving courts with a balancing test, Congress can reduce uncertainty simply by deciding what it does and does not like about production joint ventures. A new statute might make all joint ventures between companies not competing against each other in

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171. *See supra* notes 119-20 and accompanying text.

172. *See, e.g.*, Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc., 441 U.S. 1 (1979); Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977).

173. Carl Shapiro & Robert D. Willig, *On the Antitrust Treatment of Production Joint Ventures*, J. ECON. PERSP., Summer 1990, at 113, 124 (concluding that "the rule of reason would be amply permissive towards U.S. [production] joint ventures.").

174. *See supra* note 140 and accompanying text.

175. *See supra* note 142 and accompanying text.

176. *See* SULLIVAN, *supra* note 12, §§ 63-65.

177. This same argument has been made with equal relevance in opposition to the NCRA. *See supra* note 109 and accompanying text.

any line of commerce per se legal or might make joint ventures between competitors holding more than a specified market share per se illegal. Congress can draw the firm lines businesses claim to want, encouraging those production joint ventures favorable to consumers while clearly proscribing those harmful to consumers. Ideally, businesses provided with such firm rules could then determine the legality of a proposed venture before committing any assets to it. The general public would also benefit by having the policy debate localized in a politically responsive branch of government.

Unfortunately, this proposal requires a depth of economic sophistication Congress has yet to demonstrate.[178] It is doubtful that a meaningful Congressional debate, detailing precisely which economic effects of a joint venture merit protection and which merit condemnation, can occur in the real world of partisan rivalry and lobbying by wealthy interest groups.

C. *Adopt the European Community's Approach*

A third possible solution, and one which may overcome the defects of the previous two, is to adopt some form of the "exemption" process currently practiced in the European Community (EC). The procedural mechanism for such a process already exists in the United States in two forms: the business notification procedure of the NCRA[179] and the DOJ's business review letter program. Regulators would only need to import the substantive analysis the EC applies to joint ventures.

The EC evaluates joint ventures under two primary laws: Article 85 of the Treaty of Rome[180] and the EC's new merger control regulation.[181] United States regulators could dispose of the merger control regulation fairly easily since it applies only to joint ventures falling within a fairly narrow set of criteria: the venture must involve very large firms, those whose annual global "aggregate turnover"[182] exceeds approximately

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178. "Congress is rarely inclined, and probably rarely equipped, to specify detailed standards for competitive analysis in statutory language." Edward Correia, *Congress and Antitrust Policy After the Reagan Administration*, *in* REVITALIZING ANTITRUST IN ITS SECOND CENTURY 451, 454 (Harry First, Eleanor M. Fox & Robert Pitofsky eds., 1991).

179. *See supra* part III.B.2.c.

180. TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY [EEC TREATY] art. 85.

181. Commission Regulation 4064/89, 1990 O.J. (L 257) 13 [hereinafter Merger Control Regulation].

182. This term essentially means "sales." *See* Otto Sandrock & Elke van Arnheim, *New Merger Control Rules in the EEC*, 25 INT'L LAW. 859, 864 n.25 (1991). "Turnover" is the sum of the amount of goods sold and services provided in a firm's ordinary course of business, minus sales rebates, value-added taxes, and some other taxes. Alternate valuations, such as a fixed

$7 billion and whose annual "aggregate turnover" within the EC exceeds approximately $350 million.[183] Only the very largest ventures will meet this regulatory threshold.[184] The EC regulations exclude even those ventures that meet the aggregate turnover requirements if the purpose or effect of the venture is "the coordination of the competitive behavior of [firms] which remain independent."[185] On the other hand, ventures "performing . . . all the functions of an autonomous economic entity" remain within the terms of the regulation.[186] The applicability of the regulation thus turns on the degree of integration the venturers undertake—the closer their conduct resembles a merger, the more likely the EC's merger control regulation will apply. Enforcement officials may still analyze joint ventures not meeting the fairly high threshold for applicability of the merger control regulation under Article 85,[187] an analysis which United States policymakers should consider. In particular, Article 85 details a process which exempts joint ventures from regulation after the venture meets certain requirements,[188] in effect establishing a rule of per se legality for ventures satisfying its conditions. To qualify for exemption

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percentage of total assets, can be used in some circumstances. Merger Control Regulation, *supra* note 181, art. 5. For efforts to explain the turnover concept, see Joel Davidow, *Competition Policy, Merger Control and the European Community's 1992 Program*, 29 COLUM. J. TRANSNAT'L L. 11, 28-29 & n.92 (1991); Christopher Jones, *The Scope of Application of the Merger Control Regulation*, 14 FORDHAM INT'L L.J. 359, 362-64 (1990-1991).

183. Merger Control Regulation, *supra* note 181, art 1. The financial figures must be measured in European Currency Units (ECUs), for which the global and EC aggregate turnover requirements are 5 billion and 250 million, respectively.

184. Sandrock and von Arnheim estimate that "forty to sixty merger operations per year will meet the Regulation's threshold of 5,000 million ECU." Sandrock & von Arnheim, *supra* note 182, at 865. The number of joint ventures of sufficient size to come under the Regulation may be even fewer. However, the thresholds are expected to be lowered in 1993 "to an aggregate turnover of 2,000 million ECU and to a Community-wide turnover over 100 million ECU." *Id.*

185. Merger Control Regulation, *supra* note 181, art. 3.

186. *Id.*

187. Sandrock & van Arnheim, *supra* note 182, at 867-68. Each of the EC member nations' domestic competition laws will still apply to ventures outside the scope of the merger control regulation. *Id.* at 873.

188. EEC TREATY art. 85, ¶ 3; Robert W. Kuhn, Recent Development, *Emerging International Antitrust Perspectives on Research and Development Joint Ventures*, 16 LAW & POL'Y INT'L BUS. 1181, 1200-04 (1984). While Kuhn's discussion focuses on R&D joint ventures, nothing in his analysis necessarily precludes extending Article 85 principles to production joint ventures, just as the Amendments seek to build on the principles of the NCRA.

under Article 85, the venture must demonstrate

1. that it "contributes to the improvement of the production or distribution of goods or to the promotion of technical or economic progress";

2. that consumers receive an "equitable" share of the resulting benefit;

3. that it does not impose greater restrictions on the venturers than are necessary to accomplish the venture's objectives; and

4. that it does not increase the power of the venturers to "eliminat[e] competition in respect of a substantial portion" of the products in question.[189]

These requirements mesh well with the policy objectives of the NCRA and the Amendments. A stated desire for technological progress fuels both the NCRA and the Amendments. A production joint venture truly contributing to such progress should pass muster far more easily than a venture designed merely for short-term exploitation of consumers, yet the text of the Amendments does not require joint venturers to demonstrate benefits expected to flow from the venture.[190] Adopting a measure analogous to the first prong of the Article 85 test would ensure that only those truly procompetitive ventures receive antitrust exemptions from Congress. Similar arguments can be made for each of the other prongs of the Article 85 test. In this manner, Article 85 provides businesses with the certainty the rule of reason approach cannot, exempting ventures which satisfy the Article 85 tests.[191]

The United States could implement legislation codifying some variant on the EC's Article 85 tests using either of two procedures already in place. First, the DOJ could expand the business notification procedure of the NCRA[192] to include evaluation of the venture's adherence to Article 85

189. EEC TREATY art. 85, ¶ 3.

190. This approach would, in effect, establish a rebuttable presumption of illegality, with the burden on the joint venturers to demonstrate the benefits their alliance would produce. Other commentators have suggested similar antitrust presumptions against other types of potentially harmful business activity. *See* John J. Flynn & James F. Ponsoldt, *Legal Reasoning and the Jurisprudence of Vertical Restraints: The Limitations of Neoclassical Economic Analysis in the Resolution of Antitrust Disputes*, 62 N.Y.U. L. REV. 1125, 1148-50 (1987).

191. *See* EEC TREATY art. 85.

192. *See supra* part III.B.2.c.

principles. After determining that a venture satisfies the statutory requirements, the DOJ could then give those ventures whatever degree of antitrust exemption Congress might choose, from "detrebling" of damages to outright immunity from liability from suits brought by private parties. Second, the DOJ currently issues business review letters to parties seeking its opinion on a planned business transaction. These letters sometimes include the DOJ's position regarding whether, given the facts the parties supply, the DOJ would challenge the transaction. The DOJ's conclusion in a business review letter does not bind the DOJ to inaction if it later decides that the public interest demands a challenge. The DOJ could expand the business review letter procedure to include the DOJ's evaluation on whether a transaction submitted for review meets the Article 85 standards. If they do, the legal effect of a decision not to prosecute could be made binding on the DOJ, creating some of the certainty claimed to justify the Amendments.

Either approach would require the DOJ to spend more time and resources reviewing transactions for compliance with relevant statutory standards. Delegating concomitant review authority to the FTC might reduce some of this burden. Moreover, the current provision of the NCRA requiring the DOJ to act within thirty days of receiving a business notification[193] might require extension. But the experience of the DOJ with the NCRA review procedure and business review letters should minimize the logistical problems that might otherwise result from adopting a review standard similar to Article 85.

VI. CONCLUSION

There is no reason to make transnational cartelization any easier. The webs of interconnected joint ventures in the most oligopolistic of United States industries can hardly be said to have made those industries more competitive or consumers better off.[194] If the nation is concerned with the competitiveness of United States firms in the global marketplace, the way to make industries competitive is to require those industries to compete. In the words of Harvard Business School Professor Michael E. Porter, United States industries need

> not less competition but more. Instead of relaxing antitrust enforcement, we should be tightening it. Mergers and alliances

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193. 15 U.S.C. § 4305(b) (1988).

194. *See generally* Adams & Brock, *supra* note 3. For case studies of the effect of transnational cartelization on the United States electricity, oil, uranium, chemicals, steel, artificial fiber, and maritime shipping industries, see MIROW & MAURER, *supra* note 25.

> between leading competitors should be prohibited—they are good neither for companies nor for America . . . . The proposal to relax antitrust scrutiny of joint production ventures should be quietly and quickly dropped.[195]

Nonetheless, abandoning the Amendments does not necessarily mean that Congress must leave the antitrust laws applicable to transnational production joint ventures completely unchanged. Article 85 of the Treaty of Rome provides a good framework for future legislation. Adopting it in some form or another would require businesses to demonstrate that Congress meant to foster their type of joint venture, a step found nowhere in the Amendments. It is futile to try to improve the global competitiveness of United States industry by sacrificing the nation's consumers. Although the Amendments would do just that, alternative proposals can encourage truly procompetitive ventures without risking harm to consumers. The time has arrived for some of those alternatives to enter the debate.

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195. Michael E. Porter, *Japan Isn't Playing by Different Rules*, N.Y. TIMES, July 22, 1990, § 3, at 13, *quoted in* Adams & Brock, *supra* note 3, at 483.

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