Tuning in to HDTV: Can Production Joint Ventures Improve America's High-Tech Picture?

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I. **INTRODUCTION**

High-definition television ("HDTV")\(^1\) is coming, but so far, it is

\(^1\) "High definition television is a cutting edge consumer electronics technology which offers markedly superior video display, and is estimated to become a $20 billion industry by the mid-1990's." S. 952, 101st Cong., 1st Sess. § 2(3) (1989). HDTV would make use of technologies such as flat screen displays, fiber optic multipliers, 4M-bit and 16M-bit DRAMS,
not coming from the United States. With high-resolution picture quality on large, extra-wide screens and sound quality equivalent to the fidelity of a digital compact disk, HDTV will not only redefine virtually every aspect of the television industry but will advance the electronics industry as well. The market for this new technology has been estimated to range from $20 to over $200 billion annually by the year 2010. The race to capture this market is on in Japan, Europe, and the United States. Japan, who fostered the development of HDTV in the late 1960's, had spent an estimated $700 million on its research and development by 1988. By that time, Europe had invested over $220 million, while the United States—the country that invented television—had invested virtually nothing.

Recently, however, both United States public and private sectors have realized the potential spoils involved in becoming a player in the manufacturing and distribution of HDTV. The hope is that if the United States can become competitive in the fruition of HDTV technology, the benefits will uplift America's sagging electronics industry. Having been responsible for the development of products such as ASICs, advanced microprocessors, optical disks, and other highly advanced digital technology to produce the wider, more highly defined picture. Robertson, *A Winning HDTV Script*, Electronic News, Feb. 27, 1989, at 8, col. 1; see also Kenny, *Get the Picture: A Guide to High-Technology TV*, STEREO REV., April 1989, at 65.


3. See Pollack, *supra* note 2, at Y21, col. 6 (stating that "using the American Electronics Association's own rosy projections for development of the technology, sales would only total about $30 billion in 2010"). *High Tech's Fickle Helping Hand*, TIME, Dec. 4, 1989, at 68 (noting that "the U.S. stands to lose 2 million jobs and suffer a $225 billion increase in its annual trade deficit by the year 2010 if it does not develop a coherent strategy to compete in HDTV and associated industries").


5. An American Electronics Association report says that the U.S. must re-enter the consumer electronics market by developing its own HDTV system or lose substantial world market share in semiconductors, microcomputers, factory automation, and telecommunications. Robertson, *AEA Study Says U.S. Needs HDTV*, Electronic News, Nov. 28, 1988, at 36, col. 1. HDTV's extensive use of semiconductors will bring about a revolution in electronics, and a U.S. market share of less than 10% will lose U.S. semiconductor firms 50% of their market share through the year 2010. If the Japanese control the HDTV market, they will be able to keep foreign competitors out of these semiconductor markets, which would reduce U.S. competitiveness in other sectors, such as personal computers, as well. Id. Michael Borrus, Deputy Director of the Berkeley Roundtable on the International Economy, for example, thinks that the focus should not be on HDTV but on "[h]igh volume high-technology." Pollack, *supra* note 2, at Y1, col. 3. Proponents of the HDTV effort feel that it is not meant to be a panacea but merely a beginning. Erich Bloch, former IBM vice president
as the computer chip and the VCR, American industry is well aware that invention and development of a new product is not tantamount to capturing the financial rewards of its commercial success. With this lesson in mind, America’s success or failure in the burgeoning HDTV industry must be viewed as paradigmatic of the country’s ability to compete in the new globalized marketplace.

In an effort to insure that the United States will play a role in producing this technology, members of the 101st Congress became increasingly focused on the potential of the joint venture format. Countries competing with the United States encourage joint venture activity for the efficiencies and economies which often ensue; yet, it is believed that U.S. producers are overly wary of even discussing the possibility of a joint venture for fear of an antitrust attack. At this stage of HDTV development, joint ventures may indeed be one of the few ways for American producers to participate. With this in mind, the Congress proposed several bills which would specifically aid the HDTV industry. While these “HDTV bills” vary on the questions of government subsidies and tax credits, most propose some form of antitrust amendment which would encourage United States producers to enter into joint ventures so that they may compete more evenly with producers from Europe and Japan.

In addition to the HDTV bills, Congress also proposed several “generic” bills which are geared to encourage joint ventures in all industries, including HDTV. As the current administration seems vehemently opposed to an industrial policy of picking specific indus-

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6. This can be demonstrated by the comments of the Speaker of the House, Thomas S. Foley, who stated: “Today, the America that invented the computer chip and the VCR has seen its market share shrink or vanish in both products. We are falling dramatically behind in new technologies such as high definition television.” T. Foley, Democratic Response to the 1990 Presidential State of the Union Address (Jan. 31, 1990) (available at the University of Miami Law Review office).


8. See infra notes 221-51 and accompanying text.


10. See infra notes 170-86 and accompanying text; see also Pollack, supra note 2, at Y1, col. 3.

tries for special treatment, these generic bills may be the greatest legislative hope for United States HDTV producers. The generic bills, by not discriminating as to industry, would ease the application of all antitrust laws to specific classifications of joint ventures. These classifications either would be limited to production, or under some of the proposals, would include distribution joint ventures as well.

Both the "HDTV" and the "generic" proposals attempt to encourage joint ventures by applying either a "certification" approach similar to that of the Export Trading Company Act of 1982 ("ETCA"), or by applying a "registration" approach like that of the National Cooperative Research Act of 1984 ("NCRA"). The ETCA, through its certification approach, allows companies collaborating in export to obtain an advanced certification which substantially immunizes them from antitrust attack. Alternatively, the NCRA registration approach presently aids research joint ventures, does not immunize them from antitrust attack, but allows them to register with the government in a manner that: (1) shelters them from the potential liability of triple damages inherent in American antitrust law; and (2) insures that a less draconian standard of review would be used in the event of antitrust litigation. The questions of which approach (certification, registration, or none) should be enacted, and which joint ventures (production, marketing, or HDTV only) should be covered, are of concern here.

This Comment evaluates these current bills which intend to invigorate the HDTV industry, and America's competitiveness in general, by fine tuning antitrust laws to encourage joint ventures. Section II defines the joint venture and differentiates between research, production, and distribution joint ventures. Section III outlines United States antitrust policy generally, with a discussion of the current judicial and legislative standpoints, and includes a focus on the ETCA and the NCRA. Section IV details the present "HDTV" and "generic" Congressional proposals. Section V examines the regulation of collaborative efforts in Japan and in the European Economic

12. See infra note 173 and accompanying text.
13. See infra notes 195-201 and accompanying text.
14. See infra notes 202-20 and accompanying text.
17. See infra notes 128-34 and accompanying text.
18. See infra notes 135-65 and accompanying text.
19. See infra notes 149-50 and accompanying text.
20. See infra notes 146-48 and accompanying text.
Community. Section VI discusses the relative merits of each proposal. Section VII concludes that an NCRA-type registration approach (as opposed to an ETCA-type certification approach) for production joint ventures (as opposed to distribution or HDTV-specific joint ventures) would be prudent and afford some of the necessary incentive to benefit American high-technology producers and allow them to compete fairly in the ever-changing globalized marketplace.

II. JOINT VENTURES DEFINED

Historically, joint ventures have been valuable tools for industry.\(^{21}\) In order to better understand the current legislative proposals (especially vis-à-vis the antitrust laws), it is helpful to be familiar with the different classifications of the joint venture format. Having been characterized as "one of the darkest corners of antitrust,"\(^{22}\) the American joint venture is a hybrid which has no uniform legal definition.\(^{23}\)

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As Justice Clark observed:

It is said that joint ventures were utilized in ancient times, according to Taubman, who traces them to Babylonian "commenda" and Roman "societas." Their economic significance has grown tremendously in the last score of years, having been spurred on by the need for speed and size in fashioning a war machine during the early forties. Postwar use of joint subsidiaries and joint projects led to the spawning of thousands of such ventures in an effort to perform the commercial tasks confronting an expanding economy.


23. For tax purposes, Taubman simply defined joint ventures as: "[any] association of two or more natural or judicial persons to carry on as co-owners [of] an enterprise, venture, or operation for the duration of that particular transaction or a series of transactions." J. Taubman, The Joint Venture and Tax Classification 83 (1957). Another definition of a joint venture is:

[a]n enterprise, corporation or partnership, formed by two or more companies, individuals, or organizations, at least one of which is an operating entity which wishes to broaden its activities, for the purpose of conducting a new, profit-motivated business of permanent duration. In general, the ownership is shared by the participants with more of less equal equity distribution and without absolute dominance by one party.

G. Young & S. Bradford, Joint Ventures: Planning and Action 11 (1977). Other definitions have varied substantially. See, e.g., N. Lattin, R. Jennings & R. Buxbaum, Corporations: Cases and Materials 35 (4th ed. 1968) (stating that the joint venture "is nothing more than an ad hoc partnership"); Ginsburg, Antitrust, Uncertainty, and Technological Innovation, 24 Antitrust Bull. 635, 670 (1979) (noting that "a joint venture can be seen as a partial rather than complete integration of two firms, which preserves pro tanto their capacity to compete with respect to the portion of their operations that is not integrated in the joint venture"); Note, Concerted Refusals to Deal Under the Federal Antitrust Laws, 71 Harv. L. Rev. 1531, 1536 (1958) (defining joint venture as "a group which undertakes an economically productive activity in concert in order to overcome the impracticability of any one mem-
Generally, a joint venture can be any association of two or more firms for achieving any commercial objective. However, Professor Brodley has defined joint ventures more narrowly for antitrust purposes:

"[A joint venture is an] integration of operations by two or more firms where: (1) the enterprise is under the joint control of the parent firms, which are not under related control; (2) each parent makes a substantial contribution to the joint enterprise; (3) the enterprise exists as a business entity separate from its parents; and (4) the joint venture creates significant new enterprise capability in terms of new productive capacity, new technology, a new product, or entry into a new market."

In other words, a valid joint venture must create some significant new capability. It exists to benefit its parent firms, is fueled financially or otherwise by its parent firms, and operates as a separate business entity rather than as a union.

ber's amassing sufficient capital for the project or in order to eliminate the economic waste involved in duplication of effort").

The definitional issue of joint ventures can also be viewed through an "exclusionary" approach in which certain joint actions are not joint ventures, for example: (1) a "naked restraint"—one where the joint conduct has no purpose apart from controlling output and/or increasing price; (2) a merger; or (3) an agreement to buy and sell assets or products or services with no additional relationship."

The Acting Director of the FTC's Bureau of Competition once stated that "[few terms in antitrust law are used with as much uncertainty as 'joint venture law.' ” Winslow, Joint Ventures—Antitrust Problems and Opportunities, 54 ANTITRUST L.J. 979, 979 (1985). Pitofsky notes that "[u]ncertain enforcement can be traced in part to problems of definition." Pitofsky, A Framework for Antitrust Analysis of Joint Ventures, 54 Antitrust L.J. 893, 893 (1985); see also Taubman, What Constitutes a Joint Venture?, 41 CORNELL L.Q. 640 (1956); Note, A Definitional Test for Joint Ventures, 31 WAYNE L. REV. 1251, 1254 (1985) (noting the need for a clear definition of joint ventures "to enable courts to prevent companies engaged in anticompetitive conduct from circumventing antitrust laws by hiding behind a joint venture facade").

24. Pogue, Antitrust Considerations in Forming a Joint Venture, 54 ANTITRUST L.J. 925, 925 (1985). The firms may be competitors or they may be in different geographic or product markets or at different levels on the distribution chain. See H. HOVENKAMP, ECONOMICS AND FEDERAL ANTITRUST LAW 111 (1985); Zwart, Innovate, Integrate, and Cooperate: Antitrust Changes and Challenges in the United States and the European Economic Community, 1989 UTAH L. REV. 63, 72-73.


26. The joint venture entity may operate under different legal forms. The parents may
There are various financial justifications for a company to cooperate in a joint venture.\textsuperscript{27} The benefits generally include achieving economies of scale\textsuperscript{28} or transactional economies,\textsuperscript{29} lowering risk through cost spreading,\textsuperscript{30} accelerating result horizons,\textsuperscript{31} and easing entry into new markets.\textsuperscript{32} Depending on the situation, a joint venture

enter into a partnership agreement or form a separate corporation of which they hold the shares. Zwart, \textit{supra} note 24, at 70. However, as a joint venture involves the creation of a new business, it is more comprehensive than a mere contractual arrangement. Brodley, \textit{Joint Ventures and Antitrust Policy, supra} note 25, at 1527. \textit{But see} United States v. Columbia Pictures Indus., 507 F. Supp. 412 (S.D.N.Y. 1980) (joint venture where control was achieved through contract terms rather than through ownership control).

27. One commentator listed the primary incentives for participating in a joint venture as: "(1) risk avoidance, (2) technology acquisition, (3) utilization of the assets and attributes belonging to partners, and (4) organizational superiority." Wright, \textit{supra} note 25, at 145.

28. Hovenkamp states that:

\begin{quote}
"The most traditional justification for joint ventures is that they can enable two or more firms working together to perform an activity at minimum optimal scale (MOS), while a single firm acting alone could not. For example, suppose that three firms use a particular, specialized metal alloy in the production of certain parts. Efficient production of the alloy requires a plant capable of producing 100,000 tons per year, but the three firms each require only 40,000 tons per year in their production process. If the three firms together build the plant they will be able to maintain output at an efficient rate."
\end{quote}

Pitofsky, \textit{supra} note 23, at 895; \textit{see also} Kitch, \textit{The Antitrust Economics of Joint Ventures}, 54 \textit{Antitrust L.J.} 957, 964 (1985) (discussing joint venture transactional efficiencies vis-à-vis the works of Coase and Williamson).

30. Wright, \textit{supra} note 25, at 145. While the overall risk of a given project is the same whether under the joint venture form or not, a share in several projects can reduce total exposed risk. \textit{Id.} Risk sharing is a very common pro-joint venture consideration which "doesn't really exist in any of the other alternatives." De Lone, \textit{The Joint Venture Versus Other Alternatives}, 54 \textit{Antitrust L.J.} 915, 917 (1985).

31. Joint ventures were extensively used during World War II "having been spurred on by the need for speed and size in fashioning a war machine during the early forties. Postwar use of joint subsidiaries and joint projects led to the spawning of thousands of such ventures in an effort to perform the commercial tasks confronting an expanding economy." United States v. Penn-Olin Co., 378 U.S. 158, 169 (1963) (emphasis added).

32. \textit{See Joint International Business Ventures} 197 (W. Friedmann & G. Kalmanoff eds. 1961) "(In a number of less developed countries, a foreigner is precluded by law or policy from investing in certain industries except on a joint venture basis."). This may also be done in a subtler manner than direct government regulation. Japanese producers, for example, may reduce trade barriers for American corporations who join their cartels, thus enabling the Japanese to "control the situation." 57 Antitrust & Trade Reg. Rep. (BNA) 115 (1989) (quoting Joseph Alioto, Jr., antitrust practitioner); \textit{see} R. KOMIYA, M. OKUNO & K. SUZUMURA, \textit{Industrial Policy of Japan} 180 n.16 (1988) (MITI refused to allow Texas Instruments a license to establish a subsidiary that would produce semiconductors unless it agreed to, among other things, a 50-50 joint venture with a Japanese company.). \textit{See generally}
format may present significant advantages over the alternatives of contractual arrangements, mergers, or internal expansion. However, joint ventures may also be inviting for their ability to cloak competitors or potential competitors who are engaged in collusive practices such as price fixing, output restriction, and monopoly-creating market division. This latter category of “advantages” gives rise to legitimate antitrust concerns.

As the mere characterization of an enterprise “as a ‘joint venture’ is to say nothing about its effect on competition or its legality under the antitrust laws,” in examining joint ventures from an antitrust perspective, more specific classification is helpful. A joint venture can be classified by the central or final stage of the business cycle in which it is intended to operate.


33. Other than the joint venture, the three basic options for firms attempting to expand in either research and development, production, or marketing are: (1) acquisition or merger; (2) contract, e.g., supply and distribution agreements; and (3) internal expansion. De Lone, supra note 30, at 916; see Brodley, supra note 25, at 1528 (“[A] merger may neither make economic sense nor be desired by the parties. In addition, mergers can themselves raise serious antitrust problems.”); De Lone, supra note 30, at 919 (Internal expansion, in some instances, can be an unattractive alternative.); Pitofsky, supra note 23, at 895-96 (Contractual arrangements may require anticipation of a prohibitive amount of contingencies and mergers may be politically or commercially undesirable.); Wright, supra note 25, at 146 (“[The joint venture] can be formed for a discrete project or series of projects, the participants need not totally merge all their assets and operations, and each co-venturer retains more control over the direction of the enterprise than would a mere investor.”); see also Rule, The Administration’s Views on Joint Ventures, 54 Antitrust L.J. 1121, 1125-28 (1985) (The article discusses a joint venture which was the solution to competitive problems caused by merger (citing United States v. Alcan Aluminum Ltd., 1985-1 Trade Cas. (CCH) ¶ 66,427 (W.D. Ky. 1985))).

34. H. Hovenkamp, supra note 24, at 111; see also Pitofsky supra note 23, at 895 (“Some joint ventures are little more than cloaks for cartel-like activities—allowing the parties to adopt a non-aggression pact with respect to present and future competitive activities.”).

35. H. Hovenkamp, supra note 24, at 111; see Timken Roller Bearing Co. v. United States, 341 U.S. 593, 598 (1951) (“Nor do we find any support in reason or authority for the proposition that agreements between legally separate persons and companies to suppress competition among themselves and others can be justified by labeling the project a ‘joint venture.’ Perhaps every agreement and combination to restrain trade could be so labeled.”).

36. However, there are other ways to classify joint ventures. Brodley has developed a system which classifies joint ventures on the relation of the venture to the parents' business operations: (1) horizontal joint ventures, (2) output joint ventures, (3) input joint ventures, (4) related market joint ventures, and (5) interlocking joint ventures. Brodley, Joint Ventures and Antitrust Policy, supra note 25, at 1552. Jorde and Teece classify “operating joint ventures” as a separate enterprise that performs sets of activities on behalf of the parents. In contrast, “non-operating joint ventures” are those in which the enterprise contracts with their parents and other parties to perform the collaborative activity. Jorde & Teece, Innovation, Cooperation, and Antitrust, 4 High Tech. L.J. 1, 25 (1989); see also Practicing L. Inst., 27th Advanced Antitrust Seminar: Mergers, Markets and Joint Ventures 298-99 (1987) (classifying joint ventures into three categories: (1) backward joint ventures formed
tures, production joint ventures, and distribution joint ventures. Firms in any of these joint ventures must not only forgo the ability to remain independent but must deal with conflicts that may arise in such areas as the divvying up percentages of input and reward and the choosing of other venture partners. Yet, despite these inherent problems with participating in joint ventures, there are also distinct advantages within each classification.

Research joint ventures can speed up the development and innovation of new technologies by pooling such assets as labor and knowledge. They take advantage of economies of scale by eliminating duplication of costly research allowing otherwise wasted resources to be invested in other areas. Additionally, they help to minimize the problem of firms “free riding” on the results of research which cannot be effectively protected by patents or other means, thereby aiding firms who might otherwise forgo the potential result. Recognizing these benefits, and in an effort to increase United States competitive-

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by competitors to supply a product or service useful to their industry; (2) forward joint ventures formed for joint marketing of competing finished products; and (3) new market joint ventures formed to exploit or create a new product or market). However, this does not preclude other possible venture forms. See W. FRIEDMANN & J. BÉGUIN, JOINT INTERNATIONAL BUSINESS VENTURES IN DEVELOPING COUNTRIES 3 (1971) (“[T]he joint capital venture [is] an enterprise in which two or more parties, representing one or several developed and one or several developing countries, share the financial risks and the decision-making though joint equity participation in a common enterprise.”).

37. See P. AREEDA, ANTITRUST LAW ¶ 1477, at 348 (1986) (A “joint venture” usually refers to a research, production, or marketing enterprise.”). Vakerics divides joint ventures into two broad categories: production and marketing joint ventures (P&MJVs), and research and development joint ventures (R&DJVs). T. VAKERICS, ANTITRUST BASICS § 10.1, at 10-5 (1989).

38. See Zwart, supra note 24, at 72-73.

39. For example, problems occurred in IBM’s relation with the Sematech joint venture due to IBM’s desire to join JESSI (a European joint venture). As IBM produces about 35% of its chips in Europe, it did not want to close off this market. However, Sematech refuses to admit foreign players for fear that the Japanese will also enter. Smith, Can Consortums Defeat Japan?, FORTUNE, June 5, 1989, at 245-54.

40. Wright states that:

Individual firms lacking all the ingredients necessary for a successful research project (e.g. trained personnel, essential patents and licenses, or access to raw materials) are likely to form research joint ventures with other firms possessing different missing ingredients . . . [that] may produce a synergistic effect which lowers the total cost of R&D.

Wright, supra note 25, at 148.

41. Id. (“When effective research requires extremely expensive facilities which small firms cannot afford by themselves, a joint venture may result in an overall increase in R&D.”).

42. “Research and development (R & D) and advertising are two areas in which free rider problems are significant. . . . A research joint venture will benefit all the firms in the market, however, and force all to share in the costs.” H. HOVENKAMP, supra note 24, at 114. Patents and intellectual property law have only limited effectiveness in protecting technologies from free rider activity. See Jorde & Teece, supra note 36, at 6.
ness, Congress passed the NCRA which gives a level of antitrust certainty to firms specifically engaging in research (as opposed to production or distribution) joint ventures.43

Production joint ventures have the ability to harvest the tremendous economies of scale available in large-scale production44 and may also accelerate the production process.45 They have been used to acquire more sophisticated manufacturing techniques and to gain knowledge of foreign markets.46 Also, the production joint venture scenario may facilitate capital formation in situations where institutions are more amenable to lending on the credit of several firms rather than one.47 Similarly, where investment cost is prohibitive to a single firm, a production joint venture may permit that investment's realization through cost sharing and risk spreading.48

Flexibility is one of the distribution joint venture's main advantages; however, this flexibility may also lead to antitrust uncertainty. Distribution joint ventures have been used to educate consumers,49 consolidate inefficient selling practices,50 form purchasing cooperatives,51 and market private label products.52 Export joint ventures are distribution joint ventures formed to compete with disparate offshore

43. For a detailed discussion of the NCRA, see infra notes 135-65 and accompanying text.
44. "Reasons for expecting economies of scale in production are many. Specialization and division of labour in production, the existence of indivisibilities, the economies of increased physical dimensions of some plants, and economies of manual resources are often quoted." D. HAY & D. MORRIS, INDUSTRIAL ECONOMICS THEORY AND EVIDENCE 41 (1979).
45. See generally id. at 41-47, 141-80.
46. See Weinbaum, Antitrust Problems in Conducting the Joint Venture's Business Activities, 54 ANTITRUST L.J. 993, 996 (1985) (The General Motors/Toyota production joint venture was an opportunity for GM to learn "a great deal" from the Japanese about small car production, while Toyota was able to see if it could adapt American suppliers and unions to Japanese production methods.). Currently, in this era of global democratization, joint ventures are being used to gain access to formerly communist countries. See Ticket to Europe: Joint Ventures, USA Today, March 13, 1990, at B6, col. 5 ("General Motors and Volkswagen have just announced separate joint ventures in which each will build cars in East Germany.").
47. Small high technology firms have particular problems with capital formation. Banks generally base their willingness to lend money on the firm's physical assets but "a large proportion of [small firms'] assets are contained in the technological potential or their new products." R. OAKEY, R. ROTHWELL & S. COOPER, THE MANAGEMENT OF INNOVATION IN HIGH-TECHNOLOGY SMALL FIRMS 164 (1988).
48. Id. at 129-30.
49. Trade associations are common examples of joint ventures formed by particular industries to educate their customers.
50. See, e.g., Broadcast Music, Inc. v. Columbia Broadcasting Sys., 441 U.S. 1 (1979); see also infra notes 103-07 and accompanying text.
trade policies. Agreements to form television networks, coordinate and limit network coverage of sports leagues, and agreements to collect and share data are also examples of distribution joint ventures. With so many different possible applications, the distribution joint venture deserves especially close antitrust scrutiny.

III. UNITED STATES ANTITRUST PERSPECTIVE

A. Generally

There is an arsenal of statutory provisions which a plaintiff may employ to attack joint ventures. The Sherman Act is the primary deterrent of joint venture activity. Section 1 of the Sherman Act prohibits every business combination or conspiracy which unreasonably restrains trade, and it can be construed to assert that "[c]oncerted conduct is inherently suspicious." Section 2, although generally applied to the independent conduct of a single firm, would also apply insofar as the joint venture involves actual or attempted monopolization. Under the Clayton Act, if the joint venture is a corporation, it may be reviewed using the merger provision of Section 7 which prohibits corporate acquisitions that lessen competition. Moreover,


55. See, e.g., NCAA v. Board of Regents, 468 U.S. 85 (1984); infra notes 115-18 and accompanying text.


57. 15 U.S.C. § 1 (1988). Section 1 of the Sherman Act states: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." Id.

58. H. HOVENKAMP, supra note 24, at 92.


No person engaged in commerce or in any activity affecting commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another person
under the Federal Trade Commission Act, a joint venture may be analyzed using Section 5 which prevents "unfair methods of competition."

Antitrust laws may be enforced by the government or by private plaintiffs. Two federal agencies share jurisdiction to bring government suits: the Federal Trade Commission ("FTC"), an independent administrative agency; and the Antitrust Division of the Department of Justice ("DOJ"), under the direction of the Attorney General, and indirectly, the President. Private actions for damages or injunctive relief may be brought by a firm's competitors or by persons that might sell to, or purchase from the venture. Approximately ninety-five percent of all antitrust actions are brought privately. To encourage these private suits, United States law automatically awards a successful private plaintiff three times the actual damages. This provision engaged also in commerce or in any activity affecting commerce, where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.


62. See J. BURNS, ANTITRUST DILEMMA: WHY CONGRESS SHOULD MODERNIZE THE ANTITRUST LAWS 8-9 (1969). The agencies have an agreement to allocate investigations efficiently and they "work out between themselves which agency has the greater expertise to handle a particular investigation." Winslow, Joint Ventures—Antitrust Problems and Opportunities, ANTITRUST L.J. 979, 980 (1985). It should also be noted that the Justice Department is able to actively enforce antitrust laws using criminal liability for corporate executives. See generally Grippando, Caught in the Non-Act: Expanding Criminal Antitrust Liability for Corporate Officials, 34 ANTITRUST BULL. 713 (1989).


[A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has
for treble damages has come under increasing criticism for discouraging efficient behavior, overdeterring, and impairing American firms’ ability to compete internationally. In addition to treble damages, the prevailing plaintiff will be awarded attorney fees, contrary to the "American Rule" of each party paying for its own counsel.

In deciding Sherman Act cases, courts may use one of two methods of scrutinizing a firm’s activities. Under the rule of reason method, a court will attempt a balancing of the procompetitive versus the anticompetitive effect of the agreement. If the agreement is found to be net anticompetitive, it is illegal under the rule of reason. Conversely, under the per se method, a court will decide if the agreement is of a type which will almost always produce an anticompetitive effect. Agreements to boycott, fix prices, limit production, engage in tie-ins, and share horizontal markets have been held as illegal per se.

The ease of winning an antitrust suit is often dependant upon which method of analysis a court decides to use. Under rule of reason analysis, the plaintiff generally has a burden to establish the market’s size and structure, the costs involved, the existence of other parties, and the disincentives for the other parties to engage in the same activities which the venture creates. Under per se analysis, a plaintiff must only show that the anticompetitive practice took place and the extent of the resultant damages. A court may hold that the per se rule prevents it from considering relevant facts—such as a defendant’s market power and efficiencies or reductions in cost which were

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68. See National Soc’y of Professional Eng’rs v. United States, 435 U.S. 679 (1987) (Antitrust cases are to be analyzed under either a rule of reason or a per se method.).
69. See, e.g., infra notes 71, 89 & 96 and accompanying text.
71. In Chicago Bd. of Trade v. United States, 246 U.S. 231 (1918), the court stated: [T]he court must consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant factors.

Id. at 238.
72. Id.
73. See, e.g., infra notes 108-14 and accompanying text.
passed along to the end consumer. Thus, under rule of reason analysis the defendant is in a better position, while per se analysis favors the plaintiff.

The ease of winning per se cases—coupled with the windfall potential of treble damages and attorney fees—has been blamed for encouraging suits whose sole motive is to stifle competition or obtain large settlements. United States industry has become wary of entering into even innocuous agreements for fear of having to defend an antitrust action. Indeed, antitrust cases concerning joint ventures support this fear as they demonstrate the perennial lack of uniformity.

B. Case Law Applicable to Joint Ventures

Although it may appear that there is a facile division between a per se and a rule of reason analysis, in practice, the Supreme Court’s case history has been ambiguous and unclear from its inception. By tracking this history, one can see that the Court has taken vacillating, if not contradictory, positions as to whether certain conduct is to be analyzed under the per se or rule of reason standard. This has caused uncertainty for potential joint venturers.

United States v. Trans-Missouri Freight Association was the first antitrust case the Supreme Court ever decided on the merits, and some have referred to it as a joint venture case. In Freight Association, a consortium of eighteen railroad companies entered into a joint running association which coordinated members’ schedules, transfer of cargo, and freight rates. In its decision, the Court queried: “What is the meaning of the language as used in [Section 1 of the Sherman Act], that ‘every contract, combination in the form or trust

75. See Cavanagh, supra note 66, at 826-29.
76. Id. at 809-10. Cavanagh discusses the fact that when faced with such actions, companies often decide that settlements are the better alternative even if the claim is baseless. Id. Professor Folsom states that:
I’m opposed to eliminating the treble-damage element but I have to tell you that, based on my experience here in the private sector, I’m convinced that there are an enormous number of treble-damage cases that have no logical basis other than the hope that—because litigation is so costly—the defendants will give the plaintiffs some money.
77. 166 U.S. 290 (1897).
78. While this case seems to involve merely cartel price fixing, the association can be viewed as a joint venture. See H. HOVENKAMP supra note 24, at 111; Kitch, supra note 29, at 957 n.2.
or otherwise, or conspiracy in restraint of trade or commerce . . . is hereby declared to be illegal? Is it confined to a contract or combination which is only in *unreasonable* restraint of trade or commerce . . . ?"\(^{80}\) The Court decided that "[t]he term is not of such limited signification,"\(^{81}\) and refused to hold that only unreasonable restraints of trade were in violation of the Sherman Act.\(^{82}\)

Thirteen years later, however, the Court in *Standard Oil v. United States*\(^{83}\) gave a paradoxical explanation for *Freight Association* by saying that:

> It is undoubted that in [Freight Association] general language was made use of, which, when separated from its context, would justify the conclusion that it was decided that reason could not be resorted to for the purpose of determining whether the acts complained of were with in the statute . . . . [However,] [a]s the case[ ] cannot by any possible conception be treated as authoritative without the certitude that reason was resorted to for the purpose of deciding [it], it follows as a matter of course that it must have been held by the light of reason . . . .

> . . .

If the criterion by which it is to be determined in all cases whether every contract, combination, etc., is a restraint of trade within the intendment of the law, is the direct or indirect effect of the acts involved, then of course the *rule of reason* becomes the guide, and the construction which we have given the statute, instead of being refuted by [Freight Association], is by [that] case[ ] demonstrated to be correct.\(^{84}\)

Thus, the first vague "rule of reason" standard was established in the common law.

Seven years later in *Board of Trade v. United States*,\(^{85}\) the Court attempted to more clearly define this rule of reason. The issue was a "call" price agreement between competing members of the Chicago Board of Trade.\(^{86}\) Under the "call" rule, Board members were allowed to trade commodities after regular trading hours, but only at the price of the previous session's closing.\(^{87}\) Although the government urged that this was illegal price fixing by competitors, the Court

\(^{80}\) Id. at 327 (emphasis added).
\(^{81}\) Id. at 328.
\(^{82}\) Id. at 341-43.
\(^{83}\) 221 U.S. 1 (1911).
\(^{84}\) Id. at 64-66 (emphasis added).
\(^{85}\) 246 U.S. 231 (1918).
\(^{86}\) The Chicago Board of Trade is one of the most perfect "real" world markets with hundreds of buyers and sellers and nearly instantaneous price information. See H. HOVENKAMP, supra note 24, at 121.
\(^{87}\) *Board of Trade*, 246 U.S. at 237.
found the "bald proposition" of price fixing to be too "simple a test." Holding that the call rule was a reasonable regulation of business, Justice Brandeis stated:

Every agreement concerning trade, every regulation of trade, restrains. . . . The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts.

For the first time, however, in the 1940 distribution joint venture case of United States v. Socony-Vacuum Oil, the Court limited this application of the rule of reason in favor of assumptions that certain types of agreements have a pernicious effect on competition and are illegal per se. In Socony, an association of gasoline producers agreed to allocate the gasoline supply. The depression-era agreement was public and known to the government. Although there was no actual price fixing, members of the association did make price "recommendations." Justice Douglas concluded that: "[u]nder the Sherman Act a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal per se."

In the seminal 1964 joint venture decision, the Court in United States v. Penn-Olin Chemical again demonstrated the determinative value of per se analysis versus rule of reason analysis. Penn-Olin Chemical Company was a joint venture to produce sodium chlorate for use in the paper industry by two parent companies who thought that such production would be too risky to enter into without a partner. Justice Clark's majority opinion affirmed the lower court's rule

88. Id. at 238.
89. Id.
90. 310 U.S. 150 (1940).
91. Id. at 223-24.
92. Id. at 179-83. Under the allocation agreement, each large producer was assigned to independent producers who did not have strong marketing ability. The major producers, therefore, were in a position to gear their own output and total output may have decreased in the process. Id. at 194-200.
93. Id. at 223.
95. Id. at 166-67.
of reason analysis on the Sherman Act charge. This was despite the strong dissent of Justices Douglas and Black who stated that: "[a]greements among competitors to divide markets are per se violations of the Sherman Act."

The judicial pendulum swung back in 1971. The Court in United States v. Topco Associates reverted to per se analysis in finding that a distribution joint venture was in violation of the Sherman Act. In Topco, an association was established to purchase and distribute private label foods among twenty-five small grocery chains. Each member was assigned a market, although the average member's share in each market was only six percent. This arrangement allowed these smaller chains to compete more efficiently against larger chains who could afford to produce and advertise their own labels. However, the Court held that the agreement was to horizontally divide territory and, therefore, illegal per se. Justice Marshall wrote that "[w]hether or not we would decide this case the same way under the rule of reason used by the District Court is irrelevant to the issue before us." Chief Justice Burger stated that "[t]he per se rules...are directed to the protection of the public welfare; they are complementary to, and in no way inconsistent with, the rule of reason." Yet, Topco does seem to be inconsistent with the Court's 1987

96. Id. at 175-77. Regarding the Clayton Act Section 7 charge, the Court listed 15 criteria to consider "in assessing the probability" a manufacturing joint venture would substantially lessen competition:

[1] the number and power of the competitors in the relevant market; [2] the background of their growth; [3] the power of the joint venturers; [4] the relationship of their lines of commerce; [5] the competition existing between them [6] and the power of each in dealing with the competitors of the other; [7] the setting in which the joint venture was created; [8] the reasons and necessities for its existence; [9] the joint venture's line of commerce and [10] the relationship thereof to that of its parents; [11] the adaptability of its line of commerce to noncompetitive practices; [12] the potential power of the joint venture in the relevant market; [13] an appraisal of what the competition in the relevant market would have been if one of the joint venturers had entered into it alone instead of through [the joint venture]; [14] the effect, in the event of this occurrence, of the other joint venturer's potential competition; and [15] such other factors as might indicate potential risk to competition in the relevant market.

97. Id. (Douglas, J., dissenting and joined by Black, J.) (footnotes omitted).
98. 405 U.S. 596 (1972).
99. Id. at 599-600.
100. Id.
101. Id. at 609.
102. Id. at 621 (Burger, C.J., dissenting); see also Mt. Vernon Sundat, Inc. v. Nissan Motor Corp., 1976-1 Trade Cas. (CCH) ¶ 60,842 (E.D. Vir. 1976) (Price fixing by a regional car dealer association's advertising plan is a per se violation of the Sherman Act.)
decision in Broadcast Music, Inc. v. Columbia Broadcasting System.\(^\text{103}\) Broadcast Music, Inc. ("BMI"), a distribution joint venture of musical composers, publishers, and owners sold "blanket licenses" permitting the licensee to use anything in the BMI library. The price of this license varied according to the buyers' revenues, a type of price discrimination that can only exist if the seller has monopoly power.\(^\text{104}\) Although the Court found that this was "'price-fixing' in the literal sense,"\(^\text{105}\) it refused to find that it was illegal per se:

[The] per se rule is a valid and useful tool of antitrust policy and enforcement. And agreements among competitors to fix prices on their individual goods or services are among those concerted activities that the Court has held to be within the per se category. But easy labels do not always supply ready answers.

... [They] have joined together into an organization that sets a price for the blanket license it sells. But this is not a question simply of determining whether two or more potential competitors have literally "fixed" a "price." ... [When] two partners set the price of their goods or services they are literally "price fixing" but they are not per se in violation of the Sherman Act. ... Thus, it is necessary to characterize the challenged conduct as falling within or without that category of behavior to which we apply the label "per se price fixing." That will often, but not always, be a simple matter.\(^\text{106}\)

The Court justified the blanket licensing because "a bulk license of some type is a necessary consequence of the integration necessary to achieve ... efficiencies, and a necessary consequence of an aggregate license is that its price must be established."\(^\text{107}\)

A 1982 case, Arizona v. Maricopa County Medical Society,\(^\text{108}\) again blurred the picture for prospective joint adventurers. There, a group of doctors agreed to set certain maximum fees for specific services and insurance companies agreed to pay the full costs of those services provided by a participating physician.\(^\text{109}\) However, the Court implied that this was actually disguised minimum price fixing, therefore, illegal per se.\(^\text{110}\) Justice Stevens attempted to justify this deter-

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103. 441 U.S. 1 (1979).
104. This could be viewed as an example of monopolistic price discrimination. See generally R. GIVENS, supra note 70, §§ 10.1-.10.
105. 441 U.S. at 8.
106. Id. at 8-9 (footnotes omitted).
107. 441 U.S. at 17 n.27. The Court inquired whether the practice was "one designed to 'increase economic efficiency and render markets more, rather than less, competitive.'" Id. at 20 (quoting United States v. United States Gypsum Co., 438 U.S. 422, 441 n.16 (1978)).
109. Id. at 339-41.
110. Id. at 349.
mination by citing judicial economy and experience:

The costs of judging business practices under the rule of reason . . . have been reduced by the recognition of per se rule. Once experience with a particular kind or restraint enables the Court to predict with confidence that the rule of reason will condemn it, it has applied a conclusive presumption that the restraint is unreasonable.111

This decision has been criticized for being too quick to make that confident prediction because, in doing so, the Court failed to thoroughly analyze evidence which could have easily led to a different outcome under the rule of reason.112 The Court's own opinion noted that eighty-five to ninety-five percent of all physicians in Maricopa County charged at or above the agreed-on rates and the insurance companies had agreed to the lower prices.113 Additionally, doctors were free to come and go from the plan as they wished. Thus, "[t]hese facts are absolutely inconsistent with the economics of cartelization"114 and a rule of reason examination may have allowed the agreement to protect consumers by reducing health care costs.

More recently, the Court examined a plan by the NCAA which limited the total amount of televised intercollegiate football games and the number of any games that any one college would be able to televise in NCAA v. Board of Regents.115 While the court of appeals held that this television plan was illegal price fixing per se,116 the Supreme Court used a rule of reason analysis to determine whether the apparent purpose and the actual operation of the agreement was intended to reduce competition, and whether it actually did so.117 To the surprise of those who thought that rule of reason analysis meant automatic exoneration, the Court held that this joint venture imposed restraints on price and output without achieving any positive or procompetitive result and, as a result, violated Section 1 of the Sherman Act.118

Currently, the rule of reason approach as applied in NCAA and Broadcast Music would seem to be good law for the potential joint venture to follow, however, as one commentator noted:

Per se treatment here may be contrary to current scholarly views

111. Id. at 343-44.
112. See H. HOVENKAMP, supra note 24, at 133.
113. 457 U.S. at 341 n.10.
114. H. HOVENKAMP, supra note 24, at 133.
116. Id. at 97-98.
117. Id. at 103-04.
118. Id. at 120.
as to what the law should be, but one cannot always depend on the courts to ignore cases that may seem outdated to the commentators, as we all know. It's a bit like the cross-eyed javelin thrower: he shouldn't be dangerous, but he bears watching. In fact, one can see this “cross-eyed javelin thrower” in cases like Federal Trade Commission v. Indiana Federation of Dentists, where an organization of dentists had a policy of withholding X-rays from dental insurers evaluating patients' claims. As the conduct resembled a per se offense, the Court declared the conduct illegal under the rule of reason—but without a substantial market analysis. The fact is that businesses evaluating the history and the current state of antitrust law are presented with a fuzzy and confusing picture. Specific legislation is necessary to encourage procompetitive joint ventures by presenting a focused policy and a consistent antitrust law.

C. Antitrust Legislation Applicable to Joint Ventures

It has been estimated that between eleven and twenty-two percent of the nation's gross national product is directly affected by some antitrust exemption. In fact, the first attempt to secure a legislative antitrust exemption occurred even before the Sherman Act was passed. Many exemptions permit specific joint activity based on the policy of assisting American business in competing with foreign trade or more dominant industry. Exemptions have been granted to, among others: agricultural cooperatives and fisheries, ocean ship-

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120. 476 U.S. 447 (1986).
121. Id. at 460-61; 468 U.S. at 109-10.
122. 476 U.S. at 462-63.
123. See Pogue, American Bar Association Section of Antitrust Law Committee on Antitrust Exemptions, Antitrust Exemptions, Introduction, 33 ANTITRUST L.J. 1, 1 (1967). Exemptions are made across a wide spectrum of industry and they are often carved-out to protect natural monopolies or oligopolies such as professional sports associations, commodities and securities boards of trade and exchanges, and patent and copyright holders. Some of these exemptions are justified by the need to maintain favorable federal-state relations, while others allow the federal government to engage in contracts for national defense needs. Exemptions also exist for labor organizations, insurance companies, and the so-called learned professions. Id.
124. In 1889 and 1890 attempts were made to exempt labor and agricultural organization from the bills that led to the Sherman Act. Id. at 1 n.2.
125. When the Sherman Act became law, farm cooperatives and unions became subject to prosecution under the Sherman Act, see, e.g., Georgia Fruit Exch. v. Turnipseed, 9 Ala. App. 123, 62 So. 542 (1913); Ford v. Chicago Milk Shippers' Ass'n, 155 Ill. 166, 39 N.E. 651 (1895); Reeves v. Decorah Farmers' Coop. Soc'y, 160 Iowa 194, 140 N.W. 844 (1913), but by 1918 they had become strong enough to effectively lobby Washington for exemption. Congress adopted Section 6 of the Clayton Act as national policy acknowledging the "need to allow individuals to join together to attain competitive strength in an economic society dominated by increasingly powerful business and industrial forces." Noakes, American Bar Association
Section of Antitrust Law Committee on Antitrust Exemptions, Antitrust Exemptions, Agricultural Cooperatives, 33 ANTITRUST L.J. 7, 8 (1967). Section 6 of the Clayton Act provides that:

Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.


pers’ associations, and newspapers acting in concert. However,

126. A protective exemption has existed since 1916 for ocean shippers in foreign commerce which allows steamship lines to organize into pools and agree to offer preferential rates to shippers who agree to use those lines exclusively. Although the Shipping Act, ch. 451, 39 Stat. 728 (1916) (codified as amended at 42 U.S.C. §§ 801-842 (1982)) (scattered portions repealed in 1984), was actually silent on the issue of “double pricing,” the practice was an accepted part of the shipping industry until it was successfully challenged by the Justice Department in Federal Maritime Bd. v. Isbrandtsen Co., 356 U.S. 481 (1958). This practice was rejected by the Court as per se unreasonable where “used as [a] predatory device.” Id. at 499-500; see also Far East Conference v. United States, 342 U.S. 570 (1952). A major effort was then joined by many in government, including the White House, the Department of Agriculture, the Department of Commerce, the Department of State, the Federal Maritime Board, the shipping conferences, and even the shippers, which effectively forced Congress to “clarify” the legal status of these contracts and allow this dual rate structure subject to limitations. See Berghoff, Ocean Shipping Conferences, 33 Antitrust L.J. 56, 60-61 (1987). The Shipping Act of 1916 was modified to state that:

[O]n application, the Federal Maritime Commission shall, after notice and hearing, by order, permit the use by any common carrier or conference of such carriers in foreign commerce of any contract . . . which is available to all shippers and consignees on equal terms and conditions, which provides lower rates to a shipper or consignee who agrees to give all or any fixed portion of his patronage to such carrier or conference of carriers unless the Commission finds that the contract . . . will be detrimental to the commerce of the United States or contrary to the public interest, or unjustly discriminatory or unfair as between shippers, exporters, importers, or ports . . . . Shipping Act § 14b, 46 U.S.C. § 813a (1982) (repealed 1984). Although this portion of the modification is now repealed, what remains arguably still permits such agreements:

The Commission shall by order . . . disapprove, cancel or modify any [rate agreement] that it finds to be unjustly discriminatory . . . . No such agreement shall be approved, nor shall continued approval be permitted for any agreement (1) between carriers not members of the same conference or conferences of carriers serving different trades that would otherwise be naturally competitive, unless in the case of agreements between carriers, each carrier, or in the case of agreement between conferences, each conference, retains the right of independent action, or (2) in respect to any conference agreement, which fails to provide reasonable and equal terms and conditions for admission . . . .

. . . .

Every agreement . . . lawful under this section shall be excepted from the provisions of the Act approved July 2, 1890 entitled "An Act to protect trade and commerce against unlawful restraints and monopolies, and amendments and Acts supplementary thereto . . . .


(a) It shall not be unlawful under any antitrust law for any person to perform, enforce, renew, or amend any joint newspaper operating arrangement entered into prior to July 24, 1970, if at the time at which such arrangement was first entered into, regardless of ownership or affiliations, not more than one of the newspaper publications involved in the performance of such arrangement was likely to remain or become a financially sound publication: Provided, That the terms of a renewal or amendment to a joint operating arrangement must be filed
the current joint venture proposals are generally modeled upon exemptions which have been set out by both the Export Trading Company Act ("ETCA") (for companies collectively engaged in exporting), and by the National Cooperative Research Act ("NCRA") (for companies involved in research joint ventures). Therefore, understanding the mechanics of these acts is a vital springboard to comprehending the current proposals.

1. EXPORT TRADING COMPANY ACT OF 1982 ("ETCA")

Although the ETCA was enacted in 1982, the Act and its certification procedure—a model for the current legislation—was the result of a lengthy evolution. American exporters have long claimed that they have been unfairly disadvantaged by foreign competition which was often in the form of combinations and cartels. Responding to these concerns, Congress passed the Webb-Pomerene Act of 1918 which provided a system whereby the Sherman Act shall not "be construed as declaring illegal an association entered into for the sole purpose of engaging in export trade and actually engaged solely in such export trade, or an agreement made or act done in the course of export trade by such association." However, because the Webb-Pomerene Act is limited to associations whose sole purpose is exporting, and because it contains no actual provision for advance certification that would insure favorable treatment, Congress eventually passed the ETCA in 1982.

with the Department of Justice and that the amendment does not add a newspaper publication or newspaper publications to such arrangement.

It shall be unlawful for any person to enter into, perform, or enforce a joint operating arrangement, not already in effect, except with the prior written consent of the Attorney General of the United States. . . .

Nothing contained in the chapter shall be construed to exempt from any antitrust law any predatory pricing, any predatory practice, or any other conduct in the otherwise lawful operations of a joint newspaper operating arrangement which would be unlawful under any antitrust law if engaged in by a single entity.


The ETCA "is intended to increase U.S. exports of goods and services by authorizing banks to invest in export trading companies [and] by exempting many joint export activities from U.S. antitrust laws." While leaving Webb-Pomerine in place, the ETCA established a certification procedure whereby any export association (including those comprised of firms who engage in activities other than exporting) may be immunized from all United States antitrust laws. The Department of Commerce and the Justice Department will certify an export association after jointly determining that its conduct meets certain standards. Certification will completely preclude criminal or civil suits by any government or private body on grounds covered by the certificate. Although private parties may sue for damages if the standards are violated, treble damages are eliminated. Furthermore, should the plaintiff lose, the court may award the prevailing defendant its costs and attorney fees. This certification system stands in contrast to

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133. 15 U.S.C. § 4013. The Act provides, in part:

A certificate of review shall be issued to any applicant that establishes that its specified export trade, export trade activities, and methods of operation will—

(1) result in neither a substantial lessening of competition or restraint of trade within the United States nor a substantial restraint of the export trade of any competitor of the applicant,
(2) not unreasonably enhance, stabilize, or depress prices within the United States of the goods, wares, merchandise, or services of the class exported by the applicant,
(3) not constitute unfair methods of competition against competitors engaged in the export of goods, wares, merchandise, or services exported by the applicant, and
(4) not include any act that may reasonably be expected to result in the sale for consumption or resale within the United States of the goods, wares, merchandise, or services exported by the applicant.

Id. § 4013(a).
134. Id. § 4016. The Act reads in part:

Except as provided in subsection (b) of this section, no criminal or civil action may be brought under the antitrust laws against a person to whom a certificate of review is issued . . . which is based on conduct which is specified in, and complies with the terms of, a certificate issued under section 4013 of this title which certificate was in effect when the conduct occurred.

(1) Any person who has been injured as a result of conduct engaged in under a certificate of review may bring a civil action for injunctive relief, actual damages, the loss of interest on actual damages, and the cost of suit (including a reasonable attorney's fee) for the failure to comply with the standards of section 4013(a) . . .
(4) In any action brought under paragraph (1), if the court finds that the conduct does comply with the standards of section 4013(a), the court shall award
the more flexible registration system promulgated in 1984 to afford antitrust protection to research joint ventures.

2. NATIONAL COOPERATIVE RESEARCH ACT OF 1984 ("NCRA")

The NCRA\textsuperscript{135} is helping to encourage research and development in the United States through a process which extends rule of reason analysis to all research joint ventures and treble damage protection to those who are properly registered. Many of the current proposals would extend the Act’s shelter to include production joint ventures and some would include distribution joint ventures as well. While it has been debated whether the NCRA is technically an exemption or a clarification of antitrust laws and their enforcement,\textsuperscript{136} by providing automatic rule of reason analysis and optional treble damage immunity, its operation is such that it must be viewed, if not as an exemption, as a substantial fine tuning of antitrust law.\textsuperscript{137}

Prior to the NCRA, research joint ventures had traditionally been treated favorably under United States antitrust law,\textsuperscript{138} although uncertainty and the substantial down-side of potential liability were still great threats.\textsuperscript{139} The government attempted to address the fear of joint research cooperation with the Antitrust Guide Concerning Research Joint Ventures of 1980.\textsuperscript{140} Although the guidelines sought to


\textsuperscript{137} "These claims must have been referring to the statutory enunciation of the rule of reason test for evaluating joint R&D ventures, because detrabling was not a clarification of prior law." Wright, supra note 25, at 140 n.36.

\textsuperscript{138} The Antitrust Division of the Justice Department had a procedure whereby companies considering entering into a research joint venture could submit their plans for review. The government would reply with a letter of opinion which stated the government’s inclination to bring suit under the given facts. See Antitrust Division Business Review Procedure, 28 C.F.R. § 50.6 (1983). The opinion letter could also describe what steps the venture should take to comply. This procedure was viewed as insufficient largely due to the non-binding nature of the letter and the probability that treble-damage actions could still be brought by competitors who felt left behind by a major breakthrough of the joint research. See generally Crane, Joint Research and Development Ventures and the Antitrust Laws, 21 HARV. J. LEGIS. 405 (1984).

\textsuperscript{139} See generally INDUSTRIAL RESEARCH INST., COMMERCE TECHNICAL ADVISORY BD., INSTITUTIONAL AND LEGAL CONSTRAINTS TO COOPERATIVE ENERGY RESEARCH AND DEVELOPMENT (1975) (reprinted by Nat’l Technical Info. Service, U.S. Dept. of Commerce) (government study illustrating that corporate fear of antitrust was inhibiting joint research cooperation.).

\textsuperscript{140} ANTITRUST DIV., U.S. DEP’T OF JUSTICE, ANTITRUST DIV., ANTITRUST GUIDE
clarify antitrust laws through examples, they were criticized as ambiguous and too conservative;\textsuperscript{141} thus, the guidelines were not an effective tool to calm fear and stimulate joint research ventures.

In 1984, after considering a total of ten bills, the legislature unanimously passed the NCRA to stimulate "innovative research and development by the private sector" and "enable American business and industry to keep pace with foreign competitors in a world increasingly dependent on technological innovation."\textsuperscript{142} The NCRA only benefits narrowly defined research joint ventures.\textsuperscript{143} It should be


141. See Crane, supra note 138, at 426-32.


143. Section 2 states that:

The term "joint research and development venture" means any group of activities, including attempting to make, making, or performing a contract, by two or more persons for the purpose of—

(A) theoretical analysis, experimentation, or systematic study of phenomena or observable facts,
(B) the development or testing of basic engineering techniques,
(C) the extension of investigative findings or theory of a scientific or technical nature into practical application for experimental and demonstration purposes, including the experimental production and testing of models, prototypes, equipment, materials, and processes,
(D) the collection, exchange, and analysis of research information, or
(E) any combination of the purposes specified in subparagraphs (A), (B), (C), and (D), . . . and may include the establishment and operation of facilities for the conducting of research, the conducting of such venture on a protected and proprietary basis, and the prosecuting of applications for patents and the granting of licenses for the results of such venture, but does not include any activity specified in subsection (b) of this section.

(b) The term "joint research and development venture" excludes the following activities involving two or more persons:

(1) exchanging information among competitors relating to costs, sales, profitability, prices, marketing, or distribution of any product, process, or service that is not reasonably required to conduct the research and development that is the purpose of such venture,
(2) entering into any agreement or engaging in any other conduct restricting, requiring, or otherwise involving the production or marketing by any person who is a party to such venture of any product, process, or service, other than the production or marketing of proprietary information developed through such venture, such as patents and trade secrets, and
(3) entering into any agreement or engaging in any other conduct—
   (A) to restrict or require the sale, licensing, or sharing of inventions or developments not developed through such venture, or
   (B) to restrict or require participation by such party in other research and development activities, that is not reasonably required to prevent misappropriation of proprietary information contributed by any person who is a party to such venture or of the results of such venture.

noted that this “National” act is in no way limited to domestic business associations; foreign corporations can and have taken tremendous advantage of it. In fact, European and Japanese companies were among the first to do so. Discriminating against foreign concerns, however, would be a troublesome protectionist endeavour—especially as determining the “nationality” of a firm has become increasingly perplexing in this globalized marketplace.

The Act mandates that courts apply a specifically defined rule of reason analysis when faced with antitrust challenges to any research joint venture. Additionally, it requires that the rule of reason analysis be applied not only to alleged violations of Section 1 of the Sherman Act but to all “antitrust laws,” including state laws.

Joint ventures whose existence and purpose are disclosed by registration or “notification” are entitled to the NCRA’s “detrebling” provision. By mandating registration, the NCRA dictates a more stringent standard for detrebling than for application of the rule of reason analysis. At this point, therefore, the joint venture must decide if the safe harbor from treble damages is worth making a public disclosure of business aspirations.

Regarding attorney fees: the NCRA awards them to a prevailing

146. 15 U.S.C. § 4302. This section reads:

In any action under the antitrust laws, or under any State law similar to the antitrust laws, the conduct of any person in making or performing a contract to carry out a joint research and development venture shall not be deemed illegal per se; such conduct shall be judged on the basis of its reasonableness, taking into account all relevant factors affecting competition, including, but not limited to, effects on competition in properly defined, relevant research and development markets.

Id.
147. See id. § 4301(a)(1).
148. Id. § 4302.
149. Id. § 4305. Under Section 6, a detailed notification must be directed in writing to the Attorney General and the FTC not more than 90 days after execution of a written agreement to form the venture. Notice is also required to be published “in general terms” in the Federal Register. The protection vests on publication, making treble damages unavailable. However, the Section 4 shield addresses the scope of notification filed with the Attorney General and the FTC, not the Federal Register.
150. Id. § 4303 (“[A]ny person who is entitled to recovery on a claim under such section shall recover the actual damages sustained by such person ... if such claim ... results from conduct that is within the scope of a notification that has been filed under section [6].”).
plaintiff but provides that the court may award attorney fees to the "prevailing party defending against any such claim . . . if the claim, or the claimant's conduct during the litigation of the claim, was frivolous, unreasonable, without foundation, or in bad faith." Either award can be offset if the court finds unreasonable conduct during the litigation. As defendants in joint venture actions—by definition—represent several business associations, attorney fee awards may be substantial.

The NCRA has been successful at encouraging research joint ventures. Under the NCRA, there are ongoing cooperative research efforts in such areas as tamper-evident closures for baby food, cement, deepwater mooring lines, semiconductors, and HDTV. Research joint ventures to emerge from the NCRA include: SEMATECH, Bellcore, Microelectronics and Computer Technology Corporation (MCC), Computer Aided Manufacturing, the Zirconium Alloy Tubing Corrosion Research and Development Program, and the Petroleum Environmental Research Forum.

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151. Id. § 4304.
152. Id. § 4304(a)(2). Note that FED. R. CIV. P. 11 grants judges a comparable power.
154. Charles Rule has stated:

[W]hen we did the joint R&D legislation, you really couldn't find any joint R&D cases, there really weren't any, and everybody assumed this was ridiculous, nobody would ever use the damn thing, that it was just a waste of time. Well, the fact of the matter is, the number of filings we have received under the NCRA has vastly exceeded any of our predictions, and people really are using it, and people really do get comfort from it in terms of forming their R&D ventures.

Denger, Halverson, Reasoner & Taylor, 60 Minutes with Charles F. Rule, Assistant Attorney General, Antitrust Division, 58 Antitrust L.J. 377, 396 (1989) [hereinafter 60 Minutes with Rule].

162. See Notice, 50 Fed. Reg. 2633 (1985). MCC is a joint venture formed of about 20 companies in response to Japanese "targeting." See generally Zwart, supra note 24. Members include: Boeing, Digital Equipment, Lockheed, Martin Marietta, Minnesota Mining and Manufacturing (3M), Motorola, National Semiconductor, RCA, Rockwell, and Sperry. Id. The consortium has several programs including one aimed at breakthroughs in advanced computer architectures and artificial intelligence. MCC almost failed shortly after its creation when it was threatened with antitrust action by a nonparticipating competitor. Id.
IV. THE CURRENT PROPOSALS

A. Generally

There has been government interest in revising the status of joint ventures since the Reagan administration's superconductivity initiative in 1988.166 The current wave of antitrust concern, however, may have been sparked by a pair of articles on the Wall Street Journal editorial page by Attorney General William Thornburgh and Commerce Secretary C. William Verity: both articles urging Congress to amend antitrust laws to spur production joint ventures.167 At a time when the United States was beginning to realize that a role in high-technology innovations, especially in HDTV, is vital to the industrial

166. H.R. Doc. No. 100-169, 100th Cong., 2d Sess. (1988). In February 1988, President Reagan transmitted a message to Congress which included a draft of proposed legislation to encourage innovation, productivity, trade, and technological leadership of the United States in the area of superconductivity. While the bill included measures to increase protection for U.S. patent holders, it also made the first proposal to amend the NCRA to extend into the area of production joint ventures. The proposal’s language with regard to the NCRA is substantially the same as H.R. 2264 (The Cooperative Productivity and Competitiveness Act of 1989, infra notes 195-97). As with H.R. 2264, this proposal would extended the NCRA’s protection in a generic fashion, i.e., not merely for superconductivity firms. See generally id. In the message, President Reagan stated:

I should stress that the purpose of the NCRA is not to provide firms with immunity for anti-competitive behavior. Our antitrust statutes will continue to protect American consumers and businesses from harmful practices where they occur. This extension of the NCRA should promote innovation and productivity and will permit this country to maintain—or in some instances to regain—its position of world technological leadership.

Id. at 2.

167. United States Attorney Thornburgh stated that:

Even with a rational and sympathetic government policy, the fear of a private antitrust suit seeking treble damages, as well as attorneys' fees, is surely enough to inhibit many worthwhile ventures. The U.S. economy can ill afford the burden of such fear. Congress should consider amending the antitrust laws to eliminate antitrust uncertainty with respect to joint production ventures.


Secretary of Commerce Verity concurred:

Joint production ventures frequently would be the most efficient way to bring new products to market, but any attempt by U.S. companies to conduct joint production, even if approved by the government, virtually invites an antitrust lawsuit, which can result in a settlement requiring the innovating firm to share valuable proprietary information with the challenger. This produces a chilling effect on some kinds of technology development. At the same time, foreign firms uninhibited by such laws take on similar joint ventures and threaten further to erode U.S. leadership in technology and innovation.

Id. at col. 5; see also Thornburgh, Verity Push Antitrust Law Revision; Goal Is to Allow U.S. Firms to Better Compete Against Foreign Rivals, Wash. Post, Dec. 28, 1988, at D1, col. 4; Address by Attorney General Dick Thornburgh to the Economic Club of New York on February 22, 56 Antitrust & Trade Reg. Rep. (BNA) No. 1404, at 312 (Feb. 23, 1989).
health of the country, the 101st Congress took the call for reform seriously and, in its first session, proposed seven bills which would modify antitrust laws to encourage varying forms of joint venture. The bills are divided between proposals specifically for HDTV and proposals that are generic for all industry. Each operates through either an extension of the NCRA's "registration" approach or through an ETCA-type "certification" approach.

B. The High Definition Television Bills

The HDTV antitrust bills came as part of a Congressional movement to aid the HDTV industry. However, despite early support by Commerce Secretary Robert Mosbacher and others, the thrust in Washington has shifted away from any specific HDTV program. This shift has occurred for at least three reasons: (1) the Bush administration does not want to be accused of an ersatz industrial policy, i.e., picking industrial winners and losers; (2) HDTV has

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168. See Battle for the Future; Unless the U.S. Can Match Japan's All-Out Effort, the Race to Dominate 21st Century Technology May be Over Before it Has Begun, TIME, Jan. 16, 1989, at 42 (demonstrating the Japanese head-start in HDTV and suggesting that "a little Japanese-style teamwork . . . could do wonders in the U.S.").

169. See infra notes 177-220 and accompanying text.

170. Other proposals, however, also have antitrust ramifications. The High Definition Television Research and Development Act, for example, is one bill which has no effect on antitrust legislation. It does, however, create consortiums of HDTV producers presumably to function under the pre-existing NCRA. H.R. 1516, 101st Cong., 1st Sess. (1989). The bill would grant government funding of $100 million per year for five years through a program whereby the Secretary of Commerce through the Director of the National Institute of Standards and Technology selects one or more HDTV joint research and development ventures from respondents to a notice in the Federal Register. Id. at 6. The participants of each venture selected would then negotiate with the Director of the National Institute of Standards and Technology the activities and responsibilities for which each would be responsible. The Secretary and the participants would then submit a memorandum to the "appropriate committees of Congress" delineating those responsibilities. Id. at 5. Each venture would also have to submit annual reports to the Secretary, the Congressional committee, and the U.S. Comptroller General. The bill also amends the Intellectual Property Act to provide that all intellectual properties, trade secrets, and technical data resulting from these joint ventures would be treated as if they are inventions made with Federal assistance under chapter 19 of title 35 U.S.C. Id. at 6 (providing for remuneration when the ventures become profitable); see also Congress Awash in HDTV Bills, ELECTRONIC MEDIA, May 22, 1989, at 72.

171. "In some of these high-tech areas, most probably led by high-definition television, we need to make some changes so that there can be consortiums formed. And not only for research and development, but also for manufacturing." Kilborn, Antitrust Easing Will be Proposed to Aid TV Effort, N.Y. Times, May 4, 1989, A1, col. 6, D7, col. 1 (quoting Commerce Secretary Robert A. Mosbacher).

172. See Should Uncle Sam Tilt to HDTV?, N.Y. Times, May 15, 1989, at A18, col. 1 (editorial stating that HDTV antitrust waiver is a good place to try to reverse the retreat of American electronics companies).

173. See Boskin Notes Administration Opposition to Selective Relaxation of Antitrust Law, 56
become closely associated with those who seek huge government subsidies to develop the technology—a difficult political argument for leaders plagued by deficit budgets;174 and (3) there are many other technologies which may be viewed as equally important.175 Although the prospects for passage of a specific HDTV bill appear dubious, these bills are noteworthy demonstrations of the current United States manufacturing plight, and the potential remedial actions available to Government through the NCRA and the ETCA. Importantly, they also illustrate that HDTV is indeed becoming the paradigm of American competitiveness—a test of the country’s ability to survive under rival pressure.176

Antitrust & Trade Reg. Rep. (BNA), No. 1416, at 747 (May 18, 1989). It is the Bush administration’s view that any review of antitrust policy will be on the basis of economic needs, not in the context of government oversight of the market. Michael Boskin, Chairman of the President’s Council of Economic Advisers, stated: “The administration will not engage in industrial policy, period . . . . We will not pick winners and losers.” Id. (quoting Boskin); see also J. GATTUSO, supra note 7, at 2 (“The ‘industrialized policy’ approach, by which Washington picks out a favored industry to subsidize, is neither fiscally nor economically sensible. Instead of providing special benefits to the private sector, Washington simply should get out of the way, removing federal impediments to the development of new products and services.”).

174. See Ask U.S. for $1.35B on HDTV Project, Electronic News, May 15, 1989, at 1, col. 1 (A group of U.S. electronics companies asked the government for more than $1.35 billion in subsidies as part of a plan to develop HDTV.); see also Yang, Fiscal Follies: Ever-Growing Deficits Establish the Failure of Gramm-Rudman, Wall St. J., Oct. 3, 1989, at A1, col. 6 (Yang demonstrates the ongoing difficulty in complying with the law designed to cut the budget deficit to zero.). But the government has given some funding to HDTV through the Defense Department. See, e.g., OK $20M Funding for HDTV in FY90, Electronic News, Nov. 6, 1989, at 4, col. 3 (Senate-House approved $20 million for the Pentagon’s HDTV program.). Connelly, DARPA Picks Five Firms for HDTV Contracts, Electronic News, Jun. 19, 1989, at 6, col. 1; Robertson, DOD Board Considers National HDTV Program, Electronic News, Apr. 17, 1989, at 4, col 3; see also Elmer-DeWitt, High Tech’s Fickle Helping Hand: The White House Wavers on Funding for Microchips and HDTV, Time, Dec. 4, 1989, at 68 (“Opposition to U.S. research cutbacks proved too much even for Budget Director Darman . . . [who told] reporters that the press accounts of proposed research cuts were ‘totally wrong. Not just 60% wrong, but 100% wrong.’”

175. “‘What we’ve learned in the last six months is that there are a lot of other technologies that are equally important.’” Pollack, The Setback for Advanced TV, N.Y. Times, Sept. 30, 1989, at Y1, col. 3 (quoting Wayne Berman, counselor to Commerce Secretary Robert A. Mosbacher). Additionally, “the federal government hardly is in the best position to predict which technologies will or will not succeed in the marketplace.” J. GATTUSO, supra note 7, at 10. But see Robertson, Panel Urges HDTV Initiative, Electronic News, Sept. 11, 1989, at 1, col. 3 (The National Advisory Committee on Semiconductors recommends to the Bush administration the launching of a government/industry HDTV initiative which would serve as a critical semiconductor technology driver, since the HDTV equipment will use significant numbers of DRAMs, and create spill-over uses from the auto industry to computers and the military.).

176. See supra note 7 and accompanying text.

Introduced by Representatives Don Ritter and Mel Levine, The High Definition Television Competitiveness Act seeks "[t]o stimulate the design, development, and manufacture of high definition television technology."\(^{177}\) In making its proposal, the bill states that "development of HDTV technology by American industries is critically important to the Nation's economy and security . . . [yet] the Nation's electronic manufacturing industries have virtually ceased to develop and manufacture consumer electronics in the last decade, due to strong competition in both domestic and world markets and United States trade policies."\(^{178}\) The Ritter-Levine bill makes a strong attack. It provides for over $500 million in funding for HDTV development.\(^{179}\) The NCRA would be amended to allow antitrust protection to extend to HDTV joint production, but not distribution, ventures.\(^{180}\) Tax breaks for research and development would be reinstated,\(^{181}\) and a market would be guaranteed for U.S.-produced HDTV equipment by government purchasing.\(^{182}\)

178. Id. at 2.
179. Id. at 12. Title III grants federal support of $100 million for each of the years 1990 through 1995 through two programs. The first program would provide "general financial assistance to cooperative HDTV enterprises to promote the discovery, development, and commercialization of HDTV technology." Id. at 8. The second program would be established to provide financial assistance for "pilot manufacturing projects and experimental community demonstrations related to HDTV technology." Id. The Secretary of Commerce shall only allocate the funding to applicants who have entered into a joint cooperative agreement under terms and conditions required by the Secretary. Each venture must provide at least half of the cost of the project. Title VI of the bill appropriates another $500,000 to the Federal Communication Commission's efforts to promulgate an HDTV broadcast standard. Id. at 12.
180. The bill would amend Section 2 of the NCRA (15 U.S.C. § 4301 (1984)) by providing treble damages and per se protection to registered joint ventures which would include those "agreements concerning HDTV technology" and those ventures which would conduct research on, or design, develop, or manufacture HDTV technology. Id. at 6-7 (emphasis added). Title II also amends Section 313, the antitrust section, of the Communications Act of 1934 (47 U.S.C. § 313 (1972)) to exempt activities conducted for joint research, development, and production if notification is in effect under the NCRA. Id. at 6.
181. Title 1 of the Ritter bill repeals Sections 4(g) and 280(c) of the Internal Revenue Code of 1986 which relate to the termination and disallowance of exemption for research expenses. Id. at 5. Thus, in the name of HDTV, the bill repeals the elimination of tax credits for all industrial research and development.
182. Title IV of the Ritter bill guarantees domestic HDTV manufacturers substantial market potential by having the Commerce Secretary submit a plan to Congress to establish a mechanism to coordinate procurement of HDTV technology by the General Services Administration, the Department of Defense, the National Aeronautics and Space Administration, and other federal agencies. Id. at 11.
2. **S. 952: THE HIGH DEFINITION TELEVISION DEVELOPMENT ACT OF 1989**

Senator John Kerry introduced S. 952 "to stimulate the design, development, and manufacture of high definition television technology, and for other purposes."\(^{183}\) The Kerry bill "finds" that "cooperative efforts and joint ventures by domestic companies must be encouraged to foster domestic HDTV technology . . . ."\(^{184}\) Without the funding of the Ritter-Levine bill, Kerry's bill also would amend antitrust laws to allow the NCRA to include joint HDTV production ventures,\(^{185}\) and the Kerry bill provides for a report to Congress and the President on the status of HDTV.\(^{186}\)

**C. The "Generic" Antitrust Bills**

Unlike the floundering HDTV movement, the "generic" approach still has a strong chance for implementation. Not only has at least one independent foundation recommended that HDTV be

\(^{183}\) S. 952, 101st Cong., 1st Sess. 1 (1989). The Kerry bill reports proposed findings of Congress on HDTV. Title I states:

The Congress finds that—

1. the efficient deployment of HDTV and HDTV technologies will require significant cooperative efforts by domestic companies;  
2. current statutory restrictions make it impossible for many companies now involved in research, design and development of HDTV technologies to cooperate or engage in joint ventures designed to facilitate domestic HDTV development and manufacture; and  
3. cooperative efforts and joint ventures by domestic companies must be encouraged to foster domestic HDTV technology research, design, development and manufacture.

\(^{184}\) Id. at 3-4; see also Kerry Bill Would Extend 1984 Legislation to HDTV Production and Marketing Venture, 56 Antitrust & Trade Reg. Rep. (BNA) No. 1415, at 707 (May 11, 1989) ("Kerry declared that 'it is becoming very clear that, if we fail to act, we will have no HDTV production capability at all in the U.S.'").

\(^{185}\) Id. at 5.

\(^{186}\) Id. at 4. Section 102 of the Kerry bill lays the ground-work by amending Section 313 of the Communications Act of 1934 to exclude from the antitrust provision any activities conducted as a cooperative HDTV enterprise in a joint research, development or production venture under this bill. Id. at 4-5. Then, Section 103 of the bill amends NCRA Section 2(C)—the section defining the safe harbor ventures—by including, "with respect to a cooperative HDTV enterprise—(A) discussions, considerations, review, actions or agreements concerning HDTV technology; (B) conducting research on, or design, development, or manufacture of, HDTV technology; or (C) any combination of the activities described in subparagraphs (A) and (B)." Id. at 5 (emphasis added).

\(^{186}\) Under the Kerry bill the Secretary of Commerce would submit a report to the President and Congress on the implications for international trade of HDTV technology within 90 days after the passage of the bill. This report is to include the Secretary's recommendations on appropriate "methods by which Federal laws governing international trade may promote the development and viability of domestic manufacturers of HDTV technology." Id. at 6.
encouraged through generic antitrust reform,187 but many in industry and academia urge antitrust reform as well.188 Even President Bush, after straddling the fence,189 has come out in favor of reform.190 Thus, the generic joint venture proposals are currently the main issue in antitrust.191


Congressman Edwards introduced the National Cooperative Research and Production Amendments192 which would change the name of the NCRA to the “National Cooperative Research and Production Act of 1989.” The proposal would amend the definitional section of the NCRA to include the “production, marketing or distribution of any product, process, or service.”193 The bill would also

187. See generally J. Gattuso, supra note 7, at 10-12.
188. See Heads of High Tech Firms Urge Reform & Encourage Production Joint Ventures, 57 Antitrust & Trade Reg. Rep. (BNA) No. 1435, at 461 (Oct. 5, 1989) (noting that Jack Kuehler, President of IBM, for example, urges reform to encourage production joint ventures); see also Jorde & Teece, supra note 36 (University of California at Berkeley professors urging substantial antitrust reform to encourage cooperative arrangements).
189. In September 1989, James Rill, President Bush’s Assistant Attorney General in charge of Antitrust, stated that: “‘Joint ventures will be encouraged or not encouraged because they make economic sense. I’m not altogether sure that anyone is suggesting an exemption from the antitrust laws.’” Be Happy Bush’s Antitrust Chief Will Be Just That, FORBES, Sept. 4, 1989, at 20. In November 1989, Rill “praised” production joint ventures as a “‘very effective way for U.S. firms to improve their competitiveness in world markets’” and he acknowledged that the various proposals “may enhance business certainty” and encourage ventures needed by the nation to maintain competitiveness. Rill Finds Proposals on Joint Ventures May Enhance Business Certainty, Aid U.S., 57 Antitrust Trade Reg. Rep. (BNA) No. 1440, at 659 (Nov. 11, 1989). In February 1990, Rill stated that existing antitrust laws have “‘not inhibited our international competitiveness.’” Ostrow, Justice Department to Boost Antitrust Agency; Trade: The Division Will Add Attorneys and Cases. It is Fighting Efforts by the Commerce Department to Relax Joint Venture Laws, L.A. Times, Feb. 3, 1990, at A2, col. 1. The article also notes that reports that President Bush would ask Congress in his State of the Union address to relax antitrust bars to production joint ventures were erroneous. Id.; see also Murray & Barrett, Bush Aides Urge Antitrust Restrictions Be Eased for U.S. Firms’ Joint Ventures, Wall St. J., Jan. 22, 1990, at A2, col. 2.
190. See Antitrust Protection for Production Joint Ventures Urged by President, 94 Trade Reg. Rep. (CCH), No. 94, at 1 (March 13, 1990).
191. Special Report, Joint Venture Exemptions Emerge as Prime Antitrust Issue in 1990, Daily Rep. for Executives (BNA) DER No. 13, at S-18 (Jan. 19, 1990). “‘I think what we would like to do’ a Republican Senate committee aide told BNA, ‘is to try to build a consensus’ and then have a bill considered by the full committee. Legislation is needed . . . . However, the effort to enact a joint production venture bill is thought to be at least a three-year process, with 1990 representing the second year, the aide speculated.” Id.; see also Special Report, Regulatory Outlook ’90, Daily Rep. for Executives (BNA) DER No. 13, at 3 (Jan. 19, 1990) (“Bucking the re-regulation trend are plans . . . . to ease antitrust laws with respect to production joint ventures.”).
193. Id. Section 2 of the bill reads as follows:
amend the NCRA to provide that coverage does not extend to any production or distribution outside the scope of the venture.\footnote{194} This bill is noteworthy in that it would extend coverage not only to joint production agreements—as its title implies—but to distribution activities as well.


The Cooperative Productivity and Competitiveness Act,\footnote{195} introduced by Congressman Fish, would also amend the definitional scope of the NCRA. However, by striking the term “joint research and development venture” each place it appears and inserting “joint research, development, or production venture,” this proposal would not extend coverage to joint distribution ventures.\footnote{196} In fact, the NCRA would be specifically amended to include “the production or manufacture of any product or process in a jointly owned or operated facility,” but exclude “distribution[ ] or sale” joint ventures, in addition to “marketing” joint ventures (which are presently excluded under the NCRA).\footnote{197}


Introduced by Senator Leahy, S. 1006\footnote{198} is the Senate version of the Fish bill. Also proposed “to encourage innovation and productivity, stimulate trade, and promote the competitiveness and technological leadership of the United States,” the National Cooperative Research Extension would amend the NCRA by making it applicable to joint research and development or manufacturing ventures.\footnote{199} The only difference between this and Representative Fish’s bill is that,

Section 2(a)(6) of the National Cooperative Research Act of 1984 (15 U.S.C. 4301(a)(6)) is amended—

\begin{itemize}
  \item in the matter preceding subparagraph (A) by striking “research and development,”
  \item \ldots and
  \item by inserting after subparagraph (D) the following:
  \begin{itemize}
    \item “(E) the production, marketing, or distribution of any product, process, or service; or”
  \end{itemize}
\end{itemize}

\textit{Id.} at 2 (emphasis added).

\footnote{194 \textit{Id.} at 2-3.}
\footnote{195 H.R. 2264, 101st Cong., 1st Sess. (1989).}
\footnote{196 \textit{Id.} at 2-3.}
\footnote{197 \textit{Id.}}
\footnote{198 S. 1006, 101st Cong., 1st Sess. (1989).}
\footnote{199 \textit{Id.} at 1-3.}
here, production joint ventures are treated as distinctly separate from research joint ventures. Thus, a research joint venture which had successfully developed a product would presumably have to register separately to become protected as a joint manufacturing venture.


Representative Wyden introduced H.R. 423 "[t]o modify the application of the antitrust laws to increase competition in trade by encouraging small businesses to jointly manufacture and distribute products." Without modifying the NCRA, this bill would provide protection similar to the NCRA but only for small production and distribution ventures. The bill would allow small businesses to combine into "flexible manufacturing networks" which, upon

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200. Compare id. (which distinctly creates research or manufacturing ventures) with H.R. 2264, at 3 (implying that a research joint venture may "involv[e] the production of any product or process").

201. Id.


203. "Small business" is defined as a "person" (see the definition of "person" under § 1(a), Clayton Act, 15 U.S.C. § 15g(a)) that is primarily engaged in manufacturing; has fewer than 500 employees throughout the period which it participates under this bill; and controls not more than 20% of any relevant market for the product manufactured and distributed through such venture. Id. at 2.

204. The actual ventures covered by this act are highly defined and termed "flexible manufacturing networks." Flexible manufacturing networks are defined as:

[A]ny group of activities, including attempting to make, making, or performing a contract, carried out by 2 or more persons for any of the following purposes:

(A) Purchasing raw materials, services, or facilities to jointly manufacture and distribute a product.

(B) Collecting and sharing information on production costs and manufacturing capacity necessary to prepare a bid to sell a product jointly manufactured by such persons.

(C) Collecting and sharing information applicable to the marketing of such product.

(D) Sharing information on manufacturing and distribution capacity for purpose of jointly manufacturing and distributing such product.

(E) Any combination of the purposes specified in subparagraphs (A), (B), (C), and (D), and including the establishment and operation of facilities for quality testing and other purposes related to jointly manufacturing a product.

(b) EXCLUSIONS.—The term "flexible manufacturing network" excludes the following activities:

(1) Exchanging of information among competitors relating to costs, sales, profitability, pricing, marketing, or distribution that is not reasonably required to carry out a flexible manufacturing network.

(2) Entering into any agreement, or engaging in any conduct, to restrict a person who participates in a flexible manufacturing network with respect to the operations or activities such person carries out inside such network.

Id. at 3-4.
proper notification, would receive treble damage immunity, rule of reason scrutiny, and possible attorney fees for a prevailing defendant in the event of antitrust litigation.


Representatives Richard Boucher and Tom Campbell introduced H.R. 1024 “[t]o encourage national cooperative research and commercialization.” This bill would provide the most extensive

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205. Id. at 7-8. Section 6 outlines the filing of the disclosure and notice procedure. A flexible manufacturing network is to file a written notification with the Attorney General and the Federal Trade Commission. The notification must disclose the identities of the parties and the nature and objectives of the network. Id. at 8. Additional disclosures are to be made in case of a change of parties and are encouraged whenever “appropriate” to maintain and extend the protection of Sections 3 and 4. Id. The Attorney General or the FTC shall publish in the Federal Register a general description of the network’s planned activity within 30 days after receiving the original notification, and at that time the benefits of Sections 3 and 4 shall vest. Id. With the exception of that publication, all information and documentary material submitted and all other information obtained in the course of any investigation, administrative proceeding, or case, with respect to a potential violation of the antitrust laws by the network, shall be exempt from disclosure under the Freedom of Information Act (5 U.S.C. § 552) unless protected through a protective order. Id. at 9-10.

206. Id. at 4. Section 4 permits only actual damages to a prevailing private plaintiff in lieu of the treble relief specified in the Clayton Act. (15 U.S.C. § 15). Id. Similarly, a state prevailing in a suit against a flexible manufacturing network would only recover total damage sustained. Id.

207. Id. Section 3 provides that in any action under the federal or state antitrust laws, one’s conduct “in making or performing a contract to carry out a flexible manufacturing network shall not be deemed illegal per se.” Id. Instead, the conduct shall be judged “on the basis of its reasonableness, taking into account all relevant factors affecting competition, including its effects on competition in relevant markets.” Id.

208. Id. at 7. Section 5 provides that reasonable attorney fees and the cost of the suit should be awarded to a substantially prevailing defendant if the claim, or the claimant’s conduct during the litigation, was “frivolous, unreasonable, without foundation, or in bad faith.” Id. This award, however, may be offset if the court finds that the prevailing party’s conduct was also “frivolous, unreasonable, without foundation, or in bad faith.” Id. Compare id. with FED. R. CIV. P. 11.

209. See Barrett, Rep. Campbell’s Free-Market Resume Belies His Stance on Antitrust Matters, Wall St. J., Feb. 6, 1989, at B10, col. 1 (Former FTC chief of antitrust enforcement, Campbell, argues that U.S. computer-chip makers were so shocked by Japanese chip dumping that they now need assurances that they can join forces to regain market share.).

210. H.R. 1024, 101st Cong., 1st Sess. 1 (1989). Section 2 states Congressional findings and the purpose of the bill. In addition to mentioning the benefits of cooperative arrangements and technical innovation to the United States, the bill notes that “cooperative innovation efforts present little or no threat to competition when cooperating firms lack substantial market power, or when cooperative activity takes place in industries experiencing rapid technological change.” Id. Thus, the bill’s purpose is to:

[P]romote innovation and profitable product commercialization, facilitate trade, and strengthen the competitiveness of United States based firms in world markets by clarifying the legal standards applicable to cooperative innovation arrangements and by establishing a procedure by which firms may seek approval
protection to joint ventures of any of the pending bills.\textsuperscript{211} Rather than modifying the NCRA, the Boucher-Campbel bill would create a process by which companies seeking to enter a joint venture, or "cooperative innovation agreement,"\textsuperscript{212} would obtain certification from the DOJ or the FTC in much the same manner as companies are certified under the ETCA.\textsuperscript{213} However, certification would be based on an involved government review procedure similar to that currently used for mergers under the DOJ's \textit{Merger Guidelines}\textsuperscript{214} with special atten-

\textit{Id.} at 2-3.

\textsuperscript{211} This bill approaches the proposal set forth by Professors Jorde and Teece in their article \textit{Innovation, Cooperation and Antitrust: Striking the Right Balance}. Jorde & Teece, \textit{supra} note 36, at 84-112. Jorde and Teece, however, go further by advocating: (1) a detailed description of the rule of reason analysis; (2) symmetrical attorney fee shifting; and (3) an amendment to the NCRA, in addition to the certification procedure, which would allow business the choice of registration or certification procedures and immunities. \textit{Id.} at 71 n.199.

\textsuperscript{212} H.R. 1024, at 2-3. "Cooperative innovation arrangement" is this bill's catch phrase which covers a plethora of activities. See \textit{id.} at 3-5.

\textsuperscript{213} See \textit{supra} notes 133-34 and accompanying text.

\textsuperscript{214} Section 5 of the bill describes the process by which a "cooperative innovation arrangement" may become certified. First, the parties to such an arrangement must file disclosures with the Secretary of Commerce, the Federal Trade Commission, and the Attorney General which include, in addition to the identities of the parties and the nature of the agreement: a description of the procompetitive benefits and efficiencies to be achieved; the current market shares, in all relevant markets, of all parties; the predicted market share of the arrangement including the basis for that prediction and an estimate of the effect on competitors; the estimated market share index in all relevant markets, or if unattainable, the number of firms in each market that are capable, alone or cooperatively, of engaging in the type of innovation proposed. H.R. 1024, at 6-7.

Within 30 days of filing the application, the authorizing agency shall publish a notice in the \textit{Federal Register} that describes the parties and the arrangement, presumably in general terms. \textit{Id.} at 7. Within 30 days after that publication, the Secretary of Commerce shall have reviewed the application and made formal recommendations to the authorizing agency. \textit{Id.} The agency is to approve an application if, after consulting with the Secretary, it determines: "(A) that the arrangement will not possess substantial market power in any relevant market; and (B) that the duration of the arrangement will not exceed limits reasonably required to accomplish the objective of the arrangement, and in any event will not exceed seventeen years." \textit{Id.} at 8.

Under H.R. 1024, an arrangement shall not have substantial market power in a relevant market if the market share index of that market is, or threatens to become greater than 1800 and the arrangement does not increase or threaten to increase, the market share index by more than 50, or if the market shares of the firms cannot be measured there must be at least five firms who are capable, alone or cooperatively, of engaging in the type of activity proposed by the arrangement. \textit{Id.} at 9.

The authorizing agency and the Secretary shall determine, based on a number of factors, whether an applicant shall be certified. \textit{Id.} at 10-13. They must examine the degree of market power of the arrangement and whether it will harm competition and consumers by reducing output or increasing prices. The procompetitive benefits and the existence of a logical relationship between the contractual provisions of the arrangement and the achievement of those benefits are to be examined with particular attention to indicia such as: whether the
tion paid to the parent firms' Herfindal Hirchman Index ("HHI"). 215 Once certified, a joint venture would enjoy complete immunization from treble and actual damage claims as well as from criminal prosecution laws. 216 Thus, standing to sue would be removed for anything but injunctive relief, and that would be analyzed on a rule of reason standard. 217 Additionally, in any such litigation the losing party would be required to pay attorney fees. 218 Furthermore, the Boucher-Campbell bill includes virtually any joint venture—including those for distribution. 219 If no distribution is involved, however, approval

innovation sought will be better protected from free-riders under the arrangement; whether the innovation sought is such that it will benefit from economies of scale; and whether the market is characterized by rapid technological change. Id. Additionally, it must be determined whether the procompetitive benefits could be achieved by a single firm or a combination of firms with less market power or by the parties to the arrangement in any substantially less restrictive manner. Id. Finally, the Secretary and the authorizing agency must determine whether the existence of potential competitors in the relevant markets "precludes the potential anticompetitive effects that might otherwise be inferred from such market power." Id. at 12.

The authorizing agency may then grant, deny, or grant with modifications the arrangement. If granted the authorizing agency shall publish a statement of approval in the Federal Register, id. at 13, and the approval shall take effect 30 days thereafter unless modifications require a statement of the acceptance, id. at 14.

215. The HHI equals the sum of the squares of each firm's market share and is the most widely accepted indicium of industry concentration. See generally A. SWAN & J. MURPHY, THE REGULATION OF INTERNATIONAL BUSINESS AND ECONOMIC RELATIONS ch. 7 (forthcoming) (available at the University of Miami Law School Library). Of course, in a pure monopoly, the HHI would be 10,000; in a two-firm oligopoly with each controlling 50%, the HHI would be 5000; with four firms each controlling 25%, the HHI would be 2500. However, in a market where two firms controlled 25% each and 25 firms controlled 2% each, the market share index would be 1350 and acceptable under this bill. See supra note 214.

216. The effect of approval is that:

[N]o damages, interest on damages, costs, or attorney's fees may be recovered in any criminal or civil action based in whole or in part on conduct within the scope of a cooperative innovation arrangement approved by the authorizing agency . . . if such approval was in effect at the time of the conduct. The remedy of injunctive relief available under section 16 of the Clayton Act (15 U.S.C. 26) shall be available in such criminal or civil action.

H.R. 1024, at 14-15. Approval may be revoked by the agency effective 30 days after publication of notice, or upon final judgment in the case of injunctive relief. Id. at 15-16. Otherwise the approval would remain in effect for 17 years, or a specified lesser term at the conclusion of which the parties may submit for renewal. Id. at 16.

217. Section 4 states that "no cooperative innovation arrangement" approved under this bill "shall be deemed illegal per se" under state or federal antitrust laws. Id. at 6.

218. Id. at 20 ("Notwithstanding . . . the Clayton Act . . . the court shall, at the conclusion of the action, award to the substantially prevailing party the cost of litigation of such claim including a reasonable attorney's fee."). This provision could create a substantial disincentive to potential plaintiffs as an unsuccessful suit against a joint venture would, of course, entail the cost of at least two defendants' attorneys.

219. Id. at 4. In addition to research, experimental production, and the development of "management techniques," the bill allows possible exemptions in "manufacturing, producing, marketing, distributing, or otherwise commercializing products, processes, or information developed jointly." Id.
would be automatically granted if the economic benefits were found to outweigh potential anticompetitive harm, no matter what the parents' HHI.  

V. A WORD ON THE COMPETITION

A. Japan

Japan has a long tradition of concerted industrial activity. The Japanese Antimonopoly Law of 1947 was based on United States law and adopted by the Japanese government during the post-war, MacArthur occupation period. In a culture noted for its

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220. Id. at 8-9.
221. According to Hadley:
If oligopolistic markets are to be called cartels, and if combines are to be called cartels, then Japan does indeed have a long tradition of them. But if the term is restricted to overt, explicit agreement among businesses independent of one another, then the tradition is essentially of the 20 years preceding the end of the Pacific War.

222. SHITEKI DOKUSEN NO KINSHI OYOBI KÔSEI TORIHIKI NO KAKUHO NI KANSURO HÔRITSU (Antimonopoly and Fair Trade Maintenance Act), translated as amended in Z. KITAGAWA, DOING BUSINESS IN JAPAN app. 7A (1987) [hereinafter Antimonopoly Law].

The Antimonopoly Law's aim is stated in Chapter 1:
This Act, by prohibiting private monopolization, undue restraint of trade and unfair business practices; by preventing the excessive concentration of economic power and by eliminating undue restraint of production, sales, prices, technology, etc., and all other undue restriction of business activities through combinations, agreements, etc., aims to promote free and fair competition, to stimulate the initiative of entrepreneurs, to encourage the business activities of enterprises, to heighten the level of employment and real income of individuals, and thereby to promote the democratic and healthy development of the national economy as well as to assure the interests of consumers in general.

Id. app. 7A-1.
223. See E. HADLEY, supra note 221, at 120-21.

The Antimonopoly Act originally consisted of 10 Parts, 100 Sections and 14 supplementary provisions. It contained both substantive provisions and provisions for an enforcement agency and its procedures. It contained, however, a number of provisions more severe than the then existing United States laws. These more stringent provisions were principally in the: (a) prior approval system for mergers, transfers of business and international contracts; (b) various per se illegal provisions; and (c) dissolution of undue disparity in economic powers.

The substantive provisions carrying out the aim of the Act were:
(a) Prohibition of private monopolization . . . ; (b) Prohibition of unreasonable restraint of trade . . . ; (c) Prohibition of unfair methods of competition . . .


The Antimonopoly Law currently provides:

1. No business association shall engage in any of the following practices:
   1. substantially restricting competition in any particular field of trade;
emphasis on cooperation, yet the antimonopoly law was not relished, yet it was also not something the country could "avoid or evade." Thus, the Ministry of Trade and Industry ("MITI") has "spent the succeeding 30 years struggling to get around" American-style antitrust.

MITI has been successful. In 1953, the Japanese government began relaxing the antimonopoly laws. The per se illegality of cartels was eliminated. Depression cartels for declining industries and MITI sponsored industry-specific cartels were allowed. And a system of general cooperation under government auspices was promulgated. Under current Japanese law there is no reporting requirement for collaborative activities and no provision for treble damages. Moreover, a private party may only bring an antitrust action after the Japanese Fair Trade Commission ("JFTC") has made a final and conclusive finding of violation. The resulting concerted behavior, administered by MITI, and permitted by the JFTC, has cer-

2. entering into an international agreement or an international contract as provided for in Article 6, paragraph 1;
3. limiting the present or future number of entrepreneurs in any particular field of business;
4. unduly restricting the functions or activities of the member entrepreneurs (member entrepreneurs shall mean entrepreneurs who are members of the business association; hereinafter the same); or
5. causing entrepreneurs to do such acts as constitute unfair business practices.

Antimonopoly Law ch. III, art. 8, § 1(1-5); H. IYORI & A. UESUGI, supra.

224. "This overall pattern within Japan . . . could never have developed in the United States, for one reason: much of it would have been illegal under the American antitrust laws." AMERICA VERSUS JAPAN 79 (T. McCraw ed. 1986) (footnote omitted).

225. " 'Businessmen with a long tradition of cartels and trade associations can understand regulations arrived at after discussion among the competitors, much more readily than they can the bizarre notion that concerted actions constitute an unreasonable restraint of trade.' " E. HADLEY, supra note 221, at 372 (quoting Mrs. Ariga and Professor Reike) (citation omitted).


227. Id.

228. For a comprehensive discussion of Japan's relaxation of its antimonopoly laws, see H. IYORI & A. UESUGI, supra note 223, at 13-20.

229. Crane, supra note 138, at 439-41. When MITI seeks to promote cooperative activities it will consult with the Fair Trade Commission and, once cleared, it is "extraordinarily unlikely that the FTC would pursue antitrust remedies at a future time." Jorde & Teece, supra note 36, at 56.


231. Crain, supra note 138, at 441.

232. Id. Only four private actions, as of 1978, had been brought under the Antimonopoly Law of Japan and no damages had been recovered in court. Id. This is surely not only due to the difficulty of bringing such a suit, but also due to the Japanese view of an American-style litigation as "inefficient, obnoxious, and even irrational" as it sometimes prevents business from ever getting done. AMERICA VERSUS JAPAN, supra note 224, at 27.
tainly been a factor in the "Japanese miracle." Aside from true joint ventures, there are at least two other levels of Japanese, inter-firm cooperative relationships. One is the *keiretsu*, which is a group of affiliated companies such as Mitsubishi, for example, which encompasses more than 150 diversified companies in relationships intended to be long-term and nurturing. A second level is the "family" networks led by such "core" firms as Toyota and Matsushita who contract production work to closely related and substantially cross-owned subcontracting firms. While some Americans have belittled the holistic Japanese system as merely one of "picking winners," there is no argument that it has been successful for Japan, as evinced by, among many other things, a market share in computer chips that has risen from zero percent in 1970 to seventy percent in 1989.

B. Europe ("EEC")

Europe, in its emerging unification as the European Economic Community ("EEC"), has an active antitrust policy. Yet, the EEC insures a favorable climate for joint ventures. The basises for EEC antitrust protection are the Treaty of Rome Article 85, analogous to the Sherman Act, Section 1, of the United States. Article 85 reads in full:

1. The following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market, and in particular those which:

   (a) directly or indirectly fix purchase or selling prices or any other trading conditions;
   (b) limit or control production, markets, technical development, or investment;
   (c) share markets or sources or supply;
   (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
   (e) make the conclusion of the contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.

3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:

233. America Versus Japan, supra note 224, at 27.
234. Id. at 79-80. Of the six major *Keiretsu*, three originated as *zaibatsu*; the family-controlled cartels which once "comprised the heart of the Japanese industrial economy" were dissolved after World War II. Id.
235. Id. at 80-82.
238. Article 85 reads in full:

1. The following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market, and in particular those which:

   (a) directly or indirectly fix purchase or selling prices or any other trading conditions;
   (b) limit or control production, markets, technical development, or investment;
   (c) share markets or sources or supply;
   (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
   (e) make the conclusion of the contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.

3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:
to Section 1 of the Sherman Act, and Article 86,239 analogous to Section 2 of the Sherman Act. These Articles preempt or supersede member states' antitrust laws.240 Exemption may be individually received after application under Article 85(3)241 or may be covered by certain block exemptions which the Commission of European Communities ("Commission") promulgates.242 Criminal liability and private treble damages are not included in the EEC scheme.243

Although the Commission announced in 1968 that pure research joint ventures do not fall under Article 85(1),244 a 1983 report by the Advisory Committee on Industrial Research and Development concluded that Article 85 was still acting as a deterrent to cooperative research, notwithstanding the exemption feature of 85(3).245 In response, the Commission passed both "Commission Regulation (EEC) No. 418/85 of the Treaty to categories of research and development agreements" ("Regulation"),246 and a block exemption for

—any agreement or category of agreements between undertakings;
—any decision or category of decisions by associations of undertakings;
—any concerted practice or category of concerted practices; which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:
  (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
  (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.


239. Article 86 provides that:

Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market so far as it may affect trade between Member States. Such abuse may, in particular, consist of:
(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
(b) limiting production, markets or technical development to the prejudice of consumers;
(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
(d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

Id. art. 86.

240. Crane, supra note 138, at 436.


242. Id.


244. Id. at 437.

245. Zwart, supra note 24, at 91-93.

specialization agreements allowing companies, whose combined share of a substantial part of the Common Market does not exceed twenty percent, to agree that one firm may specialize in the production of a specific good.247

Like the block exemption, the Regulation is limited to firms whose combined market share is under twenty percent. Within this limitation, however, the Regulation's exemption coverage extends to "joint R&D of products or processes with joint exploitation of the results."248 This actually goes further than the comparable NCRA because "joint exploitation" includes joint manufacturing and licensing as well as joint research ventures,249 although it specifically excludes joint distribution and joint sales.250 To qualify for this safe harbor, the joint exploitation venture must comply with a clearly defined framework and there are elements of joint venture agreements, such as restricted output, prices or customers, which are absolutely prohibited.251

VI. DISCUSSION

Joint ventures are presently of crucial importance to the United States. In addition to competing with Japan and Europe in HDTV and electronics, joint ventures are a powerful method for U.S. industry to seize opportunities currently becoming available through global de-communization.252 Any legislation which encourages legitimate joint ventures and reduces the prevalent uncertainty in antitrust law should be seriously considered.253 Nevertheless, the question remains:

[hereinafter Regulation]. For a comparison of the Regulation and the NCRA, see generally Zwart, supra note 24.
247. Regulation, supra note 246, at 1. See generally BUSINESS INTERNATIONAL RESEARCH REP., supra note 241 at 34-35.
248. Zwart, supra note 24, at 92.

Under article 2, joint R&D must be carried out within the framework of a clearly defined program. All parties must have access to the results. In the absence of an agreement for joint exploitation, each party must be free to exploit the results as it sees fit. When the parties do agree to joint exploitation, such exploitation relates only to results that are protected by patents or copyrights, or constitute know-how that "substantially contributes to technical or economic progress." The research results must be ripe for manufacture. Moreover any jointly appointed manufacturer must supply the R&D products to all the parties, and in case of specialization, specialized manufacturers must fill orders from all parties.

Id. (footnotes omitted).
249. Id.
250. Id.
251. Id. at 94.
252. See Stewart, How to Manage in the New Era, FORTUNE, Jan. 15, 1990, at 68-69 (suggesting joint ventures as a way companies should manage differently in the "new era").
253. The call for greater certainty in all areas of antitrust is nothing new. See J. BURNS,
What antitrust reform will best promote joint ventures while maintaining the integrity of U.S. antitrust laws? Assuming that the current administration is adamant and correct in its position that reform should not be limited to specific industries, such as HDTV, there are two issues to examine: Which class of joint ventures, if any, should benefit; and, how much benefit should be given? Thus, should Congress pass legislation which would grant ETCA-type certification, or NCRA-type registration, and in either case, should the protection extend through distribution or stop at the production level?

Distribution joint ventures should not be given protection in excess of current law. The risk of "spillover" effects are too great. The closer cooperative activities are to product marketing and pricing, the greater the chance of impermissible collusion; additionally, decisions on how the joint venture product will be sold and marketed can mask signals or agreements on the pricing of other products. Bills such as the Boucher-Campbell and Edwards proposals, which permit joint marketing, expressly invite joint pricing and are, therefore, undesirable.

On the other hand, in a pure production joint venture, each parent is responsible for marketing its share of the output. Most experts and commentators would agree that that alone would substantially reduce antitrust concerns. Professor Kitch states that "joint ventures are unlikely to harm competition if (1) their participants have insufficient market share to influence competition or (2) the area of the joint venture is removed from the current sale and marketing of the products in which the members compete." Similarly, one of former-Professor Easterbrook's five "shortcuts" to determine the validity of vertical restraints is whether the firms use different methods of distribution. If they do, he argues, the restraints

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supra note 62, at 18-50 (demonstrating confusion, conflict, and uncertainty in antitrust policy); see also COMMITTEE FOR ECONOMIC DEVELOPMENT, STRATEGY FOR U.S. INDUSTRIAL COMPETITIVENESS 80-82 (1984) (suggesting that the constant threat of private antitrust suits limits the effectiveness of changes in public policy enforcement).

254. "A forward joint venture is formed for the joint marketing of competing finished products. . . . [They] are more unusual and generally more suspect under the antitrust laws than other types of joint ventures." PRACTICING L. INST., supra note 36, at 298-99. "An output joint venture obligating parents to market exclusively through the joint venture raises substantial collusive risk, for it prevents competition between the parents in marketing their output." Brodley, supra note 25, at 1555.

255. PRACTICING L. INST., supra note 23, at 327.


257. See Pogue, supra note 24, at 931.

258. Kitch, supra note 29, at 965 (emphasis added).
should be "deemed lawful, without further inquiry." In assessing the antitrust risk of a recent production joint venture entered into by two horizontally related firms with large market shares (GM and Chrysler), Professor Pitofsky stated that "since the two companies will produce—but not sell—parts together, the joint venture will have no impact on the marketing side [and] while the antitrust laws cover this kind of transaction there have been virtually no challenges to production joint ventures in 100 years." A former general counsel of the FTC said, regarding this production joint venture: "What the antitrust laws are worried about—a higher concentration among sellers and the higher prices that result—is not going to be in effect here."

The need for this type of legislation is augmented by the current globalized marketplace which, in terms of time and money, is a different specie than the one that existed at the time of the Sherman Act's passage. Where a company could formerly take from five years to a decade to develop a technology, tool-up production facilities, and produce a product; today's high-tech environment necessitates a scheduling compression such that the factory is ready upon completion of a product's development, and a second generation product is being developed as the first generation is shipped. The costs and risks of production can be tremendous. For example, a contact printer, the machine necessary to produce a sixteen-kilobyte computer chip, cost less than $35,000 only fifteen years ago. Today the "steppers" which are necessary to produce current chip technology cost $1,700,000 each and a world-class plant would need from ten to fifty of them. It is estimated that the cost of the next generation, a four-megabyte chip facility, will be over a billion dollars. 

261. Id. (quoting Michael Sohn).
264. Id. at 5.
independent, decentralized businesses' may have 'made our country
great,' they have become victims of world markets and scale econo-
mies. To reason otherwise is to 'mold the . . . economy of today into
the market pattern of another era.' "265 For these reasons, production
joint ventures should be legislatively encouraged, and for the same
reasons a Wyden-style small business bill266 is far too limited to have
any substantial impact.

The ETCA-style certification approach, on the other hand, is too
broad and complex. Under the Boucher-Campbell proposal,267 for
example, corporations wishing to take advantage of the protection
would have to prepare and present a highly detailed report on both
their proposals and the market condition, which is tantamount to the
preparation necessary for merger. Thus, many companies may be
deterred for administrative reasons, and others may opt to simply
take the next step and actually merge.268 While the necessary govern-
ment approval could be seen as a block to the foreign corporations'
taking advantage of production joint ventures, it could also put the
government in the unwanted position of picking domestic winners
and losers.269 Most importantly, however, the insulation which certi-
fication would provide may completely eliminate incentives for com-
petitors to seek relief in cases of actual trust violations. Even
Representative Cambpell admitted that "he sees logic in taking an
approach less extreme than his own," and that an NCRA-type proce-
dure "allowing plaintiffs to sue only for their ‘actual’ damages . . .

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265. Halverson, McCarthy & Hibner, supra note 119, at 1167 (citations omitted).
266. See supra notes 202-08 and accompanying text.
267. See supra notes 209-20 and accompanying text.
268. Frank Swain, Chief Counsel for Advocacy Programs in the Small Business
Administration, has testified that Congress does need to “tone down” antitrust law as a signal
to the business community that such ventures are welcome, however, he cautions that the
method should involve the “simplest procedures possible” or small businesses will not use it.
Witnesses Declare that Antitrust Law Discourages Formation of Joint Ventures, 56 Antitrust &
269. According to the Deputy Director for Antitrust Langenfeld and Visiting Scholar
Scheffman:

Such a certification process could involve the government picking entire
industries for antitrust exemptions. The effect of such a process presumes that
completely unrestricted joint activities will lead to more innovation, a
presumption that is not necessarily true. Moreover, such a policy could create an
active and regulatory office that selects particular industries for special
treatment. Not only would this potentially lead to a wasting of resources by
firms to obtain special privileges, it could lead to excessive investments in the
exempted industries at the expense of those industries not chosen by the office.

Langenfeld & Scheffman, Innovation and U.S. Competition Policy, 34 ANTITRUST BULL. 1, 61
(1989).
might be a sufficient ‘reform.’”

Proposals like those of Representative Fish and Senator Leahy which adopt an NCRA extension for production joint ventures are the most rational. Assistant Attorney General Charles Rule has said that:

The cost, in terms of competition and government resources, is minimal to nonexistent. And so, to my point of view, if you can get something for nothing—and that's what the NCRA seems to have done—we might as well get some more for nothing and extend it to production joint ventures.

Under this approach, businesses would be able to take advantage of the substantial certainty of registration using the same, relatively simple procedure with which they are already familiar through the NCRA. At the same time, the availability of actual damages to private plaintiffs would insure that private antitrust enforcement would not be hampered. Nor would the FTC and DOJ be constrained from investigating and prosecuting violators; as NCAA demonstrates, guilty verdicts are certainly obtainable even under the rule of reason.

While such proposals have been criticized as redundant because the Antitrust Enforcement Guidelines for International Operations already state that joint ventures are to be analyzed under the rule of reason, it must be remembered that guidelines do not have the force of law. Other guidelines have been seriously discounted by lawmakers. Similarly, the recent trend for rule of reason analysis in the courts should also be viewed critically, as none of the per se cases has been expressly overruled. Furthermore, even if not necessary, legislation is warranted “to the extent that industry perceives a risk of

271. 60 Minutes with Rule, supra note 154, at 396-97.
272. See supra notes 115-18 and accompanying text.
275. [A]fter the Antitrust Division issued its Vertical Restraints Guidelines, which again seemed to question the per se rule, the House of Representatives passed a bi-partisan resolution declaring that 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.” Scher, ABA Antitrust Law Section Chair’s Speech on Major Issues, 56 Antitrust & Trade Reg. Rep. (BNA) No. 1411, at 588 (Apr. 13, 1989); see also Davidow, Hawk, Lieberknecht & Shenefield, Questions and Answers, 54 ANTITRUST L.J. 1111, 1112 (1985) (“I think it's fair to put a caveat on the record . . . about those Guidelines: In certain important respects, they are the creatures of the ideology of the people who wrote them, and you see . . . very narrow, crabbed interpretations of substantive antitrust law.”).
276. See note 119 and accompanying text.
private antitrust litigation,”277 and to the extent it would focus government and industry on remedies, rather than on “vague and expansive rhetoric about levelling the playing field or punishing other nations' trade practices.”278

VII. CONCLUSION

HDTV is important as a symbol of American re-emergence and as a tangible driver of the semiconductor and electronics industries.279 Additionally, it is critical for the United States to revitalize its domestic technology and manufacturing bases before there are no bases left.280 As Representative Markey lamented, “the Japanese and Europeans are in the seventh inning of a tight ball game and the U.S. is still arguing over how to get to the ball park.”281 While no one believes that antitrust reform is a panacea,282 in this globalized marketplace, U.S. firms are facing intense and often loosely regulated overseas competition in industries where the stakes are large and the windows of opportunity are small.

In such a climate, companies can ill afford to base their decisions on speculations of what standard of review a court would use, or on whether a jury would understand the complexities of antitrust law in frivolous treble-damages litigation. There is a need, not for an abolition, but for a fine tuning of antitrust law to reflect the current world situation. “Any legislation ought to reduce antitrust uncertainty and exposure for legitimate joint ventures; it should not impair our ability to discourage and remedy cartel behavior or other anticompetitive arrangements; and it should operate efficiently with the least possible

277. Scher, supra note 275.
278. Id.
280. Jack Kuehler, Vice Chairman of the Board of IBM Corp. told the Senate Committee on Commerce, Science, and Transportation that “[n]o one is going to make a great deal of money in HDTV for a long time” but because Japan's development and manufacturing teams are in place “with their heads down,” the United States must provide support from both industry and government. Id. at 708.
282. A study prepared by the Advanced Television Committee of the Electronic Industries Association recommends overall policy measures, in addition to relaxing antitrust laws to allow production joint ventures, including: reducing United States dependence on foreign capital by cutting the deficit; increasing the savings rate; tax incentives and reforms for investment; and federal spending for worker education and retraining programs. Study Recommends Industry-Specific Goals to Boost Competitiveness in World Markets, Antitrust & Trade Reg. Rep. (BNA) No. 1401, at 189 (Feb. 2, 1989).
cost and delay for the government and the parties."283 Proposals such as those of Representative Fish (H.R. 2264)284 and Senator Leahy (S. 1006),285 would accomplish these criteria.

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284. See supra notes 195-97 and accompanying text.
285. See supra notes 198-201 and accompanying text.