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# COMMENT

## INCREASING THE INTERNATIONAL COMPETITIVENESS OF THE UNITED STATES THROUGH ITS JOINT VENTURE LAWS: A LESSON TO BE LEARNED FROM SOUTH KOREA

Tania Isenstein\*

### INTRODUCTION

The internationalization of markets has caused a crisis situation in United States antitrust law. United States businesses suffer from intense foreign competition and blame restrictive United States antitrust laws. The United States business community is lagging behind world competitors in technological sectors where joint research and development ventures are often crucial to remaining competitive. Despite the importance of research and development, however, many United States businesses refrain from entering joint research and development ventures because such action subjects the participants to the uncertainty of antitrust scrutiny. Consequently, Congress enacted the National Cooperative Research Act<sup>1</sup> in 1984 which governs United States research and development joint ventures. In marked contrast to the United States stands South Korea's international success and their antitrust statute governing joint ventures, the Monopoly Regulation and Fair Trade Act.<sup>2</sup>

Part I of this comment discusses joint ventures generally and why they are subject to antitrust scrutiny. Part II considers United States joint venture law, including a detailed analysis of the National Cooper-

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1. 15 U.S.C. §§ 4301-05 (1988).

2. Enforcement Decree of the Monopoly Regulation and Fair Trade Act, as amended by Presidential Decree 12120, Apr. 1, 1987 [hereinafter MRFTA].

ative Research Act. Part III explores South Korea's Monopoly Regulation and Fair Trade Act. Part IV of this comment examines the connection between joint ventures and international competitiveness, both in the abstract and with specific reference to the United States and South Korea. Part V recommends that United States lawmakers consider South Korea's experience with the regulation of joint ventures when they consider future antitrust legislation for this country.

## I. JOINT VENTURES GENERALLY

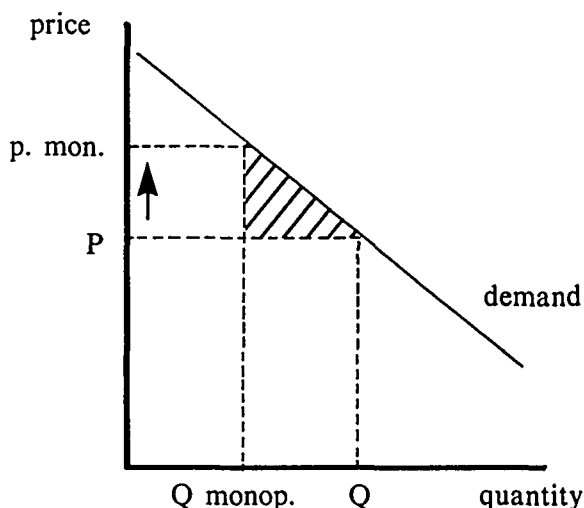
### A. BACKGROUND

In order to understand how joint ventures affect competition, one must understand how the theoretically "pure" forms of monopoly and cartels influence competition. Many economists and lawmakers consider monopolies harmful because they create inefficiency both by restricting output and raising prices, as well as by creating allocative inefficiency.<sup>3</sup> Output is the generally accepted gauge for determining

3. See Landes, *Harm to Competition: Cartels, Mergers & Joint Ventures*, 52 ANTITRUST L.J. 625, 625-26 (1983) (observing that cartels are objectionable because they reduce output while raising price); R. BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* 98-101 (1978) (detailing the inefficiencies of monopolies).

Although there is a general consensus that monopolies are undesirable because of their inefficiency, there is controversy concerning whether the law should consider income distribution, or what is known as the wealth transfer, associated with monopoly. *Id.* Bork warns that the courts should not consider income distribution effects of an activity in determining antitrust legality. *Id.* at 110-13. But see Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 HASTINGS L.J. 67, 68 (1982) (admitting that the majority view is that the antitrust laws should enhance efficiency, yet arguing that the antitrust laws are for distributive purposes).

To illustrate the effects of monopoly, examine the graph at right. This graph is a standard consumer welfare model characterization of monopoly found in any microeconomic textbook. *E.g.*, R. BORK, *supra*, at 107. It is important to note that a profit maximizing monopolist will restrict output and charge higher prices than the perfect competitor. *Id.* The result of



anticompetitive behavior.<sup>4</sup> If, for example, a firm restricts output, there is reason to suspect anticompetitive behavior. Conversely, in situations where a firm increases output there is generally a presumption of procompetitiveness.<sup>5</sup> Not all behavior restricting competition is necessarily evil to an economy, however, if there are also procompetitive effects.<sup>6</sup> Joint ventures fall into this category. They may reduce output, but they also have a positive effect on the economy.

## B. JOINT VENTURE DEFINED

Joint venture analysis begins with defining the term.<sup>7</sup> Defining a joint venture is difficult however.<sup>8</sup> Joint ventures can be classified as falling

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this is what economists call the dead-weight loss (the triangle above). *Id.* at 108. The triangle represents two items: (1) the output that would have been purchased if perfect competition prevailed, and (2) resources whose most efficient use would have been applied to that forgone output which are being used less efficiently. *Id.* This is known as allocative inefficiency. *Id.* These negative effects of monopoly are not in dispute. *See id.* at 101 (asserting that the evils of monopoly are not high prices or reduced production but misallocated resources); Lande, *supra*, at 72-79 (exploring allocative inefficiency as one result of monopoly).

Another more controversial effect of monopoly is the wealth transfer. This is the shift of consumer surplus in perfect competition to producer surplus in monopoly (arrow in graph). R. BORK, *supra*, at 85-86. In simple terms, the monopolist gets richer while the consumer grows poorer. *Id.* Chicagoan economists, often considered conservatives, hold that this is not and should not be an antitrust concern because it involves a value judgment regarding who should receive the surplus. *Id.* Further, this argument ignores the fact that producers are consumers too. *Id.* Liberal thought, however, holds that this transfer of wealth is troubling and cites the legislative history of the antitrust laws in support of this contention. *See* Lande, *supra*, at 93-96, 112-14, 135-36 (discussing legislative intent with respect to the Sherman Act, the Federal Trade Commission Act, the Clayton Act, and the redistribution of wealth); Elzinga, *The Goals of Antitrust: Other than Competition and Efficiency, What Else Counts?*, 125 U. PA. L. REV. 1191, 1192-96 (1977) (postulating that legislative intent indicates goals such as equity and income distribution for antitrust law); Schwartz, "Justice" and Other Non-Economic Goals of Antitrust, 127 U. PA. L. REV. 1076, 1076-79 (1979) (considering the legislature's intent that antitrust laws serve non-economic goals).

4. Landes, *supra* note 3, at 627. Output is a key measurement for anticompetitive behavior because it determines the deadweight loss. *Id.*

5. *Id.*

6. *See* Standard Oil Co. v. United States, 221 U.S. 1, 60 (1911) (explaining that if all contracts restraining trade were unlawful every contract would be illegal); United States v. Joint Traffic Ass'n, 171 U.S. 505, 567 (1989) (observing that virtually every business contract restrains trade to a degree); United States v. Addyston Pipe & Steel Co., 85 F. 271, 272 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899) (permitting a contract to restrain trade if the restraint is ancillary); United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 328 (1897) (stating that only contracts unreasonably restraining trade violate antitrust laws).

7. Kitch, *The Antitrust Economics of Joint Ventures*, 54 ANTITRUST L.J. 957, 960 (1985).

8. P. AREEDA, ANTITRUST ANALYSIS ¶ 360 (3d ed. 1983). A joint venture is "[a]n expansive notion without definite meaning or antitrust consequence." *Id.*; *see* Wright, *The National Cooperative Research Act of 1984: A New Antitrust Regime for Joint*

somewhere between mergers and naked cartels.<sup>9</sup> Joint ventures are similar to mergers in that they involve cooperation between firms that are often competitors.<sup>10</sup> Joint ventures differ from mergers, however, because joint ventures are less integrated, venturers retain their individual identities, and all parties' operations unrelated to the venture remain separate.<sup>11</sup>

Joint ventures are similar to naked cartels in that they both involve an agreement between competitors that, directly or indirectly, affects prices. Joint ventures differ from cartels, however, which do not integrate resources or enhance productive capacity.<sup>12</sup> Hence, joint ventures may reduce competition less than a merger would and could increase efficiency more than a naked cartel to fix prices.<sup>13</sup>

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*Research & Development Ventures*, 1 HIGH TECH L.J. 133, 144 (1986)(recognizing that a joint venture could be almost any agreement between two firms); Pitofsky, *A Framework for Antitrust Analysis of Joint Ventures*, 54 ANTITRUST L.J. 893, 893-94 (1985)(noting that defining a joint venture is problematic for antitrust enforcement because it could be any business enterprise where parties collaborate for a business goal).

9. E.g., Kitch, *supra* note 7, at 960 (advancing the proposition that joint ventures require less restraint on competition than mergers yet possess more hope of increased efficiency than a naked price fix); Pitofsky, *supra* note 8, at 893 (declaring joint ventures to fall between the two extremes of mergers and naked cartels).

10. E.g., Kitch, *supra* note 7, at 960. See *Yamaha Motor Co. v. FTC*, 657 F.2d 971, 973-74 (8th Cir. 1981)(considering the legality of a joint venture between two producers of outboard motors); *Virginia Excelsior Mills v. FTC*, 256 F.2d 538, 539 (4th Cir. 1958)(evaluating a joint venture between two producers of packaging materials); *United States v. Minnesota Mining & Mfg. Co.*, 92 F. Supp. 947, 950-58 (D. Mass. 1950)(examining a joint venture consisting of nine producers of coated abrasives).

11. Wright, *supra* note 8, at 144-45. Another difference between a joint venture and a merger is that a joint venture may be of limited duration while a merger is not. Landes, *supra* note 3, at 630.

12. Pitofsky, *supra* note 6, at 893. It is this difference in procompetitive benefits which determines that, under United States law, joint ventures are not illegal per se. *Id.* Cartels to fix prices, unlike joint ventures, are unjustifiable and are therefore illegal. *Id.*; see also *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 220-24 (1940) (declaring that any combination tampering with prices is engaged in an unlawful activity regardless of whether the price was reasonable); *United States v. American Tobacco Co.*, 221 U.S. 106, 121 (1911) (finding any agreement to fix prices such a threat to the market that such agreements are deemed unlawful without further inquiry).

13. Kitch, *supra* note 7, at 960. Perhaps the most thorough characterization of joint ventures has been achieved by Joseph Brodley:

[A] joint venture may be defined for antitrust purposes as an integration of operations between two or more separate firms in which the following conditions are present:

- 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.

## C. BENEFITS AND HARMS FROM JOINT VENTURES

Joint venture activity can yield several procompetitive benefits, the most significant of which is the encouragement of research and development (R&D) necessary for technological competitiveness.<sup>14</sup> Joint ventures encourage desirable R&D in several ways. First, joint ventures allow each participant to decrease its exposure to the risks of long-term research, which is often speculative yet necessary for technological advancement.<sup>15</sup> Because firms engaged in research and development joint ventures can spread the inherent risks of R&D, firms are more likely to undertake R&D projects, which results in increased innovative activity.<sup>16</sup> Additionally, many businesses engage in joint ventures to benefit from economies of scale,<sup>17</sup> to consolidate firms with complementary assets, to use those assets most efficiently,<sup>18</sup> and to minimize the "free rider" problem often concomitant with research.<sup>19</sup> Joint

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Brodley, *Joint Ventures & Antitrust Policy*, 95 HARV. L. REV. 1523, 1526 (1982).

14. Kuhn, *Emerging International Antitrust Perspectives on R&D Joint Ventures*, 16 LAW & POL'Y INT'L BUS. 1181, 1181-82 (1984) [hereinafter Kuhn]. The business community accepts the view that research and development joint ventures enhance technological competitiveness. *Id.*; see also U.S. Dep't of Justice *Antitrust Guide Concerning Research Joint Ventures* (1980), ANTITRUST & TRADE REG. REP. (BNA) No. 992 at 1, 2 [hereinafter *Antitrust Guide*] (stating that in modern economies innovation is key to competitiveness).

15. Kuhn, *supra* note 14, at 1182 n.3; see also Brodley, *supra* note 13, at 1528 (observing that joint ventures reduce the participating firms' risk of loss).

16. S. BERG, J. DUNCAN & P. FRIEDMAN, *JOINT VENTURE STRATEGIES AND CORPORATE INNOVATION* 77 (1982). Although the risk of failure of a project is the same with or without the joint venture, a firm can reap the benefits of the results with less investment and therefore with less total risk. *Id.* Although the participants will have to share the rewards, this is usually less important than the reduced risk. *Id.*; see also *id.* at 94-95 (providing a detailed discussion of joint ventures as they relate to risk reduction and risk aversion); Pitofsky, *supra* note 8, at 895 (noting the situation in which potential competitors will not assume the entire risk of an undertaking but are willing to enter into the market with partners); Wright, *supra* note 8, at 147 (characterizing research as a high risk activity).

17. Weston & Ornstein, *Efficiency Considerations in Joint Ventures*, 53 ANTITRUST L.J. 85 (1984). Economies of scale become relevant when the project may be carried out more efficiently if done on a larger scale. Kitch, *supra* note 7, at 963. Economies of scale are also relevant to risk in that a project may be too large for one firm only because it involves too much risk, not because of other factors of production. *Id.*

18. Kitch, *supra* note 7, at 694. One incentive to create a joint venture exists when two firms each possess a different component or asset needed for the production of a good. *Id.* A joint venture is beneficial in this situation because it could yield a competitor that would not otherwise exist. Pitofsky, *supra* note 8, at 895. Furthermore, there may only be a limited number of persons sufficiently skilled to carry out advanced technological research, so that a single company on its own may not be able to successfully operate such a project. S. REP. NO. 427, 98th Cong., 2d Sess. 1 (1984) *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 3105.

19. Wright, *supra* note 8, at 147 n.79. A free rider is someone who reaps the benefits of another's investment without contributing. R. POSNER & F. EASTERBROOK, AN-

ventures also avoid the duplication of effort that often occurs when competing firms conduct the same research.<sup>20</sup> Finally, joint ventures reduce transaction costs, thereby increasing efficiency.<sup>21</sup>

Joint ventures also yield more general benefits. For example, increased technological rivalry between joint ventures stimulates innovation by heightening competition.<sup>22</sup> Joint ventures can also increase the market value of the participating firms.<sup>23</sup> In addition, international joint ventures provide companies with access to foreign markets otherwise inaccessible due to insufficient capital, technology, or personnel.<sup>24</sup>

Anticompetitive effects may accompany the procompetitive benefits of joint ventures. The most discussed and feared anticompetitive effect is "spillover collusion."<sup>25</sup> Spillover collusion occurs when firms congregate

TITRUST: CASES, ECONOMIC NOTES AND OTHER MATERIALS 177 (2d ed. 1981). This happens often with research because the research can be gotten by others through simple methods such as reverse engineering. Wright, *supra* note 8, at 147 n.79. See Kitch, *supra* note 7, at 963 (explaining how the free rider problem is an imperfection in the market and how this externality can be corrected through the use of joint ventures).

20. Wright, *supra* note 8, at 148. For example, transactional efficiency occurs when firms with complementary assets form a joint venture utilizing those assets instead of purchasing them from each other. Kitch, *supra* note 7 at 964.

21. Kitch, *supra* note 7, at 964. See Pitofsky, *supra* note 8, at 895 (proffering profit sharing instead of fixed fees, and joint venture structure instead of contracts which require anticipation and specification, as some of the joint venture's transactional efficiencies). For a detailed study from a transactional approach, otherwise known as the "organizational failures framework," see O. WILLIAMSON, MARKETS AND HIERARCHIES: ANALYSIS AND ANTITRUST IMPLICATIONS (1975); see also Coase, *The Nature of the Firm*, 4 *ECONOMICA* 386 (1937) (providing the seminal study which created the transaction costs approach).

22. S. BERG, J. DUNCAN & D. FRIEDMAN, *supra* note 16, at 127-36.

23. Weston & Ornstein, *supra* note 17, at 94. This results from the expectation that the joint venture will positively affect the firm's efficiency. *Id.*

24. Wright, *supra* note 6, at 145-46. International joint ventures may also permit entry into economies that do not permit enterprises where a majority of the firm is owned by a foreign entity. *Id.* There are many reasons for the rise of international joint ventures. Local participation, for example, may provide an otherwise foreign owned venture with the best managerial talent. W. FRIEDMANN & J. BEGUIN, JOINT INTERNATIONAL BUSINESS VENTURES IN DEVELOPING COUNTRIES 4 (1971). Additionally, a local government may effectively force the foreign investor to structure the investment in the form of a joint venture by requiring local participation or making the awarding of licenses contingent upon a joint venture arrangement. *Id.* For developing countries, a joint venture may symbolize equality between themselves and foreign investors as well as the hope of economic development. *Id.* Some developing countries engaging in international joint ventures include Iran, Liberia, Chile, Africa, Hong Kong, India, Turkey, Indonesia, Ghana, and Brazil. See generally *id.* (discussing international joint ventures in each of these countries); W. FRIEDMANN & G. KALMANOFF, JOINT INTERNATIONAL BUSINESS VENTURES (1961) (studying the significance of the international joint venture in detail). South Korean policy is to encourage joint ventures between a United States investor and a South Korean enterprise. Chan-Jin Kim, *The Antimerger Laws of the United States, Japan and Korea*, 12 *KOREAN J. OF COMP. L.* 1, 36 (1984).

25. See Pitofsky, *supra* note 8, at 900 (observing that joint ventures may encourage collusion by allowing competitor parents to fix prices or exchange information regard-

for a legal, procompetitive purpose, yet the group engages in anticompetitive collusion, such as price fixing.<sup>26</sup> Additionally, a joint venture may impose anticompetitive collateral restraints not reasonably related to the joint venture.<sup>27</sup> Collateral restraints are agreements between the parties which would be illegal if not necessary for the success of the joint venture.<sup>28</sup> Joint ventures may also restrict competition by preventing potential competitors from entering the market.<sup>29</sup> Finally, the joint venture may stifle competition by virtue of the standard agreement that the parents not compete with the joint venture.<sup>30</sup> Concern about the

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ing future prices, capacity, or sales); *Weston & Ornstein*, *supra* note 17, at 85 (asserting that in the past courts' primary concern have been spillover collusion); *S. BERG, J. DUNCAN & D. FRIEDMAN*, *supra* note 16, at 68 (declaring spillover collusion a major concern with joint ventures); *see also* *United States v. Imperial Chem. Indus.*, 100 F. Supp. 504 (S.D.N.Y. 1951), *modified*, 105 F. Supp. 215 (S.D.N.Y. 1952) (examining a joint venture that firms had used to organize a worldwide cartel); *United States v. Minnesota Mining*, 92 F. Supp. 947, 947 (D. Mass. 1950) (condemning a joint venture because it would give the participants who were otherwise competitors a chance to exchange information not essential for the success of the joint venture).

26. *See S. BERG, J. DUNCAN & D. FRIEDMAN*, *supra* note 16, at 69 (asserting that firms forming marketing joint ventures are most likely to form them for the purpose of creating the opportunity to engage in anticompetitive behavior).

27. *Pitofsky*, *supra* note 8, at 901.

28. *Id.* An example of this is an agreement between the participants by which they each put unique technology into the joint venture to prevent the other participants from using that technology for their individual benefit. Without the joint venture, courts could declare this agreement illegal *per se* but it is necessary if parties will be contributing technology to the joint venture. *Id.* For a discussion of illegal collateral restraints, *see* *Yamaha Motor Co. v. FTC*, 657 F.2d 971 (8th Cir. 1981)(finding certain agreements not reasonably related to the joint venture).

29. *Weston & Ornstein*, *supra* note 17, at 85. The court's concern is most acute when parents of the joint venture already compete in the market or when they would have entered the market, because in such cases the joint venture does not add a new competitor to the market. *Pitofsky*, *supra* note 8, at 896. Instead, there is only one competitor (the joint venture) where there would have been more (the parents). *Id.* at 897. There is the least antitrust concern where neither parent competed nor was likely to enter the market, because such a joint venture would add a new competitor. *Id.* at 898. A joint venture case becomes more complex, however, where one parent is not a potential competitor and one parent is. *Id.*

30. *Pitofsky*, *supra* note 8, at 899. If courts prohibited joint ventures on this basis, then the number of joint ventures would decrease. As a result, United States courts generally do not use the "stifling" effect test to disallow joint ventures. *See* *United States v. Pan Am World Airways, Inc.*, 193 F. Supp. 18, 33-36 (S.D.N.Y. 1961), *rev'd on other grounds*, 371 U.S. 296 (1963)(finding a territorial restraint on the parents of a joint venture not unreasonable and not a *per se* violation of antitrust laws); *United States v. Penn-Olin Chem. Co.*, 378 U.S. 158, 159 (1964)(holding that an agreement between parties to a joint venture not to enter a product market competitive with the joint venture's product without informing the other party is not a collaterally restrictive agreement).



potential anticompetitive effects, however, is underscored by the fact that joint ventures are often self-detering.<sup>31</sup>

#### D. APPROPRIATE FOCUS OF INQUIRY

The preceding discussion illustrates that joint ventures do not *necessarily* harm or benefit competition because joint ventures can have diverse effects on competition. It follows, therefore, that courts should not declare joint ventures per se illegal as they do many other potentially anticompetitive activities.<sup>32</sup> Because joint ventures offer procompetitive effects and encompass a wide range of activities and circumstances,<sup>33</sup> a court should examine each joint venture individually before declaring the transaction illegal.<sup>34</sup>

In determining the legality of a particular joint venture, experts advocate the rule of reason analysis because it balances the procompetitive effects and the anticompetitive effects.<sup>35</sup> In particular, courts and

31. See Wright, *supra* note 8, at 146 (enumerating reasons why parties would not engage in a joint venture). For instance, potential joint venture participants must consider the uncertainty of their contributions and benefits. S. BERG, J. DUNCAN & D. FRIEDMAN, *supra* note 16, at 11. Further, joint ventures are difficult to organize and involve agreement on several key points of strategy. *Id.* at 72.

32. Pitofsky, *supra* note 8, at 913. See *Arizona v. Maricopa County Medical Soc'y*, 457 U.S. 332 (1982) (holding maximum fee price agreements of a medical society per se unlawful); *United States v. Topco Assocs.*, 405 U.S. 596, 597 (1972) (finding allocation of territories to reduce retail competition illegal); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 150 (1940) (declaring any price fixing agreement violative of the Sherman Act).

Justice Black provided the logic behind the per se rule as follows:

[T]here are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use. This principle of per se unreasonableness . . . avoids the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable—an inquiry so often wholly fruitless when undertaken.

*Northern Pac. Ry. Co. v. United States*, 356 U.S. 1, 5 (1958). Courts classify activities as per se illegal only if they can predict with confidence that the restraint would fail a rule of reason test. *Maricopa*, 457 U.S. at 344 n.15.

33. See *supra* notes 14-24 and accompanying text (exploring procompetitive aspects of joint ventures).

34. See Kitch, *supra* note 7, at 957-59 (enumerating conditions of the joint venture and its surrounding circumstances in determining a joint venture's impact on competition); Landes, *supra* note 3, at 635 (warning that the label of an activity does not necessarily create a given impact on competition); Pitofsky, *supra* note 8, at 913 (declaring that the belief that a rule of reason analysis should be used for joint ventures is virtually unanimous).

35. See Landes, *supra* note 3, at 635 (recommending that courts judge joint ventures using a rule of reason test with particular emphasis on the effects on output);

economists support the proposition that the effect on output is the key factor in the analysis,<sup>36</sup> although others have proposed a different focus.<sup>37</sup> Despite their differences, however, all methods contain a common thread: they possess, either inherently or overtly, what Weston and Ornstein label the "renaissance in antitrust thinking."<sup>38</sup> This renaissance focuses on efficiency as opposed to merely drawing inferences from concentration ratios.<sup>39</sup> Accordingly, courts will determine a joint venture's legality by examining its effects on competition, which may include gains in efficiency as well as anticompetitive effects.

## II. UNITED STATES ANTITRUST LAW

### A. GOALS OF UNITED STATES ANTITRUST LAW

United States antitrust law seeks to preserve competition, thereby yielding efficient output at efficient prices.<sup>40</sup> In *Northern Pac. Ry. Co. v. United States*,<sup>41</sup> the Supreme Court declared that the Sherman Act rests upon the theory that unrestrained competition yields the most efficient allocation of resources, the highest quality products, and the greatest material progress.<sup>42</sup> When one examines more specific goals,

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Pitofsky, *supra* note 8, at 904 (urging courts to determine the legality of joint ventures by the extent of integration and efficiencies derived from the joint venture as well as whether the joint venture's restrictions are reasonably related to attaining the efficiencies); Weston & Ornstein, *supra* note 17, at 94 (advising that United States antitrust policy must allow United States companies to act without being restricted by "anti-quated" and "doctrinaire" restrictions).

36. Landes, *supra* note 3, at 635. Landes states that "[a] practice harms competition when it restricts output and raises price, causing a deadweight or efficiency loss. . . . [joint ventures] should be judged by a rule of reason analysis that focuses on the effects on output." *Id.* (emphasis added). See *supra* note 4 (noting that output is an important measuring tool).

37. Kitch, *supra* note 7, at 965. Kitch proposes an analysis for joint ventures providing that joint ventures are not likely to negatively affect competition if the participants have such a small market share that they are unable to influence competition, or where the joint venture is in an area where the participants compete. *Id.* Further, he contends that joint ventures are more likely to increase efficiency where they correct externalities, gain economies of scale, or reap transactional efficiencies. *Id.*

Pitofsky uses a slightly different analysis. He views joint ventures as a tradeoff between increased efficiency and anticompetitive effects. Pitofsky, *supra* note 8, at 904-05. Hence, he would examine the extent of integration in the joint venture as a substitute for increased efficiency which is difficult to measure. *Id.* To quantify the anticompetitive effects, Pitofsky would determine whether the joint venture's restrictions on the participants are reasonably related to the procompetitive benefits sought. *Id.*

38. Weston & Ornstein, *supra* note 17, at 94.

39. *Id.*

40. Wright, *supra* note 8, at 148.

41. 356 U.S. 1 (1958).

42. *Id.* at 4-5.

however, distinct schools of thought emerge.<sup>43</sup> One group believes that antitrust law should serve a number of functions including distributing income, limiting the concentration of economic power, and protecting small businesses.<sup>44</sup> The competing school of thought is that the sole goal of antitrust law is efficiency, determined by total social welfare.<sup>45</sup> This ongoing controversy renders the goals of antitrust law uncertain.<sup>46</sup> The Supreme Court appears to favor the latter view, however, because it most often emphasizes efficiency.<sup>47</sup> Consequently, the efficiency approach is most appropriate for analyzing joint ventures.

## B. UNITED STATES JOINT VENTURE LAW—AN OVERVIEW

All three branches of the United States government have the ability to affect the antitrust laws.<sup>48</sup> The legislature enacted statutes forming the basis for antitrust law,<sup>49</sup> but has since played only a limited role in

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43. See Fox, *The Battle for the Soul of Antitrust*, 75 CALIF. L. REV. 917 (1987)(examining the raging battle between the economically oriented Chicago School and the legislatively and judicially oriented New Coalition); Fox & Sullivan, *Antitrust-Retrospective and Prospective: Where Are We Coming from? Where Are We Going?*, 62 N.Y.U. L. REV. 936 (1987)(finding three dominant groups challenging antitrust law: the Chicago School, the left, and industrial policy proponents).

44. See Gerber, *Foreward: Antitrust and the Challenge of Internationalization*, 64 CHI.-KENT L. REV. 689, 692-94 (1988)(discussing the uncertainty of antitrust goals yet listing deconcentration of economic power, protection of small businesses, and promotion of consumer welfare as potential aims); Elzinga, *supra* note 3, at 1191 (1977)(listing and discussing efficiency, redistribution of income, and promotion of small businesses as antitrust ideals); Lande, *supra* note 3, at 67 (hypothesizing that Congress passed antitrust laws to achieve distributive equity or the prevention of "unfair" wealth transfers to producers); Pitofsky, *The Political Context of Antitrust*, 127 U. PA. L. REV. 1051 (1979)(urging courts to consider political values such as deconcentration of economic power in addition to efficiency); Schwartz, *supra* note 3, at 1076-79 (declaring that the non-economic goal of justice should play a major role in antitrust analysis). See also *supra* note 1 (discussing the debate over wealth transfer).

45. See R. BORK, *supra* note 3, at 81-89 (concluding that adherence to the single goal of consumer welfare is preferable to a multiple goal approach). See also *supra* note 3 (discussing that the wealth transfer is of no concern to those viewing efficiency as the goal of antitrust law).

46. Gerber, *supra* note 44, at 694. The effect of this uncertainty regarding antitrust goals has led to a "weakening of antitrust law rather than its careful modification in response to the impact of internationalization." *Id.*

47. Pitofsky, *supra* note 8, at 913. See also *id.* at 907-13 (providing an overview of Supreme Court cases regarding joint ventures).

48. See Gerber, *supra* note 44, at 702 (discussing the role each branch has assumed).

49. E.g., Sherman Act, ch. 647, 26 Stat. 209 (1890) (current version at 15 U.S.C. §§ 1-2 (1982)); Clayton Act, ch. 323, § 7, 38 Stat. 730 (1914) (current version at 15 U.S.C. § 18 (1984)); Federal Trade Commission Act, ch. 311, § 5, 38 Stat. 719 (1914) (current version at 15 U.S.C. § 45 (1982)). See *infra* notes 60-79 and accompanying text (overviewing the four antitrust statutes particularly relevant to joint ventures).

United States antitrust law.<sup>50</sup> The courts, on the other hand, have played a major role, shaping antitrust law through the interpretation of the statutes in specific cases.<sup>51</sup> The executive branch, including administrative agencies, affects enforcement and composition of the courts but plays an otherwise limited role.<sup>52</sup>

Four statutes form the basis of United States antitrust law.<sup>53</sup> They are: section one of the Sherman Act,<sup>54</sup> section two of the Sherman Act,<sup>55</sup> section seven of the Clayton Act,<sup>56</sup> and section five of the Federal Trade Commission Act (FTC Act).<sup>57</sup> These acts are individually discussed below, but they all yield similar results for joint ventures.<sup>58</sup>

Section one of the Sherman Act addresses joint activity.<sup>59</sup> The key question in a section one analysis is whether the activity in question is a restraint of trade.<sup>60</sup> To answer this question, a court may place the activity into one of two categories.<sup>61</sup> The court may declare such per se unlawful inherently restrictive agreements as price fixing or dividing markets because they lack procompetitive benefits.<sup>62</sup> Where there is the

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50. Gerber, *supra* note 44, at 702. For example, the Sherman Act is extremely broad, so that specific interpretation is left to the judiciary. *Id.*

51. Gerber, *supra* note 44, at 702.

52. See generally Baxter, *Separation of Powers, Prosecutorial Discretion and the "Common Law" Nature of Antitrust Law*, 60 TEX. L. REV. 661, 673-82 (1982) (discussing separation of powers with respect to antitrust and concluding that the president has authority to affect antitrust enforcement); Litvack, *Government Antitrust Policy: Theory Versus Practice and the Role of the Antitrust Division*, 60 TEX. L. REV. 649, 650 (1982) (noting that the Reagan administration's focus on economic theory has affected antitrust enforcement). See Wright, *supra* note 6, at 173-75 (exploring the Department of Justice's enforcement policy regarding joint ventures).

53. This comment discusses only the central provisions of United States antitrust statutes that relate to joint ventures.

54. 15 U.S.C. § 1 (1982).

55. *Id.* § 2 (1982).

56. *Id.* § 18 (1982).

57. *Id.* § 45 (1982).

58. See *Antitrust Guide*, *supra* note 14, at 3 (specifying that the outcome of a joint venture case depends more upon the specific facts than upon the applicable legal standard); Wright, *supra* note 8, at 149 (observing that the conclusion of whether a joint venture is legal will be the same regardless of which statute the court applies); Brodley, *supra* note 13, at 1539 (declining to consider the *possibly* varying reaches of the antitrust statutes because the remedies are equally available under all the statutes).

59. 15 U.S.C. § 1 (1982). Section one provides in relevant part that "every contract, combination . . . or conspiracy, in restraint of trade or commerce . . . is declared to be illegal." *Id.*

60. Kuhn, *supra* note 14, at 1185.

61. *Id.*

62. See *United States v. Topco Assocs.*, 405 U.S. 596, 595 (1972) (finding a horizontal agreement geographically dividing markets per se unlawful); see also *Socony-Vacuum Oil Co.*, 310 U.S. at 150 (holding that price fixing in any form is per se unlawful under section one of the Sherman Act). But see *Broadcast Music v. Columbia Broadcasting Sys.*, 44 U.S. 1 (1979) (effectively overruling *Topco* by declaring that a

potential for procompetitive benefits, however, the courts apply a rule of reason test to weigh the restraint against the benefits it produces.<sup>63</sup>

The first step in a rule of reason analysis is to evaluate market definition and market power.<sup>64</sup> Definition of the relevant market contains two components: the product market and the geographic market.<sup>65</sup> The relevant market must include suppliers of a similar product in a nearby geographic area who, by their existence and ability to enter the relevant market, restrain the antitrust defendant's power.<sup>66</sup> It is against this background that a court examines the restraints and benefits of the practice in question.<sup>67</sup> Whether a court classifies the activity as per se illegal or provides a rule of reason analysis, section one of the Sherman Act is relevant to joint ventures because it addresses joint activity directly.<sup>68</sup>

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horizontal restraint was not per se unlawful). No R&D joint venture has been held per se unlawful. Wright, *supra* note 8, at 152.

63. See, e.g., *Standard Oil Co. v. United States*, 221 U.S. 1, 60 (1911) (creating the rule of reason analysis); *United States v. American Tobacco Co.*, 221 U.S. 106, 175-80 (1911) (considering and further refining the rule of reason analysis). Some of the factors courts may consider in determining the legality of the restraint under a rule of reason analysis are: (1) whether the restraint regulates or suppresses competition; (2) the nature of the industry involved; (3) the condition of the industry both before and after the restraint; (4) the nature of the restraint and its probable or actual effect; (5) the restraint's history; and (6) the intent of the parties imposing the restraint. *Board of Trade v. United States*, 246 U.S. 231, 338-39 (1918).

Before the 1984 National Cooperative Research Act, courts analyzed R&D joint ventures under the rule of reason standard. Kuhn, *supra* note 14, at 1185. See *Berkey Photo v. Eastman Kodak Co.*, 603 F.2d 263, 302 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980) (concluding that the rule of reason is to be used with respect to joint ventures); see also *infra* note 68 and accompanying text (discussing the *Berkey* case).

64. Harris & Jorde, *Antitrust Market Definition: An Integrated Approach*, 72 CALIF. L. REV. 3, 4-6 (1984). Experts agree that "the purpose of defining a market is to help measure a firm's power over price and output, or its power to foreclose markets." *Id.* at 4. Because it is difficult to ascertain this power directly, courts will infer it from the percentage of the market at issue in a given case. *Id.* Hence, a definition of the relevant market to use as a benchmark is essential. *Id.* The focus of this Comment is restricted to market definition and does not address market power. International joint ventures alter the standard analysis for market definition, hence this Comment will focus on market definition rather than market power. See Harris & Jorde, *supra* at 3 (discussing market power in the international context).

65. P. AREEDA & L. KAPLOW, *ANTITRUST ANALYSIS* 512-13 (4th ed. 1988). Because this Comment challenges the common analysis of the geographic market, that is where the focus shall be; see also *id.* at 575-77 (assessing product market determination); Wright, *supra* note 8, at 160-62 (discussing determination of the relevant product market).

66. P. AREEDA & L. KAPLOW, *supra* note 65, at 572.

67. *Id.*

68. Kuhn, *supra* note 14, at 1185. The seminal section one joint venture case, perhaps even the seminal joint venture case, is *Berkey Photo v. Eastman Kodak Co.*, 603 F.2d 263 (1980). See Wright, *supra* note 8, at 153 (characterizing *Berkey* as establishing the standard for joint venture antitrust analysis). *Berkey* established the standard for analyzing R&D joint ventures. *Id.* The court held that joint ventures are not per se

Section two<sup>69</sup> of the Sherman Act is relevant to joint ventures because the Federal Trade Commission or the Department of Justice could accuse joint venture participants of monopolizing. As in a section one analysis, the first step under section two is to determine the relevant market.<sup>70</sup> The next step is to determine whether the activity either attempts to or succeeds in controlling prices or excluding competition.<sup>71</sup>

The third statute, section seven of the Clayton Act, also threatens the legality of a joint venture. This section forbids the acquisition of stock or assets of another corporation if the result would be less competition or a potential monopoly.<sup>72</sup> Although Congress intended section seven to apply to the regulation of mergers,<sup>73</sup> *United States v. Penn-Olin Chem. Co.* held section seven to govern joint ventures as well.<sup>74</sup> Thus, the appropriate inquiry is whether the joint venture will decrease competition in the relevant market.<sup>75</sup>

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illegal because they have procompetitive potential. *Berkey*, 603 F.2d at 302. joint ventures also have the power to be exclusionary and accordingly are subject to antitrust evaluation. *Id.* The heart of the analysis is whether the joint venture will increase or decrease innovation which depends upon such factors as the market structure and the research program. Wright, *supra* note 8, at 155-56.

69. 15 U.S.C. § 2 (1982). Section two states in relevant part that "[e]very person who shall monopolize, or attempt to monopolize, or . . . conspire with another . . . to monopolize any part of . . . trade or commerce . . . shall be deemed guilty of a felony . . . ."

70. Kuhn, *supra* note 14, at 1187. The reason for this is that market power is the measure courts use to determine whether an antitrust inquiry is warranted and, if so, whether it constitutes monopoly power. P. AREEDA & L. KAPLOW, *supra* note 65 at 337-40. In order to measure market power, one must first determine the relevant market, both product and geographic. *Id.* § 241, at 572-75; *see also supra* note 65 (discussing market definition).

71. *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 391 (1956). In this case, the Court determined first that cellophane was the appropriate market and then examined whether du Pont had monopoly power, that is, whether du Pont had the "power to control prices or exclude competition." *Id.*

72. 14 U.S.C. § 18 (1982).

73. *See Brown Shoe Co. v. United States*, 370 U.S. 294, 312-13 (1962) (noting that the original section seven forbade one corporation from acquiring the stock of another if the acquisition would decrease competition between the two corporations or tend to create a monopoly).

74. *United States v. Penn-Olin Chem. Co.*, 378 U.S. 158, 167-68 (1964). The Court held that the effect of the restraint governs whether section seven controls the restraint. *Id.* at 168. It continued by stating that a joint venture could reduce competition. *Id.* Further, the Court found that holding section seven inapplicable to joint ventures created a loophole that Congress designed section seven to close. *Id.* Despite this holding, the government has not yet successfully challenged an R&D joint venture based upon section seven. Wright, *supra* note 8, at 153.

75. *Penn-Olin*, 378 U.S. at 173-77. Under *Penn-Olin*, courts should consider the following factors: the power of the actors in the relevant market and the nature of their growth; the power of the joint venture's parents and the competition between them; the nature of the joint venture and its purpose; the relationship of the joint venture's line of commerce to its parents; the ease with which the joint venture could engage in an-

Finally, section five of the FTC Act provides in pertinent part that "unfair methods of competition in or affecting commerce, are declared unlawful."<sup>76</sup> This section aims to prevent potential violations of anti-trust law<sup>77</sup> and therefore may cover activities not violating other sections.<sup>78</sup> There is no section five case on R&D joint ventures, so it is difficult to predict how courts will address this issue.<sup>79</sup>

### C. THE NATIONAL COOPERATIVE RESEARCH ACT

In 1984, the National Cooperative Research Act<sup>80</sup> (NCRA) codified joint venture analysis. To avail themselves of the protections the NCRA offers, those proposing an R&D joint venture may register with the Attorney General as well as with the Federal Trade Commission (FTC).<sup>81</sup> The NCRA applies to certain R&D joint ventures<sup>82</sup> and contains three main provisions.

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ticompetitive practices; the potential power of the joint venture; what the effect would be if the parents entered the joint venture's market on their own; and any other factors that one might infer as a potential threat to competition in the relevant market. *Id.* at 177. In weighing these factors, the Court instructs consideration of congressional concern with the *potential* lessening of competition rather than only tangible restraints. *Id.*; see also Pitofsky, *supra* note 8, at 897 (noting that the Supreme Court in *Penn-Olin* expressed concern that joint ventures might reduce potential competition.)

76. 15 U.S.C. § 45 (1982).

77. See, e.g., *FTC v. Cement Institute*, 333 U.S. 683, 692-93 (1948) (stating that the legislative history of the FTC Act indicates intent to give the FTC and the courts the power to stop restraints in their incipient stages).

78. See, e.g., *Brown Shoe Co. v. United States*, 370 U.S. 294, 322 (1962) (asserting that the Court may, under section five, stop restraints in their incipency even where such restraints do not violate other antitrust provisions); *FTC v. Motion Picture Advertising Service Co.*, 344 U.S. 392, 394-95 (1953) (finding that Congress passed the FTC Act to supplement the Sherman and Clayton Acts by halting restrictive practices which, if carried out, could violate the acts).

79. Kuhn, *supra* note 14, at 1189.

80. 15 U.S.C. §§ 4301-05 (1988).

81. See *id.* § 4305 (requiring joint venturers to file with the Attorney General or the FTC in order to secure protection). Following the filing, the Attorney General or the FTC will publish notice of the newly formed venture in the Federal Register. *Id.*

82. *Id.* § 4301(a)(6). The Act defines a joint research and development venture as: [A]ny group of activities. . . 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 practical 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 pro-

First, the NCRA mandates a rule of reason standard for R&D joint ventures.<sup>83</sup> It dictates that a court consider the activity's reasonableness, accounting for all factors affecting competition in the relevant research and development markets.<sup>84</sup>

The other important provisions of the NCRA deal with recovery. The successful challenger of a joint venture will not receive the usual treble damages, but rather the challenger may only recover actual damages against those R&D joint ventures registered with the FTC and the Department of Justice.<sup>85</sup> The NCRA also allows a court to award attorney's fees in certain circumstances.<sup>86</sup>

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prietary basis, and the prosecuting of applications for patents and the granting of licenses for the results of such venture. . . .

*Id.* Activities excluded from the definition and hence from the protection of the statute include the exchange of information about costs, sales, and prices not related to the venture, and restriction of marketing or production not related to the venture by one of the participants. *Id.*; see also Katsh, *Act Sets New Standards for Research Ventures*, Wash. Legal Times, Nov. 26, 1984, at 11 (discussing issues raised by this definition).

83. 15 U.S.C. § 4302 (1988). The NCRA specifically states that "a joint research and development venture shall not be deemed illegal per se. . . ." *Id.*

84. *Id.* There are two main points of controversy regarding this provision. First, there is debate concerning whether a traditional rule of reason analysis should be given to qualifying R&D joint ventures or whether the more expansive "reasonableness" standard is appropriate. Katsh, *supra* note 82, at 15. The traditional rule of reason analysis only weighs the procompetitive and anticompetitive effects while the reasonableness standard considers other factors such as innovation and national security. *Id.* See 15 U.S.C. § 4302 (stating that competition in relevant markets is only one of the relevant considerations in the analysis); S. REP. NO. 427, *supra* note 18, at 1-4 (supporting consideration of other interests besides competition); H.R. REP. NO. 1044, 98th Cong., 2d Sess. 11-12, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 3131, 3135-36 (stating that the effect on competition is the most important factor).

The second issue raised under section 4302 is the definition of the relevant market. Many experts hold that the relevant geographic market for R&D joint ventures ought to be international. See, e.g., *Antitrust Policy and Competition 1983 Hearing Before the Joint Economic Committee of Congress*, 98th Cong., 1st Sess. 36 (1984) (statement of Donald L. Martin, Vice President, Glassman-Oliver Economic Consultants, Inc.) [hereinafter *Antitrust Policy Hearings*] (charging that the exclusion of foreign producers in the analysis of relevant product and geographic markets is a matter of great importance with respect to antitrust enforcement policy); Baldridge, *Two Areas of Antitrust Law in Need of Reform*, 2 DET. C. L. REV. 1035, 1041-43 (1983) (maintaining that using domestic markets as the backdrop for the relevant market prevents many mergers and acquisitions that could help U.S. competitiveness vis-a-vis foreign firms in both domestic and international markets); Gerber, *supra* note 44, at 698-99 (detailing how the internationalization of markets makes defining the relevant market difficult); Wright, *supra* note 8, at 162 (recommending that the relevant geographic market for R&D joint ventures be international both because of efficient transportation and the fact that there is significant foreign competition in R&D).

85. 15 U.S.C. § 4303 (1988). This is not likely to have a significant impact on R&D joint ventures because private causes of action are not a primary method of antitrust enforcement.

86. *Id.* § 4304.



The key impetus for passing the NCRA was the growing concern regarding the United States' position in the world market.<sup>87</sup> Congress proposed the NCRA in response to the United States' declining international technological competitiveness.<sup>88</sup> As previously discussed, joint ventures encourage the R&D so crucial to the United States' international technological position.<sup>89</sup> The House and Senate, however, found United States companies reluctant to participate in joint ventures for one key reason: fear of antitrust litigation.<sup>90</sup> Accordingly, the NCRA

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87. See 130 CONG. REC. H10,565 (daily ed. Oct. 1, 1984) (revealing that Representatives Rodino, Edwards, Fish, Hyde, and Moorhead all emphasized the importance of enhancing U.S. international competitiveness through the proposed NCRA). In particular, Representative Moorhead instructs that "the overriding purpose of [the NCRA] is to encourage American companies to compete more effectively in the international marketplace. All of the provisions of this legislation should be interpreted in a manner consistent with that overriding purpose and intent." *Id.* at H10,570.

88. See H.R. REP. NO. 656, 98th Cong., 2d Sess. 7, 9 (1984) (reporting that U.S. R&D expenditures decreased by 25% between 1964 and 1978). See also F.M. SCHERER, *INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE* 407-08 (2d ed. 1980) (demonstrating that technological progress has affected U.S. economic growth); *Patent Law Improvements Act, 1984: Hearing on S. 1535 and S. 1841 Before the Subcomm. on Patents, Copyrights and Trademarks of the Senate Comm. on the Judiciary*, 98th Cong., 2d Sess. 1 (1984) (evidencing lagging American technology). See generally *Antitrust Policy and Joint Research and Development Ventures*, 1983: *Hearing Before the Joint Economic Comm. of Congress*, 98th Cong., 1st Sess. 1 (1983) [hereinafter *Joint Research and Development Venture Hearing*] (stating that the U.S. is losing its internationally dominant technological position).

89. See *supra* notes 12-29 and accompanying text (exploring the relationship between joint ventures and R&D). Members of Congress argued that the encouragement of joint ventures would alleviate other problems. S. REP. NO. 427, *supra* note 16, at 3105. For instance, joint ventures would minimize the risks associated with R&D. *Id.* In addition, the Senate found that United States firms were often duplicating research, a wasteful cost that joint ventures would minimize. *Id.* at 3106. See generally *The National Productivity and Innovation Act and Related Legislation, 1983 and 1984: Hearings on S. 1841, S. 568, S. 737 and S. 1383 Before the Comm. on the Judiciary of the Senate*, 98th Cong., 1st and 2d Sess. 1, *passim* (1983 and 1984) [hereinafter *National Productivity Hearings*] (discussing how joint ventures decrease risk and reduce research duplication).

90. See H.R. REP. NO. 656, *supra* note 88, at 10-11 (finding that despite the Department of Justice's limited enforcement of joint venture antitrust violations and the fact that there are few private actions, the business community perceives the threat of antitrust litigation as an obstacle to forming a joint venture). See also S. REP. NO. 427, *supra* note 18, at 3106 (stating that the business community fears antitrust prosecution). See generally *National Productivity Hearings*, *supra* note 89, *passim* (recording several members of the business community expressing fear of antitrust litigation as a barrier to entering joint ventures).

Another factor leading to the uncertainty of antitrust litigation perceived by the business community is the lack of precedent with respect to joint ventures. *Joint Research and Development Hearing*, *supra* note 88, at 25 (statement of William F. Baxter, Assistant Attorney General, Antitrust Division, Department of Justice). But see *National Productivity Hearings*, *supra* note 89, at 302 (statement of Eleanor M. Fox, Professor of Law, New York University, School of Law) (testifying that she believes trade barriers and lenient monopoly laws are the cause of the decline in technological progress).

seeks to help United States firms compete internationally through R&D joint ventures by clearly articulating when joint ventures will and will not violate antitrust laws.<sup>91</sup>

Another reason for enacting the NCRA is the behavior of other competitors in the world market. Other nations, such as Japan, Germany, and France, allow collaboration on R&D joint ventures,<sup>92</sup> and governments even encourage collaborative behavior.<sup>93</sup> Behind the NCRA is a sense that not all world competitors play by the same rules.<sup>94</sup> Consequently, the NCRA protects R&D joint ventures, the innovative collaborative efforts necessary to permit the United States compete in the international marketplace.<sup>95</sup>

### III. SOUTH KOREAN ANTITRUST LAW<sup>96</sup>

#### A. BACKGROUND: SOUTH KOREA'S LAW AND ECONOMY

South Korea's antitrust law differs significantly from that of the United States. This divergence grows out of a different attitude toward law in Korea. While Americans are litigious and confrontational, South Koreans are not inclined to settle their disputes through litigation.<sup>97</sup> South Koreans have a general aversion toward legalism.<sup>98</sup> As a result,

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91. 130 CONG. REC., *supra* note 87, at H10,567 (statement of Rep. Fish).

92. *Id.* at H10,568 (statement of Rep. Hyde). The EC also allows substantial collaboration. *Id.* See *National Productivity Hearings*, *supra* note 89, at 12-13 (discussing Japanese, French, and EC collaborative practices). For a detailed discussion of Japan's government sponsored R&D programs, see *Joint Research and Development Hearing*, *supra* note 88, at 198-234 (statement of Gary P. Saxonhouse, Professor of Economics, University of Michigan).

93. S. REP. NO. 427, *supra* note 18, at 3105.

94. 130 CONG. REC., *supra* note 87, at H10,566 (statement of Rep. Edwards).

95. S. REP. NO. 427, *supra* note 18, at 3107.

96. There are two key reasons to compare South Korea with the United States: (1) South Korea has experienced definitive growth over the last decade, and (2) South Korea's antitrust laws are decidedly different, both in substance and enforcement, from those of the United States. See Willis, *Riding a Tiger: Joint Ventures under South Korea's New Foreign Capital Inducement Act*, 17 N.Y.U.J. INT'L L. & POL. 1023, 1023 (1985) (characterizing South Korea as one of the "four tigers of East Asia" that is duplicating Japan's success); Gittelman, *The South Korean Export Miracle: Comparative Advantage or Government Creation? Lessons for Latin America*, 42 J. INT'L AFF. 187, 187-88 (1988) (asserting that South Korea has achieved a spectacular growth rate and that South Korea is one of Asia's brightest stars); Wagner, *Antitrust. The Korean Experience*, 32 ANTITRUST BULL. 471, 474 (1987) (reporting South Korea's impressive growth rates of 9.6% between 1963 and 1975 and 7.3% between 1975 and 1984).

97. SANG HYUN-SONG, INTRODUCTION TO THE LAW AND LEGAL SYSTEM OF KOREA (1983).

98. *Id.* at 528. In what is regarded as the most important study of attitudes of Koreans toward the law, only 32% of the Koreans surveyed indicated that they would go to court to resolve a family problem. Haem Pyong-choon, *The Attitudes of the*

litigation is relatively rare, and there is little South Korean caselaw.<sup>99</sup> Instead, South Koreans utilize reconciliation to settle the majority of legal disputes.<sup>100</sup>

In addition to understanding Korean attitudes regarding the law, one must be familiar with the South Korean economy to comprehend its antitrust laws. The most striking feature of the South Korean economy is its extraordinary success in recent years.<sup>101</sup> A by-product of this enormous success was the concentration of economic power in a few producers.<sup>102</sup> This concentration of power, however, resulted partially from government policies placing strength in those who are most experienced, and assuming that there are economies of scale to be reaped.<sup>103</sup> Many criticized the South Korean government's policy of promoting

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*Korean People toward Law* (1983) reprinted in SANG HYUN-SONG, *supra* note 97, at 57.

Part of the Korean aversion toward legalism can be traced to the long history of Confucian influence on Korea. See *id.* at 43 (asserting that Confucianism is the most persistent, persuasive, and influential teaching in East Asian history). Confucianism teaches that nature's laws are necessarily superior to human or positive laws. *Id.* Hence, Koreans are bred with the ideal that it is of tantamount importance to perfect one's own human nature which makes the need and respect for positive laws minimal. *Id.*

It is interesting to compare the relationship between law and religion in the Judeo-Christian societies, such as the United States, with that in Korea. For instance, in the Judeo-Christian heritage, God is frequently referred to as a judge and the laws and commandments are central themes. Steinberg, *Law and Development in Korean Society*, 13 KOREANA Q. 43 (1971), reprinted in SANG HYUN-SONG, *supra* note 97, at 49. Further, judges play a significant role in Judeo-Christian history. *Id.* As a result, law in western countries is validated by the countries' religious roots. *Id.* In contrast, Confucianism does not suggest that human-made law is divinely inspired. In Korea, law is a symbol of failed virtue, and justice is administered only because of the unfortunate breakdown of harmony and peace. *Id.* at 50.

99. SANG HYUN-SONG, *supra* note 97, at 17. According to Sang Hyun-Song, "[i]t is well-condifed [sic] laws that are the primary statements of an integrated body of general theory and it is thus Korean lawyers' job to interpret them more generally . . . ." *Id.* at 15. Korean statutes, however, are broad and loosely drawn so that administrative regulations determine statutory interpretation. *Id.* at 253.

100. *Id.* at 17.

101. See Chan-Jin Kim, *supra* note 24, at 9 (reporting that between 1962 and 1980 the market share of the South Korean industrial sector doubled); SANG HYUN-SONG, *supra* note 97, at (discussing South Korea's success).

102. Wagner, *supra* note 96, at 474. A few massive conglomerates belonging to only a small number of people called *chaebol* controlled a large portion of the economy. *Id.* Until 1979, however, South Korea's economic policy showed its belief that industrial strength must be placed in the most experienced hands. Chan-Jin Kim, *supra* note 24, at 9. For example, the government assigned key economic industries to a limited number of entrepreneurs who also received tax benefits and low interest loans. *Id.* In 1979, monopolists or oligopolists manufactured 89% of industrial goods in South Korea. Wagner, *supra* note 96, at 475.

103. Wagner, *supra* note 96, at 475.

economic concentration, however, which prompted the government to enact the Monopoly Regulation and Fair Trade Act.<sup>104</sup>

## B. THE MONOPOLY REGULATION AND FAIR TRADE ACT

Although the legislative history of the Monopoly Regulation and Fair Trade Act (MRFTA) is not well documented,<sup>105</sup> the general view is that the South Korean government designed it to control monopolies, oligopolies, and anticompetitive abuses by companies with large market shares.<sup>106</sup> The South Korean government hopes to achieve these goals by prohibiting abuse of market dominating positions,<sup>107</sup> restricting the combination of enterprises and controlling market concentration,<sup>108</sup> restricting unreasonable joint acts,<sup>109</sup> designating unfair trade acts,<sup>110</sup> and restricting resale price maintenance.<sup>111</sup>

MRFTA chapters nine through fourteen govern its administration and enforcement.<sup>112</sup> The MRFTA vests primary enforcement authority in the Economic Planning Board (EPB), an economic ministry headed by the deputy prime minister.<sup>113</sup> The EPB supervises all ministries gov-

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104. Enforcement Decree of the Monopoly Regulation and Fair Trade Act, as amended by Presidential Decree 12120, Apr. 1, 1987.

105. See Wagner, *supra* note 96, at 473 (stating that debates, which must have occurred, over the MRFTA are captive in the memories of South Korean economic ministries); Haley, *Antitrust Enforcement in Korea*, E. ASIAN EXEC. REPS., Oct. 1985, at 8 (noting that there have been few writings in any language regarding the impetus for enacting the MRFTA).

106. See, e.g., Lee Hwa Ja, *Antitrust and Fair Trade Law Goes into Effect*, E. ASIAN EXEC. REPS., May 1981, at 25 (observing that the MRFTA was formed to encourage free competition by restricting monopolies and anticompetitive practices of large businesses); Sang Hyun-Song, *New Antimonopoly Law Proposed*, E. ASIAN EXEC. REPS., Nov. 1980, at 3 (noting that the law is intended to suppress monopolies, oligopolies, and anticompetitive practices).

Article one of the MRFTA states the Act's purpose as follows: "The purpose of this Decree is to prescribe matters delegated by, and matters necessary for the enforcement of, the Monopoly Regulation and Fair Trade Act." MRFTA, art. 1. The stated purpose of the July 21, 1984 version of the MRFTA is different from the 1987 amendment:

This Act, by prohibiting abuse of market dominating position by entrepreneurs and excessive concentration of economic power, and by controlling unreasonable concerted activities and unfair trade practices, aims to encourage fair and free competition and thereby to stimulate creative business activities and to protect consumers as well as promote a balanced development of the national economy.

MRFTA, art. 1 (as amended July 21, 1984), reprinted in Wagner, *supra* note 94, at 477-78.

107. MRFTA arts. 3 to 11.

108. *Id.* arts. 12 to 16; see also Chan-Jin Kim, *supra* note 24, at 28-34 (discussing the restrictions on the combination of enterprises under the MRFTA in detail).

109. MRFTA arts. 17 to 20-2.

110. *Id.* arts. 21 to 21-2.

111. *Id.* arts. 24 to 26.

112. *Id.* Ch. 9-14.

113. *Id.* arts. 5, 6, 10.

erning South Korea's economic affairs.<sup>114</sup> The EPB may also pursue corrective action, promulgate regulations, and investigate potential violations of the MRFTA.<sup>115</sup>

The MRFTA also establishes two enforcement agencies within the EPB; the Fair Trade Office (FTO) and the Fair Trade Commission (the Commission).<sup>116</sup> The assistant minister for fair trade heads the FTO, which performs investigative and enforcement functions such as conducting investigations, developing policy, and drafting rules.<sup>117</sup> The Commission, a five member regulatory body, considers such issues as corrective measures before referring them to the EPB for final action.<sup>118</sup>

The MRFTA mandates that participants in joint acts apply for authorization.<sup>119</sup> The minister of the EPB reviews the proposed joint activity.<sup>120</sup> The minister then oversees the registration process and either authorizes, demands, or rejects the activity.<sup>121</sup>

The MRFTA provides five justifications upon which the minister may authorize joint acts.<sup>122</sup> First, the minister may authorize the joint act based upon industrial efficiency or "rationalization."<sup>123</sup> This requires that: (1) the joint act obviously enhance efficiency; (2) the efficiency be difficult to achieve by any other method; and (3) the efficiency be greater than the effects of prohibiting a restriction on competition.<sup>124</sup>

Second, the minister may authorize a joint act under the MRFTA in order to overcome an economic depression if four conditions are satisfied.<sup>125</sup> The MRFTA requires: (1) a continually decreasing demand for a certain good leading to a lasting glut; (2) a market price for the good

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114. Government Organization Act of Korea, art. 28, *reprinted in*, Wagner, *supra* note 96, at 484.

115. MRFTA arts. 5, 6, 10, 16, 25, ch. 9.

116. *Id.* arts. 5, 6, 10.

117. Wagner, *supra* note 96, at 482-85.

118. *Id.* at 486. It is important to note that both the FTO and the Commission are subordinate to the EPB. *Id.* at 484. The EPB has the power to enforce; the FTO is only responsible for enforcement activities and the Commission's power is merely advisory. *Id.*

119. See Wagner, *supra* note 96, at 477 (observing that agencies achieve enforcement by requiring registration).

120. MRFTA art. 17.

121. *Id.*

122. *Id.* arts. 19 to 19-5. Note that four of the five justifications were inserted into the act by the 1987 amendment. *Id.* arts. 19-2 to 19-5.

123. *Id.* art. 19.

124. *Id.*; see also *supra* notes 31-38 and accompanying text (discussing the efficiency gains of joint ventures and the anticompetitive risks associated with joint ventures).

125. MRFTA art. 19-2.

below average cost of production for a considerable period; (3) concern that enterprises will have difficulty maintaining their businesses; and (4) a showing that it is impossible to rectify the problems listed in (1) and (3) by rationalizing the enterprise.<sup>126</sup>

Third, the minister may permit a joint act in order to adjust industrial structure.<sup>127</sup> This authorization is only appropriate where: (1) there is excess supply in an industry due to a change in domestic and foreign economic situations or where production facilities cause international competitiveness to decrease; (2) it is not possible to rectify the problem of excess supply by rationalizing the enterprise; and (3) the effect of adjusting the industrial structure will be more beneficial than the effect of prohibiting the restriction on competition.<sup>128</sup>

Fourth, the minister may authorize a joint act to improve the competitive power of small and medium enterprises.<sup>129</sup> To authorize such a joint act: (1) it must be obvious that the activity will increase productivity or increase the negotiating power of the participating businesses regarding terms and conditions of doing business; (2) all participants must be small and medium-sized enterprises; and (3) it must be difficult for smaller businesses to compete with large enterprises by any other means than the joint activity.<sup>130</sup>

Finally, the minister may authorize joint activity to rationalize the terms and conditions of business.<sup>131</sup> The requirements are: (1) rationalization would obviously enhance productive efficiency; (2) rationalization of the terms and conditions of business are both technically and economically practicable for most businesses in the field; and (3) the effect of rationalization is more beneficial than the effect of prohibiting a restriction on competition.<sup>132</sup>

Only one provision imposes limits on which joint acts the minister may authorize.<sup>133</sup> This provision dictates that the minister cannot authorize a joint act if: (1) participants structure the joint act more broadly than it needs to be in order to achieve its goal; (2) the joint act has potential to unreasonably damage interests of consumers and other firms in the industry; (3) the joint act contains unjust discrimination

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126. *Id.*

127. *Id.* art. 19-3.

128. *Id.*

129. *Id.* art. 19-4.

130. *Id.*

131. *Id.* art. 19-5.

132. *Id.*

133. *Id.* art. 19-6. This provision addresses the use of collateral restraints; *see also supra* note 26 (discussing collateral restraints in greater detail).

among participants; or (4) participants are unlawfully restricted from participating in or withdrawing from the joint act.<sup>134</sup>

Despite the attention the MRFTA gives to joint acts and other potentially anticompetitive behavior cases indicate that courts use the MRFTA to ensure fairness and prevent deceptive retail practices more often than to preserve competition.<sup>135</sup> Essentially, the MRFTA is a tool used for consumer protection and,<sup>136</sup> in fact, most MRFTA cases involve false and misleading advertising.<sup>137</sup>

#### IV. INTERNATIONAL COMPETITIVENESS AND JOINT VENTURES

The internationalization of markets is a complicated and multifaceted process. Foreign production, more and more, is meeting the demands of United States consumers.<sup>138</sup> A corollary to this is that producers seek to sell their goods in more than one state or country.<sup>139</sup> Hence, competition comes from all over the world, and competition in technology-oriented fields is especially fierce.<sup>140</sup> As a result, the business community in these technological sectors makes business decisions in order to maintain their international technological competitiveness.<sup>141</sup> The best way to achieve this goal according to the business community is through R&D joint ventures.<sup>142</sup>

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134. MRFTA art. 19-6. This provision was added by the 1987 amendment. *Id.*

135. Haley, *supra* note 105, at 8. Between April 1981 and July 1985, the breakdown of MRFTA cases was as follows: two relating to competition-restricting stock acquisition, three concerning abuse of a market-dominating position, eight regarding collusive activities, 26 considering competition-restricting activities of trade associations, and 236 cases of unfair trade practices such as false advertising and tie-ins. Wagner, *supra* note 96, at 505. See Haley, *supra* note 105, at 26-27 (discussing unfair trade practice cases in detail).

136. Wagner, *supra* note 96, at 505. South Korean case reports are not indicative of the full picture, however, because they contain only those cases where the EPB found violations and issued corrective orders. *Id.* Hence, there is not information on what complaints had been considered and rejected. *Id.*

137. *Id.* at 516. The Korean government has not been afraid to scrutinize some of its largest companies' advertising; it has found violations by Hyundai, Samsung, and Dae Woo Motor Company. *Id.* Some advertising violations under the MRFTA have included misleading statements regarding a competitor's product, misleading endorsements, and false labeling. Haley, *supra* note 105, at 26-27.

138. Gerber, *supra* note 44, at 690.

139. *Id.*; see also, Pagoulatos & Sorensen, *Industrial Policy and Firm Behavior in an International Context*, in *WESTERN ECONOMIES IN TRANSITION* 305 (1980).

140. Kuhn, *supra* note 14, at 1181.

141. *Id.*

142. *Id.* at 1181-82.

## A. THE UNITED STATES

The internationalization of markets has had an unsettling effect on United States antitrust law.<sup>143</sup> United States firms suffering from stiff foreign competition blame the antitrust joint venture laws because of the uncertainty these laws create.<sup>144</sup> As a result, Congress, realizing the United States' decline and the importance of joint ventures to enhance its position, enacted the National Cooperative Research Act (NCRA).<sup>145</sup>

The United States' international competitiveness in high technology sectors has been on the decline for over a decade.<sup>146</sup> The competitive decline corresponded with reduced total spending on R&D.<sup>147</sup> This is not surprising, however, because international competitiveness correlates positively with R&D spending.<sup>148</sup> Advocates of the NCRA maintained that the declining world market position of the United States resulted from insufficient spending on R&D which, in turn, was caused by the fear of United States companies to enter R&D joint ventures because they might violate the antitrust laws.<sup>149</sup>

The NCRA responded to this fear by codifying existing law. joint ventures receive a rule of reason analysis where the procompetitive ben-

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143. See Blechman, *Use of Joint Ventures to Foster U.S. Competitiveness in International Markets*, 53 ANTITRUST L.J. 65 (1984)(noting the perception that U.S. international competitiveness is lacking due, in part, to U.S. antitrust laws with particular concern for joint ventures).

144. E.g., Baldridge, *supra* note 84, at 1035 (voicing the Department of Commerce's concern that U.S. companies refrain from R&D joint ventures due to fear of violating antitrust laws); Kuhn, *supra* note 14, at 1182-83 (reporting that potential lawsuits and treble damages have hindered the use of R&D joint ventures by businesspeople); *supra* note 90 and accompanying text (evidencing the fear of antitrust violation by the business community and exploring the source of the uncertainty).

145. See *supra* notes 80-94 and accompanying text (detailing the legislative history of the NCRA).

146. Wright, *supra* note 8, at 138-39. The decline in technological competitiveness began before the 1980 appreciation of the dollar which suggests a lack of strength in the United States technology sector. *Id.*

147. L. THUROW, *THE ZERO SUM SOLUTION* 148 (1985)(reporting that American firms cut research in half during 1980-81 and 1982-83 in the face of increasing international competition).

148. Wright, *supra* note 8, at 139. In other words, firms that spend a large portion of revenues on R&D tend to be more internationally competitive than those firms that do not commit substantial resources to R&D. *Id.*

149. *Id.* In addition, proponents of the NCRA voiced concern that the antitrust laws of U.S. trading partners are looser than those of the United States. See 130 CONG. REC. S8963 (daily ed. June 29, 1984) (statement of Sen. DeConcini) (articulating his concern that Japan allows its companies to conduct R&D joint ventures); 130 CONG. REC., *supra* note 87, at H10,568 (statement of Rep. Hyde) (stating that the United States' trading partners permit collaboration on R&D joint ventures). See also *supra* note 92 and accompanying text (discussing that other countries permit collaboration on R&D).



efits are weighed against the anticompetitive effects.<sup>150</sup> The NCRA, will not, however, aid the United States in international markets if courts determine benefits and costs in relation to the domestic market.<sup>151</sup> If courts consider international markets the benchmark for R&D, as many experts suggest they must,<sup>152</sup> then the NCRA will permit the large scale R&D joint ventures necessary to compete on the world market.<sup>153</sup>

Perhaps the goal of United States antitrust law, however, is not to preserve a niche in the world market for American firms. As discussed previously, the goals of United States antitrust law are nebulous.<sup>154</sup> Congress erected the pillars of antitrust law, the Sherman Act and the Clayton Act, upon an ideal of domestic competitiveness.<sup>155</sup> Congress, however, enacted the NCRA, the most recent antitrust statute, to save domestic competition not by ensuring the rigors of the United States marketplace, but rather by attempting to prevent foreign firms from driving domestic companies out of the market entirely.<sup>156</sup> The result is that policy-makers must make a crucial choice: whether to continue the United States antitrust tradition of domestic market competitiveness above all else or whether to confront the reality of foreign conglomerates crushing the American firms that conform to the traditional United States antitrust ideal. The solution to this problem is considered below.

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150. *Supra* note 83 and accompanying text.

151. *See id.* (providing expert opinions recommending the use of international markets as a benchmark). This is important because a company may possess monopoly power domestically but not internationally.

152. *See id.* (discussing experts' views suggesting that the relevant geographic market should be international).

153. *See* Gerber, *supra* note 44, at 691 (asserting that the primary characteristic necessary for international competition is large size). Antitrust critics contend that "bigness" promotes efficiency and economies of scale. Adams & Brock, *The "New Learning" and the Euthanasia of Antitrust*, 74 CALIF. L. REV. 1515, 1519 (1986). In addition, many assert that large business entities are able to eliminate transaction costs. *Id.* Some experts, however, do not regard "bigness" a sign of strength. *Id.* at 1546-66.

154. *See supra* notes 40-47 and accompanying text (discussing the diverse goals of United States antitrust law).

155. *See* P. AREEDA & L. KAPLOW, *supra* note 65, at 50-60 (discussing the legislative history of United States antitrust laws). Considering the history of United States antitrust laws it is clear that Congress enacted the first antitrust statutes before the United States was exposed to rigorous international competition. *Id.*

156. *See supra* notes 80-95 and accompanying text (detailing the legislative history of the NCRA with particular attention to international competitiveness).

## B. A COMPARATIVE ANALYSIS OF UNITED STATES AND SOUTH KOREAN JOINT VENTURE STATUTES

South Korea's joint venture statute takes a different approach than does that of the United States. Two of South Korea's five justifications for joint activity directly address problems plaguing the United States. First, in a joint act to adjust industrial structure, South Korea's Economic Planning Board *must* consider international competitiveness in its skeletal rule of reason analysis.<sup>157</sup> The NCRA, in contrast, prescribes a vague rule of reason test in relation to "properly defined relevant research and development markets . . . taking into account all relevant factors."<sup>158</sup> Although the NCRA's legislative history reveals that Congress enacted it to promote international competitiveness, the NCRA does not mention international status as a relevant factor to be considered. Second, South Korea explicitly provides the opportunity for joint activity to enhance the power of small and medium-sized firms, provided that they do so by narrowly-tailored means.<sup>159</sup> The United States statute provides no such opportunity.

## C. THE APPROPRIATE GOAL OF UNITED STATES ANTITRUST LAW<sup>160</sup>

Many antitrust experts propose that consumer welfare alone should be the goal of United States antitrust law.<sup>161</sup> Another goal, however,

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157. MRFTA art. 19-3. This focus on international competitiveness is mirrored in the MRFTA antimerger provisions. Chan-Jin Kim, *supra* note 24, at 30-31. There, as in the provisions relating to joint activity, the details of what to consider in determining what is required for the exception are left out of the regulations, leaving the administrative authority latitude in applying the exceptions. *Id.*

158. 15 U.S.C. § 4302 (1988).

159. MRFTA art. 19-4.

160. Antitrust policy cannot be made rational until we are able to give a firm answer to one question: What is the point of the law—what are its goals? Everything else follows from the answer we give. Is the antitrust judge to be guided by one value or by several? If by several, how is he to decide cases where a conflict in values arises? Only when the issues of goals has been settled is it possible to frame a coherent body of substantive rules. R. BORK, *supra* note 3, at 50.

161. *Id.* at 81. See *supra* notes 40-47 and accompanying text (explaining the different goals experts have advocated for antitrust law). There are three reasons to adopt this position. First, it reduces uncertainty for those businesses who must conform to antitrust laws. R. BORK, *supra* note 3, at 81. In contrast to a multiple goal system where one never knows which judge will find which goal determinative, the consumer welfare goal gives the business community fair notice of what standard will be applied. *Id.*

Second, a consumer welfare goal ensures that the legislature as well as the judiciary perform their proper roles. More specifically, when courts decide upon the operating goals of antitrust, such as protecting small business or income distribution, they are making sweeping policy choices. *Id.* at 82-83. It is inappropriate for courts to be making these decisions without specific congressional guidance. In a democracy, the repre-

may be the maintenance of United States international competitiveness. The notion of considering the United States' world market position in formulating its antitrust laws is manifest in the legislative history of the NCRA.<sup>162</sup> Although this consideration is not written in the statute, many experts argue that international competitiveness is a current goal of United States antitrust law.

## V. RECOMMENDATIONS

The NCRA is unlikely to effectively enhance United States international competitiveness for several reasons.<sup>163</sup> The NCRA is merely a codification of existing law; it does not declare R&D joint ventures legal, and it does not give them antitrust immunity.<sup>164</sup> Further, although damages resulting from private causes of action are now actual instead of treble, private parties are still free to sue and the actual damages can be great.<sup>165</sup> Finally, the NCRA's rule of reason analysis does little to provide the business community with their desired certainty because

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sentative body of the legislature is to make basic policy decisions; the courts' duty is to carry them out. *See* U.S. CONST. art. I, § 1 (declaring all legislative powers to be vested in Congress); U.S. CONST. art. III, §§ 1, 2 (vesting judicial power in the Supreme Court which extends to all cases arising under the Constitution, United States laws, and treaties). Additionally, the legislature has access to the resources necessary for the type of massive fact-finding needed to make this important policy decision. R. BORK, *supra* note 3, at 82. Several groups argue, however, that the legislative history of the antitrust statutes is sufficient to steer the courts. There is evidence in the legislative history to suggest a consumer welfare goal. *See* R. BORK, *supra* note 3, at 50-71 (finding the history of the Sherman Act to have considered consumer welfare as a goal). *See also* Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J.L. & ECON. 7 (1966) (providing a detailed argument that the legislative history of the Sherman Act suggests a consumer welfare goal). Further, there is nothing in the antitrust statutes to suggest that consumer welfare is subordinate to any other objective. R. BORK, *supra* note 3, at 82.

Finally, pursuing a consumer welfare goal will avoid arbitrary distinctions and anticonsumer rules. *Id.* Maximizing total consumer surplus is the only way to avoid subjective value judgments regarding whether producers or consumers get the surplus. *Id.* In other words, the consumer welfare goal will make the pie as large as possible without allowing courts to decide how to slice it and who gets the biggest piece.

162. *See supra* notes 80-95 and accompanying text (detailing the legislative history of the NCRA).

163. Wright, *supra* note 8, at 175. *See* Blechman, *supra* note 143, at 67 (commenting that concerns addressed by the proposed NCRA, per se illegality and treble damages, are not what is keeping U.S. industries from being internationally competitive). Between 1984 and June, 1988, only 111 cooperative joint ventures had registered under the NCRA. T. JORDE & D. TEECE, *INNOVATION, COOPERATION & ANTITRUST* 100 (Oct. 7, 1988) (revised discussion draft) (on file with *The American University Journal of International Law and Policy*).

164. Wright, *supra* note 6, at 176. *See* T. JORDE & D. TEECE, *supra* note 163, at 99 (observing that registered firms are still subject to antitrust litigation).

165. Further, costs incurred in defense of an antitrust suit can be substantial. T. JORDE & D. TEECE, *supra* note 163, at 99.

such an analysis involves a weighing of the specific circumstances.<sup>166</sup> Hence, court decisions are extremely fact specific and therefore of little predictive value to businesses.<sup>167</sup>

Although it is not likely that the United States will alter its antitrust laws so radically as to abolish them<sup>168</sup> or to impose them upon other countries,<sup>169</sup> the United States could benefit by following certain elements of South Korea's model. For instance, the structure of South

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166. Wright, *supra* note 8, at 178. See *Legislative Proposals to Modify the U.S. Antitrust Laws to Facilitate Cooperative Arrangements to Commercialize Innovation: Hearing on H.R. 1024, H.R. 1025 & H.R. 2264 Before the Subcomm. on Economics & Commercial Law of the House Judiciary Comm.*, 101st Cong., 1st Sess. 24 (1989)[hereinafter *Proposal Hearing*] (statement of Thomas M. Jorde, Professor of Law, University of California (Boalt Hall) at Berkley) (finding that a registration system will not yield the certainty required to encourage large scale joint ventures); T. JORDE & D. TEECE, *supra* note 163, at 98-99 (noting that the NCRA provides little, if any, guidance for its mandated rule of reason analysis).

167. See *Proposal Hearing* (statement of Thomas M. Jorde), *supra* note 166, at 24 (explaining that a registration system will lead to case-by-case determinations which will prove expensive and unpredictable).

For an example of how the NCRA fails to encourage sufficient R&D joint ventures, see Abbott, *U.S. Competitiveness Would be Enhanced by Amending the 1984 Act*, *Legal Times*, Dec. 7, 1987, at 24.

168. See Kuhn, *supra* note 14, at 696-97 (suggesting that internationalization obviates, or at least reduces, the need for antitrust law). United States antitrust laws have been called futile and obsolete. L. THUROW, *THE ZERO-SUM SOCIETY: DISTRIBUTION AND THE POSSIBILITIES FOR ECONOMIC CHANGE* 146 (1980). The reason for this is that United States antitrust laws have a national focus that does not fit today's international world. *Id.* Another expert asserts that "[a] purely national view of antitrust law has long since ceased to correspond to the reality of world economics, and hardly continues to correspond to legal reality." Fikentscher, *Third World Trade Partnership: Supranational Authority vs. National Extraterritorial Antitrust—A Plea for "Harmonized" Regionalism*, 82 MICH. L. REV. 1489, 1497 (1984). For example, many of the industrialized countries of the West rely upon exports for a large portion of their national income. *Id.* This may indeed be the case because international competition creates the competitiveness that the antitrust laws seek to foster. Kuhn, *supra* note 14, at 697. See Grossman, *Import Competition from Developed and Developing Countries*, 64 REV. ECON. & STATISTICS 271, 271-72 (1982)(reporting results of a study which evidences the increased competition from United States trading partners). International competitiveness reduces the ability to acquire the market power necessary for many antitrust violations. Kuhn, *supra* note 14, at 697. However, to say that internationalization eliminates the need for all antitrust law in all contexts may not be correct. *Id.* More appropriately, to account for the increased internationalization of the market, joint ventures should be analyzed with respect to how they affect the goals and functions of antitrust law. *Id.* In particular, because this internationalization has directly and seriously affected United States technology and R&D, courts and legislators should pay specific attention to internationalization as it affects joint venture laws if United States technology is to remain internationally competitive. *Id.*; see also *Antitrust Policy Hearing*, *supra* note 84, at 63-69 (arguing that antitrust law as it exists in the United States should be abolished).

169. See Chan-Jin Kim, *supra* note 24, at 38 (commenting that, with respect to a joint venture, application of United States antitrust law could contravene the laws of another country if, for instance, host governments encourage monopolizing).

Korea's joint venture laws is more conducive to the formation of joint ventures than is that of the United States. South Korean joint ventures register with the minister who, if the venture qualifies, approves the joint venture and declares it legal.<sup>170</sup> United States joint ventures, on the other hand, register with the FTC or the Department of Justice who declare that if there is an antitrust action, the joint venture's liability is limited to actual damages.<sup>171</sup> The joint venture is not declared legal; it is merely not yet deemed illegal so that the United States joint venture is still subject to a costly and potentially crippling lawsuit at any time. Although one of the stated goals of the NCRA was to provide antitrust certainty to United States joint ventures, lawmakers would have remained more faithful to their goal by following South Korea's model.<sup>172</sup>

A further revision that would improve the United States antitrust laws governing joint ventures is eliminating the vague rule of reason analysis sketched in the NCRA. Congress should articulate clearly drawn factors for courts to consider, such as international competitiveness.<sup>173</sup> This guidance would allow joint ventures to act with increased certainty.

### CONCLUSION

The crux of the United States antitrust crisis is policy-makers' inability to face the reality of the United States' economic decline and how misguided antitrust policies have contributed to it. Instead of continuing in the tradition of pursuing domestic competitiveness, United States lawmakers must not ignore the fact that the world has changed. National economic boundaries have become blurred.

United States lawmakers must take antitrust action similar to that taken in South Korea to ensure international competitiveness. Although

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170. See *supra* notes 122-37 and accompanying text (discussing the minister's oversight authority).

171. *Supra* note 83 and accompanying text.

172. See H.R. 1024, 101st Cong., 1st Sess. (1989) (providing for a similar certification approach in the proposed National Cooperative Innovation and Commercialization Act of 1989). In support of the bill, Congressman Boucher stated that "[w]hat the U.S. needs is assurance before the joint venture is undertaken that it will not violate the antitrust laws." 135 CONG. REC. E425-26 (daily ed. Feb. 21, 1989) (statement of Rep. Boucher). He explained that the bill provides for approval of joint ventures so that, once certified, they would be free of any potential civil liability. *Id.* If such a certification method were employed, more firms would be encouraged to undertake joint ventures because it would banish the risk of unforeseen antitrust exposure. T. JORDE & D. TEECE, *supra* note 163, at 100.

173. See Wright, *supra* note 8, at 186 (recommending that United States antitrust doctrine explicitly factor international competitiveness into its antitrust equation).

international competitiveness has not always been a goal of United States antitrust law in the past, it is a growing concern, as the NCRA's legislative history evidences. Moreover, if the United States is to have rigorous domestic competitiveness, it must have firms that are able to compete. If United States antitrust laws continue to ignore international competitiveness as a goal, there may not be any United States firms left to compete.