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TOTEM AND TABU IN EXPORT TRADE

NORMAN E. HOLLY^{*}

If a Kwatiutl violated tabu, he was in *tû-tû*—a most excruciating state of ungrace. To question tabu was itself a violation. The temptation to question was alleviated by veneration of the ancestral myth, consecrated in the symbols of totem.

The Kwatiutl's gods proved impractical under our sacerdotum of exchange, so we invented new ones. Under our custom totem is vested in commerce and *it* is guarded by tabu. It is tabu, for example, to question the supremacy of commerce, particularly transactions occurring between one tribe and another rather than wholly within the tribe; even more so, to inhibit them. When discussing this tabu one therefore avoids *tû-tû* by upholding the fundamental benefit of non-interference. Under such circumstances, of course, experience and cold logic are not absolutes but are relative to the ancestral myth.

Something of the sort must have influenced Canada six years ago when she exempted export transactions from the provisions of her Combines Investigation Act.¹ According to prevailing myth,² exports [totem] were threatened by external cartels [evil spirits or devils]; it was therefore necessary to free export transactions from the restraint of antitrust regulation [regarded by the priesthood as tabu].

Exporting is patriotic; furthermore it is a priestly activity, so he who questions the myth risks *tû-tû*. When Mr. Robert McIntyre communicated the export exemptions to us in this Journal two years ago,³ he was careful to avoid *tû-tû*. In so doing he also avoided the cold logic and experience—half a century of it, in my own country—that has already accumulated through similar exemption from anti-trust regulation.

As Mr. McIntyre noted, Canada's amendment is constructed after the United States Export Trade Act, or "Webb-Pomerene" Law, of

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¹ Combines Investigation Act, R.S.C. 1952, c. 314; amended by 1953-4, c. 51 and 1960, c. 45, s. 32(4) and (5).

² See House of Commons Debates, 1960, vol. VII, p. 6974.

³ Robert W. McIntyre, *The Purpose, Operation and Effect of the Export Exemption Provisions of the Combines Investigation Act (Section 32 (4) and (5))* (1964), 3 Osgoode Hall L.J. 106.

1918. Like Webb-Pomerene, the amendment permits groups of manufacturers to conduct their export activities in concert, so long as doing so does not "unduly" lessen internal competition or affect domestic markets.⁴ In prognosticating the amendment's contribution to Canada's social and economic progress, therefore, closer account should be taken of the history of the Webb-Pomerene law upon which it was modeled. The message of this experience is that Canada's amendment was ill advised and that Mr. McIntyre was ill informed. For immediate purposes a summary of salient points must suffice, as space limitations preclude full recital of four dozen years and hundreds of export trade associations. The author hopes soon to present them in depth.

The Origins of Webb-Pomerene

It is generally supposed that Webb-Pomerene was designed as an antedote to the foreign buying cartels of pre-World War I.⁵ This is a romantic view and unfortunately also a mistaken one. The idea of export associations as an exemption to antitrust regulation was first voiced aloud in 1912 by the United States lumber trust, primarily for the purpose of policing domestic price and production agreements among hundreds of small West Coast lumber mills.⁶ The argument presented to Congress was that a decentralized industry such as lumber lay victim to foreign purchasing syndicates (none existed in lumber at the time, but one never knew). The lumber trust's exhortations were lost upon Congress, but not upon oligopolists in other industries.

At that time the United States copper trust (commanded by John D. Ryan and Cornelius Kelley of Anaconda Copper Company) were collapsing, their carefully structured price schedules having been broken in 1907 by the Braden interests in Chile. It occurred to Ryan—having encountered the lumber export agreements through

⁴ The U.S. Export Trade Act exempts from the provisions of the Sherman Antitrust Act associations created for the purpose of, and engaged solely in, export trade; provided that they abstain from restraining domestic trade and the export trade of their competitors and provided they do not "artificially or intentionally" affect domestic prices in their commodity. 40 Stat. 516; 15 U.S.C. §61-65. Canada's amendment makes the Combines Investigation Act inapplicable in relation to export combines absent a likelihood that they will restrain Canadian exports, restrain a competitor or inhibit a potential competitor in Canadian export trade, or lessen domestic trade "unduly" in their commodities. "Unduly" is given the broadest construction, dependent upon the increment of market control attained in combination. Benefit of doubt rests with a perpetrator, since (unlike Webb-Pomerene) there is no regulatory authority under Canada's amendment. D. H. W. Henry Q.C. before the Canadian Manufacturers Association as noted in McIntyre, *op. cit.*; see also H. of C. Debates, 1960, vol. IV, pp. 6973 and 6976.

⁵ See for example McIntyre, *op. cit.*, p. 111.

⁶ An excellent and detailed account of the lumber trust's operations is given in the three-volume report of the United States Bureau of Corporations entitled *The Lumber Industry* (1913). The West Coast mills had exported under formal agreement since 1902, and two of its export associations later registered under Webb-Pomerene—the Redwood Export Association (1912) and the Douglas Fir Exploitation and Export Corporation (1916)—both antedated the Webb-Pomerene Act (1918).

Anaconda's vast northwest timber stands—that export agreements could be used to regroup the copper trust, this time on an international scale including the Bradens. If such agreements could be sanctioned in law, their true purpose (i.e., world-wide cartel management) would be obscured and their operations blessed. So copper took over the campaign from timber. The Export Trade Act was in fact drafted by one Gilbert Montague, then counsel to Anaconda Copper Company and a close associate of Ryan. Following several abortive attempts to slip the draft act inconspicuously through Congress,⁷ Ryan and Montague decided to stage the most massive demonstration then known to lobbying history. Together with other captains of industry and not a few trust conspirators they organized a National Foreign Trade Convention in Washington. No means went unexploited for convincing Congress and President Wilson of the solidarity behind Ryan's case. (In crusades of this dimension the flocking instinct among priests of enterprise is enterprising in itself; the National Foreign Trade Council which grew out of this convention still lobbies and still convenes.) Of course the giant corporations merely pulled the strings; it had been decided well in advance that "small business" would be their front.⁸ Thus the myth was promulgated that export exemptions were primarily to assist small entrepreneurs to find a place in the international market that otherwise might be foreclosed by those "foreign cartels".⁹ Interestingly, it was this same myth that the Hon. Davey Fulton advanced in support of Canada's amendment,¹⁰ even though cartels are certainly not what they used to be.

The copper trust found success through political favor. It happened that President Wilson was indebted in office to some of the agitators for export exemption. At their urging he appointed three of their nominees to the newly created Federal Trade Commission in 1914.¹¹ Thereupon this majority directed as its first order of business a two-year study of "foreign trade conditions". Its *Report on Coöperation in American Export Trade* (1916) is a massive collection of names, data and organization charts largely of foreign *selling* cartels (not purchasing, as originally) and state trading agencies—much of it incomplete or misleading and most of it irrelevant by virtue of World War I. (There were similar arguments presented in Commons, only not so detailed.)¹² Nevertheless it proved to be

⁷ On one occasion as a rider on an appropriations bill. Montague also sought, unsuccessfully, favorable administrative decisions in the Departments of State and Justice.

⁸ See Williams Haynes, *The American Chemical Industry (1912-1922)*, (New York, Van Nostrand Company, 1941), vol. III, p. 529.

⁹ See *inter alia* the first report of the National Foreign Trade Council (New York); Hearings before the Committee on the Judiciary, House of Representatives, 64th Congress, 1st Session (1916); 55 *Congressional Record* 3564 *et seq.* (1917).

¹⁰ H. of C. Debates, 1960, vol. VII, pp. 4341, 6971.

¹¹ George Rublee of the United States Chamber of Commerce; Edward N. Hurley of the National Foreign Trade Council (Hurley had assisted Wilson's nomination to the Governorship of New Jersey); and Will H. Parry of the Seattle Chamber of Commerce.

¹² For example, Mr. Aiken in H. of C. Debates, 1960, vol. VII, p. 6901 and Mr. Fulton at p. 6972.

the irresistible force that swung Congress 180 degrees in support of the Webb-Pomerene bill. Ryan and his copper trust won the day, and thereafter proceeded to cartelize copper around the world, well up to World War II.¹³

Wemm-Pomerene in Action

Ryan's friends in other industries followed suit. More than half of the first twenty associations registered under the Act were ultimately discovered primarily to be conspiracies in restraint of United States commerce. A large number of the associations registered during the life of the Act were formed solely to promote and maintain international cartels (not oppose them) in industries such as steel, petroleum, sulphur, rubber tires, zinc, electrical apparatus, phosphate, wood screws, carbon black, alkali, pipe fittings, feed grains and others. (Gilbert Montague made a good part of his fortune by founding and operating some of these instruments.) Indeed, whenever an association has encountered a foreign cartel in its commodity, its response has been to join it rather than to fight it. Many other associations were formed primarily for price leverage in domestic markets or for coercion in foreign markets.¹⁴ Several postwar associations were formed specifically for price collusion in U.S. military overseas supply, in A.I.D. procurement, in the P.L. 480 ("Food for Peace") program, or other publicly financed foreign assistance programs. Where correction of such activities has occurred both the courts and the Federal Trade Commission have found the only cure to be curtailment of permissible Webb-Pomerene activities.

By any measurement undertaken, Webb-Pomerene appears never to have benefitted either the small business in whose name it was enacted or the United States balance of payments. Evidence to this effect during the pre-World War II period is abundant.¹⁵ As to postwar, an examination of all associations registered during a recent five-year sample period shows two-thirds of them to be leading members of industries falling within the Kaysen-Turner definition of "Type I" oligopolies;¹⁶ i.e., those so heavily concentrated that

¹³ Excellent albeit dated accounts of the early copper cartel and Webb-Pomerene are given by Prof. Leslie Fournier in *The Purposes and Results of the Webb-Pomerene Law*, 22 *American Economic Review* 18-33 and Carlton Fuller, *The Copper Cartel* (1928), 6 *Harvard Business Review* 322-328. They are well supplemented in the Federal Trade Commission's report on *The Copper Industry* (1947).

¹⁴ An example of the latter is an association of leading producers of cinema films who maneuvered first to exclude smaller independent U.S. producers from Japan during the postwar occupation, and since then have used their combined power to force theatre owners in small African and Latin American countries to lease on undesired terms and to terminate leases with certain competitor producers.

¹⁵ For example, see Part III of *Small Business and the Webb-Pomerene Act*, Report of the Foreign Trade Subcommittee of the Special Committee to Study Problems of American Small Business, U.S. Senate, 79th Congress, 2d Session (1946); and Consensus Report on the Webb-Pomerene Law (1947), 37 *American Economic Review* 848-863.

¹⁶ Carl Kaysen and Donald Turner, *Antitrust Policy* (Harvard University Press, 1959), pp. 27-30.

the top eight firms are unaffected by competition from below. Half of the remaining third are in industries classified as "Type II" oligopolies: those where the significance of competition from the lower ranks upon the top eight is indeterminate. (The remaining one-sixth comprised nine associations, only three of which survived the survey period.) Only one of the associations in existence today can rightly be said to be composed mainly of small producers in its commodity, and its total exports have yet to reach six figures. Furthermore, the Webb-Pomerene movement itself is topheavy. Of the total exports all of the existing associations claimed to have assisted during a recent sample year, more than 70 percent (by value) was accounted for by only four associations, and more than 99 percent was accounted for by only eight associations.¹⁷ The size and nature of the firms conducting this business suggests that their exports would be unaffected by the sudden disappearance of the Webb-Pomerene Act, at least not deleteriously.

Clearly the Webb-Pomerene Act has performed not as Congress hoped it might, but rather as Ryan, Montague and the copper cartel intended it would.

Canada's Hopes

Can it be expected that Canada will fare better with her export exemption? It is constructed directly after Webb-Pomerene, except for being more permissive in exactly those sections which have facilitated market abuse in the United States. Also, the Canadian exemption affords no instrument for regular inspection and correction of association activity prior to formal action, as Webb-Pomerene is supposed to. Generally, it is observed that the degree of formality required in administration of a statute varies inversely as to the likelihood of its occurrence.

The brief history of Canada's export exemption is hardly comforting. "Cansulex", an association of Canadian sulphur producers, is a perfect embodiment of the fears expressed by Mr. Howard when the amending bill came before Commons.¹⁸ Cansulex is officially regarded in the United States as "the Canadian counterpart of Sulexco"¹⁹—the latter being a Webb-Pomerene association which has dominated world-wide control over sulphur prices and distribution since its creation in 1922, and which is currently under grand jury indictment for restraint of domestic and export trade. The formation of Cansulex appears to have been inspired by a 1961 freight rate ruling in the U.S. Interstate Commerce Commission which would have enabled Canadian sulphur to compete effectively in northern portions of the United States. The I.C.C. proceedings were unsuccessfully contested by Freeport Sulphur Company, following which United States producers filed an equally unsuccessful petition with the Tariff

¹⁷ Compiled from data scheduled for future release.

¹⁸ H. of C. Debates, 1960, vol. VII, pp. 7001, 7010-7012, and 7363-7364.

¹⁹ United States Bureau of Mines, *Minerals Yearbook 1962*, p. 1180.

Commission for increased duty on imported sulphur. Cansulex was organized immediately thereafter, in 1962. It is said to be dominated in policy matters by Occidental Petroleum Company, as parent of Jefferson Lake Sulphur Company (a member of Sulexco); and to be under orders to ship exclusively through International Ore & Fertilizer Corporation, another Occidental subsidiary. As the principal dealer in Canadian sulphur, Cansulex is believed to function in a price leadership rôle for Canadian exporters under a price structure in accord with Sulexco's (despite lower production costs in Canada), thereby protecting both the uniform world price structure²⁰ and the domestic price schedule of United States producers. No formal agreement between the two associations is necessary, since half of the Canadian sulphur capacity is controlled ultimately by United States firms.

In this instance Canada's export exemption amendment has resulted in curtailment of sulphur exports to the United States and in a world-wide firming of prices which (in 1964) led to upward price adjustments on the North American continent. This resembles the pattern under Webb-Pomerene.

The Ancestral Myth

With this in mind we return to Mr. McIntyre's totems on the desirability for Canada's (or any other country's) export exemptions, and on his hope

that the courts will give those export exemptions meaningful interpretation by allowing some latitude in the incidental effect which may occur in the domestic market.²¹

How much latitude Mr. McIntyre would wish, and to what end, is an intriguing thought. Nevertheless he has put his finger on a crucial fault. The point is that the amendment, like the Webb-Pomerene Act, is self-defeating. Either the provisos of s. 32(5) which Mr. Fulton considered necessary to constrain "unscrupulous persons" and market foreclosure²² are meaningless, or else they work to negate the whole idea of export combination. It is not possible for entrepreneurs to react one way about that portion of their trade which is external and the opposite way about that which is domestic: legitimate conspiracy in one produces illegitimate conspiracy in the other, no matter how pure the intention.²³ And if, as Mr. McIntyre argues,

government interference is like pregnancy—you can't have just a little of it,²⁴

then what would he say about combination?

²⁰ On world price manoeuvres in sulphur see *Reports of Restrictive Practices Cases* (National Sulphuric Acid Association), Restrictive Practices Court of Great Britain, L.R. 4 R.P. (1963); also "New Fire in Brimstone", *Barron's*, March 20, 1961.

²¹ McIntyre, *op. cit.*, p. 110.

²² H. of C. Debates, 1960, vol. VII, p. 6973.

²³ One domestic trade association in the United States quite innocently refers to a Webb-Pomerene association in the same industry as its "export division"—no doubt because they share the same office and the same officials.

²⁴ McIntyre, *op. cit.*, p. 113.

Noting the "serious competitive disabilities" facing Canada in world markets and the "small-scale operations" characteristic of much of Canadian industry, Mr. McIntyre ponders the unpopularity of the export exemptions among secondary industry. "The answer", he says, "is obscure".²⁵ But that is only because he too believes the tribal myth about exceptions to antitrust regulation being beneficial to small business.²⁶ Actually, the only obscurity is why any business otherwise unable to export effectively should be interested in the amendment. No Webb-Pomerene association of small businesses has ever enjoyed success and long life, save two whose "success" materialized through participation in a world-wide cartel.²⁷ On the contrary, "the preponderant effect of the [Webb-Pomerene] act seems to have been to facilitate the concentration of industrial power in the hands of large enterprises to the detriment of small existing or potential competitors."²⁸

But this is subordinate. We shall now risk tû-tû by engaging the biggest totem of all. The fundamental theory behind Canada's amendment, as behind its prototype the Webb-Pomerene Act, is that antitrust regulation inhibits commerce. It is suggested by responsible persons that "if laws are retained in all their rigidity" then Canadian exporters will lose overseas markets to powerful overseas consortia.²⁹ So exporters should be permitted to fend off their powerful rivals in combination. For what purpose? To undercut their rivals? This is easier done individually. To take the market at a better price? This may work if the rival is relatively weak, in which case their worst enemies are each other. But if their rival is relatively strong it can be effective only when both rival and domestic groups act in concert. So there we have it: either the exemption is unnecessary, or else it is necessary for a purpose we can't abide. The antitrust laws were enacted because trusts were killing off free enterprise. Is it exceptional when assassins cross national boundaries? If so, then let's not lament I.T.O.; let's instead abandon G.A.T.T. and reverse two decades of anti-cartel policy.

For that, in a nutshell, is what antitrust regulation is all about;³⁰ and the entrepreneurs who would lead us down the primrose path of export exemption show a greater awareness of it than those who are willing to take the trip. Otherwise, why not exempt all the other industries that feel antitrust to be a burden? They've got problems too.

²⁵ *Ibid.*, p. 112.

²⁶ See H. of C. Debates, 1960, vol. IV, p. 4341.

²⁷ Small Business and the Webb-Pomerene Act, *op. cit.*, p. 65 *et seq.* The average longevity of associations has been about four years.

²⁸ Small Business and the Webb-Pomerene Act, *op. cit.*, pp. 3-4.

²⁹ Hon. Davey Fulton in H. of C. Debates, 1960, vol. VII, p. 6972.

³⁰ See Wilbur Fugate, *Anti-trust Policy: Damper or Bellows?* (1959), 45 American Bar Association Journal 947.