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## United States Antitrust Law and Industrial Policy: International Joint Ventures and Global Competition After GM-Toyota

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# United States Antitrust Law and Industrial Policy: International Joint Ventures and Global Competition After GM-Toyota

Paul C. Curnin

## **Abstract**

Part I of this Note will describe the evolution of United States antitrust laws and their application to international joint ventures. Part II of this Note will then demonstrate, through an analysis of the GM-Toyota decision, that the FTC's settlement of its proceedings against GM and Toyota embodies an industrial policy. Part III will show that implementation of an industrial policy through the antitrust laws is logical, necessary, and above all, preferable to protectionist legislation as a means of stimulating United States industrial competitiveness in world markets. Finally, this Note will propose a program of restrictions, similar to those imposed in GM-Toyota, designed to maximize the procompetitive benefits of international joint ventures.

UNITED STATES ANTITRUST LAW AND INDUSTRIAL  
POLICY: INTERNATIONAL JOINT VENTURES  
AND GLOBAL COMPETITION AFTER  
*GM-TOYOTA*

INTRODUCTION

The effect of foreign competition on certain sectors of the United States economy<sup>1</sup> has spurred demand for protectionist

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1. UNITED STATES BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 813-21 (105th ed. 1985). The value of total merchandise imports rose from U.S.\$15 billion in 1960 to U.S.\$258 billion in 1983. *Id.* During that same time period, total merchandise exports rose from U.S.\$19.6 billion to U.S.\$200.5 billion, resulting in a U.S.\$57.5 billion merchandise trade deficit in 1983. *Id.* In 1965, the United States had a trade surplus of U.S.\$5.3 billion. *Id.* In 1976, the United States had a trade deficit of U.S.\$8.3 billion. *Id.* Merchandise exports to Japan were valued at roughly U.S.\$22 billion, while Japanese imports to this country were valued at U.S.\$41 billion, creating a U.S.\$19 billion trade deficit with Japan alone in 1983. *Id.* at 818. In 1970, the new automobiles imported into the United States were valued at U.S.\$3 billion. *Id.* at 821. This figure rose to U.S.\$23 billion in 1983. *Id.*

In 1985 alone, foreign competition was largely responsible for the loss of 340,000 manufacturing jobs. Quint, *Economy Gives Alternating Signals*, N.Y. Times, Oct. 14, 1985, at D1, col. 3. Seventy-five percent of all products made in the United States now face international competition. Baldrige, Luncheon Address, 53 ANTITRUST L.J. 397 (1984). Only eight percent of United States products were subject to foreign competition in the early 1960s. Reich, *The Next American Frontier*, Atlantic Monthly, Apr. 1983, at 97, 101. Imports climbed 26.4% in 1984. Hershey, *Protectionism and U.S. Jobs*, N.Y. Times, Sept. 11, 1985, at D2, col. 1. The United States trade deficit reached U.S.\$15.5 billion for the month of September, 1985, indicating that United States consumers were purchasing foreign-made automobiles and other goods rather than those manufactured in the United States. Farnsworth, *U.S. Trade Deficit Widens to Record as Imports Surge*, N.Y. Times, Nov. 11, 1985, at A1, col. 1. For the year 1985, the United States trade deficit was a record U.S.\$148.5 billion. Farnsworth, *Year's Trade Deficit Hit A Record \$148.5 Billion*, N.Y. Times, Jan. 3, 1986, at D1, col. 1. The December, 1985, trade deficit was U.S.\$17.4 billion, the highest monthly total ever. *Id.* The trade deficit with Japan was U.S.\$49.7 billion for 1985, one-third of the total United States trade deficit and more than the combined deficits with Western Europe and Canada. *Id.* The 1984 trade deficit with Japan was U.S.\$37 billion. *Id.*

Analysts expect the United States trade deficit with Japan to continue to increase. Farnsworth, *Trade Gap with Japan Expected to Grow*, N.Y. Times, Dec. 12, 1985, at A1, col. 3. "The Japanese undersell our manufactures [sic] and kill off thousands, even millions, of jobs. Often these are our best industrial jobs—for example, the \$25,000 slots in the auto or steel industry upon which United States real income supremacy has allegedly always been based." Samuelson, *Where Iacocca and Common Sense Err*, N.Y. Times, Sept. 15, 1985, at D3, col. 1. "[T]he disappearing well-paid factory jobs are being supplanted by low-wage service jobs, such as banktellers, hotel clerks and workers in the fast-food industry." Noble, *Study Finds 60% of 11 Million Who Lost Jobs Got New Ones*, N.Y. Times, Feb. 7, 1986, at A1, col. 1.

One United States steel town, Clairton, Pennsylvania, is so deeply in debt as a

legislation.<sup>2</sup> Economists are nearly unanimous in predicting a devastating impact on the global economy if the trade barrier<sup>3</sup> legislation currently before the United States Congress is enacted.<sup>4</sup> Implementation of an industrial policy<sup>5</sup> based on selective relaxation of the enforcement of United States antitrust

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result of the closing of the local United States Steel Corporation plant that it has discharged its entire police force and fire department. Gruson, *Steel Towns Discharge Police and Reduce Services Sharply*, N.Y. Times, Oct. 6, 1985, at A1, col. 1. Charles W. Bartsch, a policy analyst for the Northeast-Midwest Institute, a Washington-based economic and environmental research center, predicts that many industrial towns will go into bankruptcy as a result of foreign competition. *Id.* This economic decline is not temporary. See Prokesch, *Another Decline in Wage Increases Expected in 1986*, N.Y. Times, Oct. 21, 1985, at A1, col. 1; *Business Economists See a Sluggish '86*, N.Y. Times, Oct. 12, 1985, at 39, col. 3. Lester Thurow, professor of economics and management at the Massachusetts Institute of Technology, warns that a full-scale depression is a possibility. Thurow, *The 20's and 30's Can Happen Again*, N.Y. Times, Jan. 22, 1986, at A23, col. 3.

In the 1980's international debt and not the stock market is apt to be the hammer that shatters a fragile financial system. This country entered 1986 with \$100 billion in international debt, borrowing \$150 billion a year to finance its trade deficit . . . [b]y 1989, America will owe more than \$600 billion to the rest of the world and have to pay more than \$60 billion in interest payments . . . .

*Id.*

2. See, e.g., Weinraub, *White House Maps Bill to Stem Tide of Protectionism*, N.Y. Times, Sept. 12, 1985, at A1, col. 1. Approximately 300 bills designed to protect United States markets from imports are currently pending in Congress. *Id.* President Reagan has characterized the current level of protectionism as a "stampede." Boyd, *President Urges U.S. Lawmakers to Block Protectionist 'Stampede'*, N.Y. Times, Sept. 18, 1985, at A1, col. 3.

3. See *infra* note 98 and accompanying text.

4. See Kristof, *'New Wave' View of Protectionism*, N.Y. Times, Sept. 9, 1985, at D1, col. 1. "[A]lmost all economists remain aloof from the swelling political movement to curb imports," *id.*, and even those who do not condemn protectionist measures in every situation "remain loath to be seen as granting a seal of approval to Capitol Hill's broad calls for protectionism." *Id.* One economist has asserted that the support for protectionist legislation is "without any intellectual foundation at all." *Id.* (quoting Paul R. Krugman, professor of economics at the Massachusetts Institute of Technology). Duck Woo Nam, a leading economist in South Korea, predicts severe effects on the world economy if protectionist legislation succeeds in the United States Congress. Silk, *A Confident South Korean*, N.Y. Times, Oct. 9, 1985, at D2, col. 1. Finally, many authorities doubt that protectionist measures would be a successful method of protecting the United States economy. Franco Modigliani, the 1985 Nobel Prize winner in economics, has stated that "protectionism might prove ineffective—leading to higher interest rates and a higher dollar." Modigliani, *A Message for Reagan: And Why The Deficit Must Be Slashed*, N.Y. Times, Oct. 3, 1985, § 3, at 3, col. 1. Four leading economists, Robert Crandall of the Brookings Institution, Herbert Stein of the American Enterprise Institute, Edward Hudgins of the Heritage Foundation, and William Niskanen of the Cato Institute, recently issued a joint statement to the effect that protectionist legislation will not eliminate the trade deficit, but could

laws<sup>6</sup> may, however, be a viable alternative. The Federal Trade Commission<sup>7</sup> (FTC or the Commission) recently settled<sup>8</sup> a

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trigger retaliatory restrictions and "increase international tensions." *Protectionism is Criticized*, N.Y. Times, Oct. 22, 1985, at D8, col. 6.

5. Generally, industrial policy is intervention in the private business sector by the central government to "promote vigorous industrial growth." Schultze, *Industrial Policy: A Dissent*, Brookings Review, Fall 1983, at 3, 4; see *infra* notes 119-24.

6. This Note advocates more than an exercise of prosecutorial discretion. The Federal Trade Commission [hereinafter referred to as the FTC or Commission], under this proposal, would not only choose which ventures to prosecute, but would also selectively allow international joint ventures to proceed after modification. Because this proposal does not involve prosecutorial discretion, but, rather, industrial policy making, joint ventures approved by the FTC under this proposal would not be subject to private antitrust actions.

Private plaintiffs brought 1,100 antitrust suits in 1984, largely because of the allure of treble damages. "[T]he prospect of multiple recovery invites plaintiffs to pursue doubtful claims." Greenhouse, *Making Mergers Even Easier*, N.Y. Times, Nov. 10, 1985, § 3, at 1, col. 2 (quoting Douglas H. Ginsburg, head of Department of Justice, Antitrust Division).

7. The Federal Trade Commission Act established the FTC as an independent administrative agency made up of five Presidentially-appointed commissioners. Federal Trade Commission Act, 38 Stat. 717 (1914), as amended, 15 U.S.C. §§ 41-70 (Supp. 1985) [hereinafter cited as the FTC Act or the Act]. Because "nothing hampers business like uncertainty," Remarks of President Wilson, *quoted in S. Rep. No. 597* 63d Cong. 2d Sess. 6-7 (1914), the FTC was designed to "obviate the uncertainty of the antitrust laws." 1 ABA ANTITRUST SECTION, THE FTC AS AN ANTITRUST ENFORCEMENT AGENCY: THE ROLE OF SECTION 5 OF THE FTC ACT IN ANTITRUST 9 (Monograph No. 5, 1981) [hereinafter cited as 1 ABA ANTITRUST MONOGRAPH]. The FTC combines "adjudicatory, rule-making, fact-finding, advisory and reporting powers." 2 ABA ANTITRUST SECTION, THE FTC AS AN ANTITRUST ENFORCEMENT AGENCY: ITS STRUCTURES, POWERS AND PROCEDURES 1 (Monograph No. 5, 1981) [hereinafter cited as 2 ABA ANTITRUST MONOGRAPH]. The FTC Act gave the Commission a broad grant of power to take action against corporations engaged in "[u]nfair methods of competition." 15 U.S.C. § 45(a)(1)(2). The FTC enforces, inter alia, the Clayton Act, 15 U.S.C. § 46(c)-(d), and the FTC Act. 15 U.S.C. § 45.

The FTC's dual role as prosecutor and adjudicator also gives it flexibility in handling antitrust cases. The Commission often acts as both prosecutor and judge in the same case. See 1 ABA ANTITRUST MONOGRAPH, *supra*, at 1. The FTC has been criticized for this dual role. See, e.g., Jaffe, *The Illusion of the Ideal Administration*, 86 HARV. L. REV. 1183, 1186-87 (1973) (criticizing a broad delegation of powers to, among other agencies, the FTC). The basis of these criticisms is often that the Commission cannot adjudicate proceedings impartially when it has already devoted significant effort to the proceeding's investigation and prosecution. See 2 ABA ANTITRUST MONOGRAPH, *supra*, at 67.

However, the FTC's "compartmentalization of functions" provides safeguards against prejudicial handling. *Id.* at 68. Other safeguards include a "ban on ex parte communications" once litigation is initiated, and the "substantial independence," *id.*, of the administrative law judges of the FTC who perform the initial findings of fact. *Id.* at 11. Most importantly, the dual function of the FTC gives it the flexibility mandated by Congress to "develo[p] . . . special antitrust expertise and a uniform body of law" not shared by the United States Department of Justice [hereinafter referred to

as Justice Department]. *Id.* at 68. However, efforts to create a uniform body of law are hampered by the FTC's own changing policies which must adapt to the changing realities of the market, and judicial review by various circuit courts of appeal. *Id.*

Finally, the judiciary has sanctioned the dual function of the FTC. The Supreme Court held that the FTC's dual role did not necessitate its disqualification. *See* *FTC v. Cement Institute*, 333 U.S. 683, 700-03 (1948). Lower courts have followed this precedent, finding no deprivation of due process when the Commission both investigates and adjudicates a case. *See, e.g.,* *Ash Grove Cement Co. v. FTC*, 1978-1 Trade Cas. (CCH) ¶ 62,087 (9th Cir.), *cert. denied*, 439 U.S. 982 (1978); *FTC v. Cinderella Career and Finishing Schools, Inc.*, 404 F.2d 1308, 1315 (D.C. Cir. 1968) (FTC within its delegated power when it both investigates and decides to prosecute a case); *Lehigh Portland Cement Co. v. FTC*, 291 F. Supp. 628, 631 (E.D. Va. 1968) ("[b]oth industry-wide investigations and adjudicative proceedings involving the same general subject matter may be instituted and conducted simultaneously"), *aff'd per curiam*, 416 F.2d 971 (4th Cir. 1969).

The FTC is also empowered to consider a wide range of factors in making decisions. In 1972, the Supreme Court held, in *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233 (1972), that

legislative and judicial authorities alike convince us that the Federal Trade Commission does not arrogate excessive power to itself if, in measuring a practice against the elusive, but congressionally mandated standard of fairness, it, like a court of equity, considers public values beyond simply those enshrined in the letter or encompassed in the spirit of the antitrust laws.

*Id.* at 244.

The FTC's ability to consider a wide range of factors in making its decisions makes it an ideal vehicle for the implementation of this industrial policy. *See id.* at 244-45 n.5. The Court in *Sperry & Hutchinson* noted that the FTC, in making its decision, may consider, *inter alia*, "whether the practice . . . offends public policy . . . whether . . . it is . . . oppressive . . . whether it causes substantial injury to consumers." *Id.* The Court explicitly recognized the Commission's authority to go outside "the letter or spirit of the antitrust laws." *Id.* at 239; *see also* *FTC v. Brown Shoe Co.*, 384 U.S. 316, 321 (1966). "This broad power of the Commission is particularly well established with regard to trade practices which conflict with the basic policies of the Sherman and Clayton Acts even though such practices may not actually violate these laws." *Id.* (footnote omitted). The FTC's power is not, of course, without limit: "the Commission may not have the authority to decide a case on the sole basis of social or political considerations . . . [but] non-economic values . . . are unquestionably relevant and important considerations." Averitt, *The Meaning of "Unfair Methods of Competition" in Section 5 of the Federal Trade Commission Act*, 21 B.C. L. REV. 227, 282-83 (1980).

The FTC, unlike the judiciary, employs experts in its Bureau of Competition and the Bureau of Economics. *See* 16 C.F.R. § 0.9 (1985). The Bureau of Competition investigates antitrust violations and recommends action to the Commission. *Id.* § 0.16. The Bureau of Economics advises the Commission on economic matters. *Id.* § 0.18. Additionally, the FTC generally may be able to act more quickly than the courts, *see* 2 ABA ANTITRUST MONOGRAPH, *supra*, at 20-22, and avoid the multiplicity and uncertainty that the judiciary brings to deciding complex business matters. *Id.* at 20.

The FTC is also a more effective agency than Congress in administering an industrial policy, because Congress, in recent developments, has shown itself unwilling or unable to either resist protectionist devices or pass legislation that will effectively encourage United States industrial competitiveness. Shenefield, *Competitiveness in the*

*Global Economy—The Need for an End to Ideology*, 53 ANTITRUST L.J. 54 (1984) (noting what seems to amount to a “Congressional inability” to refuse to impose tariffs). For example, a small United States manufacturer, Harley-Davidson Motors, successfully sought a broad tariff on all Japanese motorcycles. *Id.* When Congress has attempted to foster United States industries’ world competitiveness through specialized legislation, the results have been ineffective. The National Cooperative Research Act of 1984, Pub. L. No. 98-462, 98 Stat. 1815 (1984), for example, provides that joint ventures are not illegal per se, and that if reported to antitrust enforcement officials in advance, cannot be subject to treble damages. However, joint ventures never have been illegal per se, and the elimination of treble damages by itself is unlikely to encourage any business to participate in a joint venture. See Blechman, *Use of Joint Ventures to Foster U.S. Competitiveness in International Markets*, 53 ANTITRUST L.J. 65, 66 (1984). “The evidence so far does not suggest that the twin enactments [the National Cooperative Research Act incorporates the National Productivity and Innovation Act and the Joint Research and Development Act] will provide a major spur to United States exports or foreign joint ventures.” Joelson, *U.S. Antitrust Policy in International Trade*, in 1984 FORDHAM CORP. L. INST. 349, 354 (B. Hawk ed.); accord Halverson, *Transnational Joint Ventures and Mergers Under U.S. Antitrust Law*, in 1984 FORDHAM CORP. L. INST. 143 (B. Hawk ed.).

Because the jurisdictions of the FTC and the Antitrust Division of the Justice Department overlap, each agency informs the other of incipient investigations in order to avoid duplicative investigations. 16 CFR § 4.6. “It is the policy of the Commission to cooperate with other governmental agencies to avoid unnecessary overlapping or duplication of regulatory functions.” *Id.* The two agencies also share similar enforcement policies. “[A]s a practical matter, there is very little, if any, difference in the nature of the analysis of the two agencies.” Glynn, *Market Definition, Mergers and Joint Ventures, Panel Discussion* in 1984 FORDHAM CORP. L. INST. 249, 255.

In *In re General Motors*, 103 F.T.C. 374 (1984) (consent decree) [hereinafter cited as *GM-Toyota*], the FTC notified the Justice Department of its investigation into the GM-Toyota joint venture. 3 TRADE REG. REP. (CCH) ¶ 22,108 (1984); see *infra* note 51 (discussion of consent decree procedure). When there is no conflicting investigation, each agency grants clearance to the other’s investigation summarily. See 2 ABA ANTITRUST MONOGRAPH, *supra*, at 16 n.52. This arrangement has been generally successful. See *id.* at 17. Although some commentators have criticized the clearance system as time-consuming, *id.* at 19, it allows for more efficient use of the agencies’ resources and expertise. See *id.* at 18.

Although the Justice Department “operates chiefly as a litigator,” J. VAN CISE, *THE FEDERAL ANTITRUST LAWS*, 47-48 (4th rev’d ed. 1982), it may, like the FTC, enter into consent decrees with defendants as a resolution to civil proceedings. See I J. VON KALINOWSKI, *ANTITRUST LAWS AND TRADE REGULATION* § 91.09[1] (1985). The Justice Department is the agency which usually sets the standards for the exercise of prosecutorial discretion among the two federal antitrust enforcement agencies. See, e.g., 1984 Justice Department Merger Guidelines, 49 Fed. Reg. 26,823 (June 29, 1984) [hereinafter cited as 1984 Merger Guidelines] amending 1982 Justice Department Merger Guidelines, 47 Fed. Reg. 28,493 (June 30, 1982) [hereinafter cited as 1982 Merger Guidelines]. Of the two agencies, only the Justice Department has jurisdiction to prosecute criminal antitrust violations. It is irrelevant which agency administers the industrial policy suggested by this Note because the policies of the two agencies are so similar. However, because the FTC was the agency which settled the *GM-Toyota* joint venture, the FTC will be the focus of this Note.

8. Technically, the FTC did not “approve” the GM-Toyota joint venture, but challenged its legality under United States antitrust laws, see *GM-Toyota*, 103 F.T.C. at

complaint challenging an international joint venture<sup>9</sup> between General Motors Corporation (GM) and Toyota Motor Corporation (Toyota)<sup>10</sup> that could significantly improve United States industrial competitiveness in world markets. The FTC decision in *In re General Motors Corporation (GM-Toyota)* already

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374-81 (complaint issued by the FTC alleging antitrust violations by GM and Toyota) [hereinafter cited as Complaint], and then settled the dispute, *see id.* at 382-86 (Decision and Order imposing restrictions on the joint venture) [hereinafter cited as Order]; *see infra* note 51 (discussion of consent decree procedure).

9. The term "joint venture" can encompass almost any cooperative effort between two firms resulting in the creation of a separate entity. *See Pitofsky, Joint Ventures Under the Antitrust Laws: Some Reflections on the Significance of Penn-Olin*, 82 *HARV. L. REV.* 1007 (1969). However, in order to receive special consideration under the antitrust laws, the venture must have some potential for realizing efficiencies, expanding output, or both. *Brunswick Co.*, 94 F.T.C. 1174, 1265 (1979), *aff'd and modified sub nom* *Yamaha v. FTC*, 657 F.2d 971 (8th Cir. 1981), *cert. denied*, 452 U.S. 915 (1982) [hereinafter cited as *Brunswick*]. In general, a joint venture is "an integration of operations likely to lead to the expansion of output." *See Brodley, Joint Ventures and Antitrust Policy*, 95 *HARV. L. REV.* 1523, 1525 (1982) [hereinafter cited as *Brodley, Joint Ventures*]. Because of the inherent social benefit associated with increased output, joint ventures are typically analyzed under the "rule of reason." The rule of reason requires analysis of "whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied . . . ." *Board of Trade of Chicago v. United States*, 246 U.S. 231, 238 (1918). Under rule of reason analysis, courts or antitrust enforcement agencies balance the anticompetitive aspects of a venture against the procompetitive aspects. *See Brodley, Joint Ventures, supra*, at 1535. By contrast, the "per se rule," which is normally applied to cartels and mergers, relies on pre-set standards based on market power percentages to determine the legality of a prospective business arrangement. *Id.* The per se rule is used only when the "nature and necessary effect are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality . . . ." *National Society of Professional Engineers v. United States*, 435 U.S. 679, 692 (1978). Efficiencies gained through combining assets are generally not a defense under a per se analysis. *See FTC v. Proctor & Gamble Co.*, 386 U.S. 568, 580 (1967). For this reason, the scope of this Note does not extend to mergers under present law.

The GM-Toyota deal should be considered a joint venture for two reasons. *See GM-Toyota*, 103 F.T.C. at 386 (statement of Chairman Miller) [hereinafter cited as Miller statement]. First, GM and Toyota remain competitors in the vast percentage of their output, as the joint venture represents only a small fraction of GM and Toyota's total production. *Id.* Secondly, in order to revitalize United States industries through the relaxation of the antitrust laws concerning joint ventures, it is important to protect the ventures from the stricter per se analysis. *But see id.* at 394 (dissenting statement of Commissioner Bailey) [hereinafter cited as Bailey statement] (because the circumstances of *GM-Toyota* are collusion-prone—"a collaboration between two major competitors resembles a partial merger more than a true joint venture"—a per se analysis might be more appropriate).

10. *See GM-Toyota*, 103 F.T.C. at 374.



has inspired similar<sup>11</sup> international production joint ventures.<sup>12</sup>

Part I of this Note will describe the evolution of United States antitrust laws and their application to international joint ventures.<sup>13</sup> Part II of this Note will then demonstrate, through an analysis of the *GM-Toyota* decision, that the FTC's settlement of its proceeding against GM and Toyota embodies an industrial policy.<sup>14</sup> Part III will show that implementation of an industrial policy through the antitrust laws is logical, necessary, and, above all, preferable to protectionist legislation as a means of stimulating United States industrial competitiveness in world markets.<sup>15</sup> Finally, this Note will propose a program of restrictions, similar to those imposed in *GM-Toyota*,<sup>16</sup> designed to maximize the procompetitive benefits of international joint ventures.<sup>17</sup>

### I. UNITED STATES ANTITRUST LAW AND INTERNATIONAL JOINT VENTURES

The purpose of the United States antitrust laws is the protection of a competitive marketplace.<sup>18</sup> In protecting competi-

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11. Cases similar to *GM-Toyota* include any potential international joint venture between a United States parent from an industrial sector under intense foreign competition and a foreign parent. See *supra* note 1 (including, inter alia, the textile, steel, semiconductor, and footwear sectors).

12. See Holusha, *Chrysler, Mitsubishi Pick Illinois Site*, N.Y. Times, Oct. 8, 1985, at D1, col. 3. Chrysler Corporation [hereinafter referred to as Chrysler] and Mitsubishi Motors Corporation have agreed to form an automobile production joint venture at a site 100 miles southwest of Chicago. *Id.* The Ford Motor Company [hereinafter referred to as Ford] and the Mazda Motor Company have announced the creation of a similar venture to be based in Flat Rock, Michigan. *Id.* In addition, U.S. Steel Corporation announced a joint venture with Pohang Iron and Steel Co. of South Korea. Cuff, *U.S. Steel in Korean Import Plan*, N.Y. Times, Dec. 17, 1985, at D1, col. 6. The two steel producers will spend U.S.\$300 million to modernize U.S. Steel's plant in Pittsburg, California. *Id.* Pohang is one of the world's most efficient steel-makers. *Id.*

13. See *infra* notes 18-47 and accompanying text.

14. See *infra* notes 48-90 and accompanying text.

15. See *infra* notes 91-128 and accompanying text.

16. See *infra* notes 70-79 and accompanying text.

17. See *infra* notes 129-52 and accompanying text.

18. *United States v. South Eastern Underwriters Ass'n*, 322 U.S. 533, 553-54 (1944); *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 610 (1972). "Antitrust laws in general . . . are the Magna Carta of free enterprise . . . [a]nd the freedom guaranteed each and every business, no matter how small, is the freedom to compete . . ." *Id.*

tion, antitrust enforcement has historically been responsive to changes in the marketplace.<sup>19</sup> As markets become increasingly global rather than national,<sup>20</sup> antitrust enforcement should reflect this change by formulating a new industrial policy<sup>21</sup> designed to facilitate international joint ventures.<sup>22</sup>

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19. See McGrath, *Views From the Justice Department—Enforcement Policy and Current Issues in International Trade*, in 1984 *FORDHAM CORP. L. INST.* 264, 279 (B. Hawk ed.). “Historically, antitrust laws were asked to serve a variety of economic, social and political goals, most of which were not mentioned or even alluded to in the [antitrust] statutes themselves.” *Id.* at 279. The “true goal of antitrust enforcement” is now perceived to be the “enhancement of economic efficiency” rather than “penalizing corporations for mere size.” *Id.* “[A]s we experienced double-digit inflation, rising unemployment, and declines in productivity growth, the public became more interested in using antitrust to promote efficiency and economic growth, and less interested in using antitrust to advance ill-defined social concerns.” *Interview with James C. Miller III*, 53 *ANTITRUST L.J.* 1, 8 (1984) [hereinafter cited as *Miller Interview*].

20. See, e.g., Alm, *Free Trade Fight*, *U.S. News & World Report*, Sept. 23, 1985, at 50. Automobile imports accounted for 23% of the United States market in 1984. *Id.*; see McGrath, *supra* note 19, at 270. Foreign trade has

expanded almost geometrically during the past decade, and our economy’s interdependence with our trading partners has increased apace. This has forced a critical reevaluation of all aspects of our economic system, especially since mounting trade deficits have caused a national concern about our ability to compete, as well as a recognition that we no longer can ignore other nations in deciding the terms on which we will compete internationally.

*Id.*

21. See *Northern Pacific Railway Co. v. United States*, 356 U.S. 1, 4 (1958). The antitrust laws themselves are an industrial policy, embodying governmental restrictions regulating the behavior of private industry. *Id.*

The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic, political and social institutions. But even were that premise open to question, the policy unequivocally laid down by the Act is competition.

*Id.*

22. See *infra* note 36 (discussion of antitrust impacts of joint ventures). Joint ventures can harm competition by presenting the opportunity for collusion between the venturers, loss of potential competition between former competitors, and market exclusion. Brodley, *Joint Ventures*, *supra* note 9, at 1530. Collusion involves the exchange of competitively sensitive information for the benefit of the parties involved. See, e.g., *GM-Toyota*, 103 F.T.C. at 395-96 (Bailey statement). Loss of potential competition results when a parent that was a potential market entrant on its own instead becomes a party to the joint venture. See Pitofsky, *supra* note 9, at 1013. However, the potential loss of competition of a parent is often offset by the market entry of the joint venture itself, which has the further benefit of being an actual and immediate

### A. *United States Antitrust Law*

During the nineteenth century, courts applied state common law to condemn businesses that restrained trade unreasonably or engaged in monopolistic practices.<sup>23</sup> As the United States became increasingly industrial, the common law antitrust standards provided insufficient deterrence against anticompetitive business practices.<sup>24</sup> Federal antitrust statutes were required to combat the anticompetitive practices made possible by the growth of industry.<sup>25</sup>

The Sherman Act<sup>26</sup> represented an early attempt by Congress to prohibit anticompetitive business combinations.<sup>27</sup> The broad language of the Sherman Act, covering a wide range of unfair practices,<sup>28</sup> made it difficult to enforce<sup>29</sup> and led to the

entry rather than a speculative entry. Brodley, *Joint Ventures*, *supra* note 9, at 1532. Additionally, establishing that a firm is a potential entrant is, in itself, very difficult. *Id.* at 1537. Finally, a joint venture can exclude competition from the market by restricting the other firm's access to materials essential to carrying on business, but this type of anticompetitive behavior usually occurs only with marketing or input supply joint ventures. *Id.*

A horizontal joint venture is one formed in the market in which the parents already compete. Pitofsky, *supra* note 9, at 1035-36. Traditionally, horizontal joint ventures in a concentrated market, such as the GM-Toyota venture, *see GM-Toyota*, 103 F.T.C. at 375, have received the highest level of scrutiny from antitrust enforcers, *see* Brodley, *Joint Ventures*, *supra* note 9, at 1552-53, especially when the parents are competitors with large market shares. *Id.*

23. 1 J. VON KALINOWSKI, *supra* note 7, at § 1.01. This practice was justified on the basis of the need to protect fair competition and public welfare. *Id.* at § 1.01[2]; *see also* P. AREEDA, *ANTITRUST LAW* 44 (3d ed. 1981).

24. 1 J. VON KALINOWSKI, *supra* note 7, at § 1.02[4].

25. *Id.* Interstate conglomerates could not be checked effectively by state laws. *See id.*

26. Sherman Act, 15 U.S.C. § 1 (1890). Section one of the Sherman Act prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations . . ." *Id.* Section two forbids any person to form a monopoly, "or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations." 15 U.S.C. § 2. "Person" includes all corporations and associations. 15 U.S.C. § 7.

27. 1 J. VON KALINOWSKI, *supra* note 7, at § 2.02[4].

28. J. VAN CISE, *supra* note 7, at 7; *e.g.*, P. AREEDA, *supra* note 23, at 48. The Sherman Act prohibits ". . . monopolies and contracts, combinations and conspiracies in restraint of trade." *Id.*

29. 1 J. VON KALINOWSKI, *supra* note 7, at § 2.03[1]. The laissez-faire theory of economics that was in vogue at the turn of the century also reduced the demand for strict antitrust enforcement. *Id.* § 2.03[1][a]; *cf.* P. AREEDA, *supra* note 23, at 53-61 (procedures for enforcing the antitrust laws).

passage of the Clayton<sup>30</sup> and Federal Trade Commission Acts (FTC Act).<sup>31</sup> These two Acts formed the statutory basis for the FTC's complaint against GM and Toyota.<sup>32</sup> The FTC alleged violation of section seven of the Clayton Act<sup>33</sup> and section five of the FTC Act.<sup>34</sup>

### B. *International Joint Ventures Under United States Antitrust Law*

International joint ventures with one foreign and one domestic parent, like the GM-Toyota joint venture,<sup>35</sup> raise questions beyond those posed by purely domestic joint ventures,<sup>36</sup>

30. 15 U.S.C. §§ 12-27, *as amended*, 15 U.S.C. § 18; *see* 1 J. VON KALINOWSKI, *supra* note 7, at § 205[1], [3]. Major amendments to the Clayton Act include the Robinson-Patman Act, 15 U.S.C. § 13 (1936) (revising § 2 of the Clayton Act against price discrimination), the Celler-Kefauver Antimerger Act, 15 U.S.C. § 18 (1950) (revising § 7 of the Clayton Act), the Hart-Scott-Rodino Antitrust Improvements Act, 15 U.S.C. § 57a (1976) (adding notification requirements, allowing State attorneys general to bring suit on behalf of any person injured, and allowing recovery of attorney's fees by prevailing plaintiff), and the Antitrust Procedural Improvements Act of 1980, 15 U.S.C. § 18A (making procedural and jurisdictional modifications of the Clayton Act).

31. 15 U.S.C. §§ 41-58, *as amended*, 15 U.S.C. §§ 41-64; *see* 1 J. VON KALINOWSKI, *supra* note 7, at § 203[1], [3]. The original powers of the FTC have been augmented on three occasions: the Wheeler-Lea Amendments, 15 U.S.C. §§ 45, 52-55 (1938); the Trans-Alaska Pipeline Authorization Act, Pub. L. No. 93-153, § 408, 87 Stat. 591-92 (1973); and the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act, Title II, Pub. L. No. 93-637, 88 Stat. 2193 (1975). The FTC's power was restricted by the Federal Trade Commission Improvements Act of 1980, Pub. L. No. 96-252, 94 Stat. 374 (1980), which provides, *inter alia*, for Congressional oversight hearings, restricts the time in which the FTC must act, and limits public disclosure by the FTC.

32. *GM-Toyota*, 103 F.T.C. at 374 (Complaint).

33. Clayton Act, ch. 323, 38 Stat. 731 (1914), *as amended*, 15 U.S.C. § 45. Section seven states, in relevant part, that no company may acquire "the whole or any part of the stock or . . . assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly." 15 U.S.C. § 18. The term "person" includes all corporations and associations. 15 U.S.C. § 8.

34. Section 5 of the FTC Act states in relevant part that "[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful." 15 U.S.C. § 45. For a more detailed discussion of the FTC Act, *see supra* note 7; *GM-Toyota*, 103 F.T.C. at 374 (Complaint).

35. *See infra* note 54 (description of the GM-Toyota cooperation).

36. Brodley, *Joint Ventures*, *supra* note 9, at 1554. "Horizontal joint ventures raise such serious collusive risk that prohibition, rather than [restriction] is normally the appropriate remedy." *Id.* In the past, antitrust analysis of joint ventures centered around potential entrants and market power. *See, e.g.*, *United States v. Penn-Olin*

although certain international antitrust issues, such as extrater-

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Chemical Co., 378 U.S. 158 (1964); *Brunswick*, 657 F.2d at 973-75. Both continue to be elusive concepts.

Identifying a potential entrant is always speculative. See Brodley, *Joint Ventures*, *supra* note 9, at 1527. Methods of measurement of market power continue to be debated, and are beyond the scope of this Note. Compare Landes & Posner, *Market Power in Antitrust Cases*, 94 HARV. L. REV. 937, 939 (1981) (calculating market power by measuring a firm's elasticity of demand) with, e.g., Brennan, *Mistaken Elasticities and Misleading Rules*, 95 HARV. L. REV. 1849, 1850 (1982) (elasticity of demand model does not take transportation costs into consideration); Kaplow, *The Accuracy of Traditional Market Power Analysis and a Direct Adjustment Alternative*, 95 HARV. L. REV. 1817, 1818 (1982) (Landes and Posner neglect to consider all social costs and incorrectly define the markets involved); Schmalensee, *Another Look at Market Power*, 95 HARV. L. REV. 1789 (1985) (the Landes and Posner analysis is limited by the market model employed). It is interesting, however, that although the FTC made traditional market power studies in the GM-Toyota decision, it largely discounted the results. *GM-Toyota*, 103 F.T.C. at 393-94 (Bailey statement). Obviously, a decision allowing a joint venture between the first and third largest firms, *id.* at 393, in a highly concentrated market, evidences a change in the emphasis given to traditional market power analysis.

The joint venture case most often compared with *GM-Toyota* is *Brunswick*, which involved a proposed joint venture in the highly concentrated United States outboard engine market between Brunswick, a United States outboard engine retailer, and Yamaha, a Japanese outboard engine producer. *Brunswick*, 657 F.2d at 973-75. The venture was prohibited after consideration of market power and loss of potential competition. *Id.* However, the factual differences between *Brunswick* and *GM-Toyota* make the comparison less than demonstrative. The *Brunswick* joint venture agreement included highly questionable collateral agreements regarding division of foreign markets. *Id.* at 981. A collateral restraint is any anticompetitive restriction arising from an agreement not central to the operation of the joint venture. See Brodley, *Joint Ventures*, *supra* note 9, at 1543. Yamaha was not present in the United States outboard engine market in any capacity, although it was a strong competitor in the motorcycle market. *Brunswick*, 657 F.2d at 978. Toyota has been a United States retailer for several years. Yamaha was positively identified as a potential entrant from two earlier, unsuccessful entry attempts. *Id.* It was only speculation that Toyota would have begun United States production were it not for the GM-Toyota venture. See Brodley, *Joint Ventures*, *supra* note 9, at 1527. But see Beauchamp, *Close the door, they're coming in the windows*, *Forbes*, Jan. 21, 1986, at 82, 84 (Toyota has begun construction of a U.S.\$800 million plant in Kentucky, scheduled to be finished in mid-1988).

A better perspective of pre-*GM-Toyota* antitrust enforcement regarding joint ventures is gained from a brief examination of the evolution of the Justice Department's Merger Guidelines. The Merger Guidelines were issued in 1968 and revised in 1982 and 1984. See *supra* note 7. The 1968 guidelines "reflected misplaced theories of the day." McGrath, *supra* note 19, at 279 n.16. These theories centered around the concept that business should be challenged primarily on the basis of size. *Id.*

The 1982 guidelines represented "a rather cautious approach" towards the use of efficiencies as an antitrust defense. Interview with J. Paul McGrath, Assistant Attorney General, Antitrust Division, 53 ANTITRUST L.J. 27 (1984). This approach entailed a limited consideration of efficiencies only in close cases. *Id.* The 1982 guide did not account for international competition in any significant fashion. See Baker, *Market*

ritorial application of United States law,<sup>37</sup> are not relevant to a joint venture based in the United States.<sup>38</sup> However, consideration of the effects of trade barriers,<sup>39</sup> the advantages enjoyed by foreign competitors that are not subject to strict antitrust laws,<sup>40</sup> and the global nature of the automobile market,<sup>41</sup> is pertinent to an analysis of domestically-based international joint ventures.

Commentators have attributed some of the recent industrial success of Japan to the Japanese Government's interven-

*Definition in Transnational Joint Ventures, Mergers and Monopolization*, in 1984 FORDHAM CORP. L. INST. 115, 121 (B. Hawk ed.).

The 1984 guidelines recognize operational and managerial efficiencies as well as the impact of foreign competition. McGrath, *supra* note 19, at 279 n.160. Commentators have questioned whether the 1984 Merger Guidelines represent an increase in certainty of treatment for international ventures. See Axinn, Greene & Denis, *Importing Foreign Competition Into American Antitrust Analysis—Is This The "New Learning?"*, in 1984 FORDHAM CORP. L. INST., 191, 204 (B. Hawk ed.). Such commentators observe that the 1984 Merger Guidelines "give the appearance of greater certainty" but are "more ad hoc." *Id.*

37. For a discussion of the problems involved with extraterritorial antitrust enforcement, see McGrath, *supra* note 16, at 269-81; Joelson, *supra* note 7, at 349-57; Halverson, *supra* note 7, at 143-56.

38. See *GM-Toyota*, 103 F.T.C. at 377. Production is to take place in Fremont, California. *Id.*

39. For a more detailed discussion of trade barriers, see *infra* notes 96-101 and accompanying text. The viability of United States automobile manufacturers has been closely tied to a Voluntary Restraint Agreement (VRA) by the Japanese government limiting the number of Japanese automobiles imported into the United States. See *Japan Still Weighing Auto Curbs*, N.Y. Times, Jan. 13, 1986, at D1, col. 3; *infra* notes 45, 47. VRA's are negotiated and entered into solely by the President of the United States and the particular foreign government involved. See Note, *Protecting Steel: Time for a New Approach*, 96 HARV. L. REV. 866, 878 (1983) [hereinafter cited as Note, *Protecting Steel*]. These agreements are not voluntary for individual Japanese businesses, which must comply with their government's agreement. See Note, *International Joint Ventures in the United States: The GM-Toyota Deal*, 22 COLUM. J. TRANSNAT'L L. 505, 508 (1984) (a VRA "acts like a quota") [hereinafter cited as Note, *International Joint Ventures*].

In 1981, the Japanese government agreed to a VRA limiting their exports to 1.68 million cars per year. *Japan to Limit Its U.S. Imports at 1,850,000 Cars*, Wall St. J., Nov. 1, 1983, at 3, col. 4. In 1983, the VRA was set at 1.85 million cars per year. *Id.* Japanese officials have not yet decided whether to extend the restraints on automobile exports for the fiscal year 1986, which begins April 1. See *Japan Still Weighing Auto Curbs*, N.Y. Times, Jan. 13, 1986, at D1, col. 3. For a discussion of the authority of the executive to negotiate VRA's, see Note, *Protecting Steel*, *supra*, at 878-82.

40. See *infra* note 127 and accompanying text (foreign governments often promote the international competitiveness of their industries).

41. See, e.g., Note, *The GM-Toyota Joint Venture: Legal Cooperation or Illegal Combination in the World Automobile Industry?*, 19 TEX. INT'L L.J. 699, 701-05 (1984); see also *supra* notes 1, 20 and accompanying text.

tion in that nation's industrial sector.<sup>42</sup> The Japanese Ministry of International Trade and Industry (MITI) has received considerable publicity<sup>43</sup> as the agency responsible for the coordination of Japan's international trade efforts.<sup>44</sup>

United States automobile manufacturers are subject to the pressures of a world market and strong international competition.<sup>45</sup> United States automobile production, as a percentage

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42. See, e.g., Reich, *supra* note 1, at 107; Schultze, *supra* note 5, at 4.

43. See, e.g., Reich, *supra* note 1, at 107; Schultze, *supra* note 5, at 4.

44. Schultze, *supra* note 5, at 4. Although commentators debate the extent of the Ministry of International Trade and Industry's (MITI) control over Japan's economy, compare *id.* at 6 ("the contributions of MITI and of industrial policy to Japan's postwar success have been far overstated") with Lundine, *Now Is the Time For a National Industrial Strategy*, Challenge, July-Aug. 1983, at 16-17 (advocating legislation creating an Economic Cooperation Council, which would function much like MITI, to "revitalize" United States industry), it is clear that antitrust citations against companies MITI deems important to Japan's economy are unusual. See Note, *Trustbusting in Japan: Cartels and Government—Business Cooperation*, 94 HARV. L. REV. 1064, 1076-77 (1981).

The Japanese Antimonopoly Act, Shiteki dokusen no kinshi oyobi torihiki no Kakuho ni Kansuru horitsu [Law Concerning the Prohibition of Private Monopolies and the Maintenance of Fair Trade], Law. No. 54 of 1947, translated in 2 EIBUN—Horei-Sha Bulletin Series KA, which is the empowering legislation for Japan's antitrust enforcement agency, the Fair Trade Commission, was created by United States occupation authorities to be similar to United States antitrust laws. See Note, *supra*, at 1065-66. However the Fair Trade Commission was without much political power, and the Antimonopoly Act was relaxed one year after occupation ended. *Id.* at 1066-68.

From the 1950's to the 1970's, MITI fostered Japan's planned economic growth, using penalties when necessary to force business to cooperate with its strategies. *Id.* at 1067, 1072. Although the Fair Trade Commission has brought a small number of successful antitrust enforcement actions in Japanese courts, its impact on the power of MITI over Japanese industry appears to be insignificant, and MITI is still authorized to instruct businesses on an individual basis. *Id.* at 1077, 1079. In addition, the Fair Trade Commission recently announced new policies designed to aid Japanese industry. See 48 ANTITRUST & TRADE REG. REP. (BNA) 40 (Jan. 3, 1985). The Fair Trade Commission stated that it would work towards establishing "appropriate competitive conditions in industries that have fallen into structural depression" and "preserve and promote vitality of the private sector and increase economic efficiency." *Id.* In any event, Japan practices industrial policy at a level of coordination well above that of the United States. See *infra* note 104 and accompanying text.

45. See Hawk, *International Antitrust Policy and the 1982 Acts: The Continuing Need for Reassessment*, 51 FORDHAM L. REV. 201, 206 (1982). Automobile imports for 1984 were valued at U.S.\$29.4 billion and accounted for 23% of the United States market. See Alm, *Free-Trade Fight*, U.S. News & World Report, Sept. 23, 1985, at 50. Although United States automobile makers enjoyed a very successful third quarter in 1985, this success was attributed to special low interest rate financing. Quint, *Economy Gives Alternating Signals*, N.Y. Times, Oct. 14, 1985, at D1, col. 3. "[Automobile] sales are still very weak and we expect that to continue to be the case until the automobile manufacturers come back with some kind of sales incentives." *Auto Sales Down 14.1%*

of the world market, has dropped from seventy-five to less than twenty-five percent since 1950.<sup>46</sup> In 1980, for the first time, another country, Japan, produced more passenger cars than did the United States.<sup>47</sup> In order to preserve a viable automobile industry in the United States, and to protect jobs in related sectors of the economy, industrial policy may be the best solution.

## II. THE GM-TOYOTA CONSENT DECREE: AN APPLICATION OF AN INDUSTRIAL POLICY

"Industrial policy" has various meanings,<sup>48</sup> and can be implemented in several ways.<sup>49</sup> Basic to any type of industrial policy, however, is intervention by the central government to "promote vigorous industrial growth" in a faltering industrial sector.<sup>50</sup>

### A. The GM-Toyota Consent Decree

In a consent decree dated April 11, 1984,<sup>51</sup> the FTC gave

*In the Oct. 21-31 Period*, N.Y. Times, Nov. 6, 1985, at D1, col. 1. General Motors began a new round of financing late in February, 1986. *New Incentive Plan Offered by G.M.*, N.Y. Times, Feb. 25, 1986, at D5, col. 5. Chrysler and Ford quickly followed suit. *Chrysler and Ford Offering Incentives*, N.Y. Times, Feb. 28, 1986, at D3, col. 5.

46. See Note, *supra* note 41, at 701 n.10.

47. *Id.* Toyota is now the third largest car manufacturer in the world behind GM and Ford Motor Co., surpassing Chrysler. See *GM-Toyota*, 103 F.T.C. at 393-94 (Bailey statement); 2 INT'L LEGAL BULL. 1 (West ed., Spring 1984). Because of this foreign competition, and the U.S.\$2,000 per car cost advantage enjoyed by the Japanese, *GM-Toyota*, 103 F.T.C. at 397 (Bailey statement), it is difficult to produce a small car profitably in the United States. See *Big 3's Car Sales Up 16.7%*, N.Y. Times, Oct. 5, 1983, at D1, col. 2. International joint ventures such as the GM-Toyota arrangement may be the only way to maintain small car production in the United States.

48. See Schultze, *supra* note 5, at 3.

49. See *id.* at 4. Examples of industrial policies are support for education, subsidies for research and development, tax breaks, loans, and trade barriers. *Id.*; see *infra* note 104.

50. See Schultze, *supra* note 5, at 3-4; *supra* note 5.

51. On December 22, 1983, the FTC provisionally accepted a consent agreement concerning the proposed joint venture between GM and Toyota. See *GM-Toyota*, 103 F.T.C. at 386 (Miller statement). The consent decree was finalized after a sixty-day period left open for public comment. *Id.* at 382; see 16 CFR § 3.25(f). The FTC's procedure in settling consent decrees is to first publish the agreement as preliminarily accepted. 16 CFR § 3.25(f). Then for a period of sixty days "the Commission will receive and consider any comments or views concerning the order that may be filed by any interested person." *Id.* After that period the FTC "may either withdraw its acceptance of the agreement . . . or take other action as it may consider



final approval to the proposed settlement of its complaint against the GM-Toyota joint venture by a vote of three to two.<sup>52</sup> The goal of the venture is the joint production of automobiles at GM's idle plant in Fremont, California.<sup>53</sup> The joint venture vehicle is closely modeled after the Toyota Corolla and the plant uses Japanese management and manufacturing techniques.<sup>54</sup>

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appropriate, or issue and serve its decision in disposition of the proceeding." *Id.* During the period for public comment in *GM-Toyota*, the Commission received "[o]ver one hundred comments" but "none of these comments raised any significant new facts or substantive arguments." *Id.* at 386 (Miller statement). The venture was challenged in the District Court for the District of Washington, D.C., by Chrysler. *Chrysler Brings GM-Toyota Suit*, N.Y. Times, Jan. 13, 1984, at D3, col. 1.

52. See *GM-Toyota*, 103 F.T.C. at 386-99.

53. See *id.* at 377. Fremont is the site of a former GM assembly facility that is to be converted for the venture's use. *Id.*

54. See *id.* at 376-81. On February 17, 1983, GM and Toyota executed a Memorandum of Understanding outlining, in detail, the form that the joint venture was to take. *Id.* The two companies agreed to jointly produce a vehicle "derived from Toyota's new front-wheel drive Sprinter." Work was to begin "as early as possible in the 1985 Model Year" at GM's unused plant in Fremont, California. *Id.* at 377 (Memorandum of Understanding). Toyota and GM would each hold a 50% equity interest in the joint venture and each would appoint half of the board of directors. *Id.* at 379. Toyota would designate the president of the joint venture, who would function as both chief executive and operating officer. See *id.* Toyota would design and oversee the refitting of the Fremont plant. See *id.* at 377. The joint venture must sell the new GM-specific automobiles it produces to GM, although the joint venture may manufacture or sell to Toyota any "additional products." *Id.* at 383-84.

One of the most controversial aspects of the joint venture agreement is the transfer of competitively sensitive information, particularly price data, between the two companies. See *id.* at 395 (Bailey statement); *id.* at 390 (dissenting statement of Commissioner Pertschuk) [hereinafter cited as Pertschuk statement]. The Memorandum of Understanding emphasizes the parents' isolation from the joint venture. "The agreements reached between the parties relate only to the manufacturing [venture] described [in the agreement] and do not establish any special relationship between Toyota and GM who continue to be competitors in the United States and throughout the world." *Id.* at 380 (Memorandum of Understanding). All "GM-specific vehicles" produced by the joint venture would be sold to GM to be marketed solely by GM. *Id.* at 378 (Memorandum of Understanding). Any other vehicles that might be produced for Toyota would be marketed exclusively by Toyota. *Id.* "As a fundamental principle, Toyota and GM shall each be free to price and free to market the respective vehicles purchased from the joint venture without restrictions or influence from the other." *Id.* at 379.

The price of the joint venture vehicle would be set in negotiations between GM and the joint venture and based initially on a "Market Basket Index" *Id.* at 381 [hereinafter referred to as the Index]. The "Market Basket" is comprised of the ten best selling subcompacts based on volume sold in the United States. *Id.* Of the top ten, two are GM cars and one is the Toyota Corolla. *Id.* The Index would be "the weighted average rate of wholesale price fluctuations of the models from the prior

The FTC imposed several restrictions on the venture in an attempt to minimize antitrust problems identified in a complaint drafted by the Bureau of Competition.<sup>55</sup> The complaint noted that both the relevant product and geographic markets are highly concentrated,<sup>56</sup> and that GM and Toyota are "substantial competitors in the relevant . . . markets."<sup>57</sup> The complaint could have noted additional anticompetitive obstacles to the venture. For example, barriers to entry in the North American automobile manufacturing market are very high.<sup>58</sup> In addition, the joint venture would decrease the likelihood

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model year to the current year, weighting Corolla at 30% versus 70% for all other comparable models combined . . ." *Id.*

The initial selling price (the price of the first year's production) must conform to an upper limit "determined by adjusting for feature differences the Dealer Net Price less 8% of Toyota's then current U.S. model front-wheel drive Corolla equipped comparably with the [joint venture] vehicle concerned, and the lower limit shall be determined by adjusting for feature differences the Dealer Net Price less 11% of said Corolla." *Id.* at 378. In subsequent years the vehicle's price will be set by applying the Index to the selling price for the previous model year. *Id.*

If at any time this formula fails to yield a satisfactory price, or produces "a selling price which is at significant variance with then current market conditions," GM and the joint venture will "negotiate a more appropriate selling price." *Id.* Additionally, if the pricing formula would cause prices to be set at a level that would cause the joint venture to operate at a loss, "Toyota, GM and the [joint venture] shall negotiate and take necessary measures." *Id.* at 378-79.

55. See *supra* note 7 (discussion of Bureau of Competition); *GM-Toyota*, 103 F.T.C. at 374-76 (Complaint). The Complaint specified as potentially anticompetitive areas expansion of the capacity of the joint venture beyond what was "reasonably necessary" to achieve the venture's legitimate goals and the opportunity for "transmission of competitively significant information." *Id.* at 376. The Complaint alleged that "[t]he effect of the [j]oint [v]enture may be substantially to lessen competition or tend to create a monopoly in the relevant markets in violation of Section 7 of the Clayton Act, as amended (15 U.S.C. § 45)." *Id.*

56. See *GM-Toyota*, 103 F.T.C. at 375. The "relevant product market" for the joint venture is identified as the manufacture or sale of small new automobiles. *Id.* The "relevant geographic market" is the United States and Canada. *Id.* The relevant market includes "those suppliers—of the same or related product in the same or related geographic area—whose existence significantly restrains [the] power [of another firm in the relevant market to raise prices]." P. AREEDA, *supra* note 23, at ¶ 231. A highly concentrated, or oligopolistic, market is one where a small number of firms dominate the economic performance of a market and collectively may exert monopolistic power. *Id.* ¶ 260.

57. See *GM-Toyota*, 103 F.T.C. at 375; see also *supra* note 56.

58. See *GM-Toyota*, 103 F.T.C. at 393 (Bailey statement). "Entry barriers to this market are obviously quite high . . ." *Id.* Barriers to entry deny new firms the chance to penetrate and compete in a particular market. P. AREEDA, *supra* note 23, at ¶ 117. Entry barriers to the automobile industry consist primarily of the large economies of scale necessary to produce automobiles efficiently enough to make a profit and the correspondingly enormous capital requirements. *Id.*

of Toyota becoming a North American producer of automobiles.<sup>59</sup>

### B. Industrial Policy Basis of GM-Toyota

Analysis of the *GM-Toyota* consent decree<sup>60</sup> reveals that it is based on reasoning outside the traditional bases of antitrust enforcement<sup>61</sup> and heralds the arrival of a new international consideration in antitrust enforcement. This new consideration, as noted by several commentators, is a federal concern for industries floundering under intense foreign competition.<sup>62</sup> The consent decree itself plainly acknowledges this consideration.<sup>63</sup> Commissioners approving the GM-Toyota venture noted the venture's potential to "lead to the develop-

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59. See *supra* note 36 (discussion of Toyota as production entrant). Toyota has been a retailer in the United States for several years, but at the time of the *GM-Toyota* decision had no manufacturing facilities in the United States. See *GM-Toyota*, 103 F.T.C. at 393 (Bailey statement). By comparison, Japanese car manufacturers Honda and Nissan have initiated United States-based manufacturing. *Id.*

60. See *supra* notes 7, 51 (discussion of consent decrees).

61. See *supra* notes 9, 22, 36 (discussion of traditional antitrust concerns).

62. See, e.g., Brodley, *The Limited Scope and Precedential Value of the FTC's GM-Toyota Decision* in 1984 FORDHAM CORP. L. INST. 223 (B. Hawk ed.) [hereinafter cited as Brodley, *Limited Scope*]; see *infra* note 104.

63. *GM-Toyota*, 103 F.T.C. at 388 (Miller statement). The majority of the FTC expressly indicated the importance of the GM-Toyota joint venture for United States industrial competitiveness. *Id.* The dissenting Commissioners attacked the decision's policy basis. *Id.* at 389 (Pertschuk statement). Commissioner Pertschuk disparaged the decision's obvious "national policy" basis in criticizing the Bureau of Competition for citing evasion of the VRA as a procompetitive benefit. *Id.*; see General Motors Corp. and Toyota Motor Corp.: Proposed Consent Agreement With Analysis To Aid Public Comment, 48 Fed. Reg. 57,246, 57,252 (Pertschuk statement) [hereinafter cited as Proposed Consent Agreement] (*GM-Toyota* is an "unacceptable exercise in second-guessing other national policies").

Commissioner Bailey stated that the question before the Commission was "whether a joint venture such as that proposed by these companies is sanctioned by the nation's antitrust laws . . . [w]hether it *should* be is not for me to say. That argument should be posed in another forum." *GM-Toyota*, 103 F.T.C. at 392 (Bailey statement) (emphasis in original). One antitrust scholar argues that promoting the United States' world market competitiveness is an "unsuitable legal standard for adjudication." Brodley, *Limited Scope*, *supra* note 62, at 224, 227-31.

Although the policy considerations objected to in these criticisms may be beyond the proper scope of the judicial review, they are not beyond the competency of the FTC. See *United States v. Philadelphia National Bank*, 374 U.S. 321, 371 (1963). "[T]he reckoning of social or economic debits and credits . . . is beyond the ordinary limits of judicial competence, and in any event, has been [done] already, by Congress . . ." *Id.* This reckoning was made when Congress delegated broad powers to the FTC. See generally FTC Act, 15 U.S.C. §§ 41-70.

ment of a more efficient and competitive U.S. industry"<sup>64</sup> and "strengthen the competitive posture of American automobile manufacturers."<sup>65</sup> This type of intervention by the federal government to aid a distressed industry is the essence of an industrial policy.<sup>66</sup>

### C. *FTC Analysis of the GM-Toyota Joint Venture*

The FTC identified two major anticompetitive problems and three major procompetitive benefits likely to result from the joint venture.<sup>67</sup> The anticompetitive effects noted by the Commission were that the venture could deter GM from continuing to produce other small cars, and that possibilities for the collusive exchange of information would be inherent in the venture.<sup>68</sup> As procompetitive benefits, the FTC expected that the joint venture would increase the overall volume of small cars available to United States consumers, allow GM to build the vehicle at the lowest possible cost, and give GM the opportunity to learn the more efficient Japanese manufacturing and management techniques which would then disseminate throughout United States industry.<sup>69</sup>

64. *GM-Toyota*, 103 F.T.C. at 388 (Miller statement).

65. *Id.* at 398 (statement of Commissioner Douglas) [hereinafter cited as Douglas statement]. The Commission's main goal was to boost United States industrial competitiveness, principally through the acquisition by GM of Japanese production efficiencies. The relative weakness of the other two procompetitive benefits cited by the majority is further evidence of the predominance of this goal. See Brodley, *Limited Scope*, *supra* note 62, at 224-25. Benefits to consumers from an increased number or choice of automobiles in the market are dubious, see *GM-Toyota*, 103 F.T.C. at 396 (Bailey statement), and are, in any event, limited by the restriction on output. *Id.* at 383; Brodley, *Limited Scope*, *supra* note 62, at 225. The output restriction also undercuts a second of the venture's procompetitive benefits, namely cost efficiency for GM, see *id.* at 226, because the stated purpose of the restriction is to encourage GM to seek alternative and necessarily more expensive small car sources. *GM-Toyota*, 103 F.T.C. at 387 (Miller statement).

66. See *supra* note 5.

67. See *infra* notes 68-69. The GM-Toyota decision was rendered "after one of the most thorough and intensive antitrust reviews in Commission history." *GM-Toyota*, 103 F.T.C. at 386 (Miller statement).

68. The two potential anticompetitive effects were: 1) that the venture would reduce "GM's incentives to continue alternative production of small cars," and 2) the "possibility of anticompetitive information exchanges that are unnecessary to achieve the legitimate purposes of the joint venture." *Id.* at 387 (Miller statement).

69. The procompetitive benefits cited by the majority were: 1) an increase in the total volume of small cars available in the United States, which would provide United States consumers with a "greater choice at lower prices, despite present restrictions

D. *Restrictions Designed by the FTC to Minimize the Anticompetitive Effects of the Joint Venture*

The *GM-Toyota* settlement was conditioned on the imposition of several restrictions.<sup>70</sup> These restrictions were designed to ensure the venture's minimum anticompetitive effects on the marketplace while maintaining the venture's maximum procompetitive benefits.<sup>71</sup>

In order to maintain GM's incentive to build small cars independently of the joint venture, the FTC limited the output and duration of the venture.<sup>72</sup> The Commission also set forth detailed regulations concerning the type of information that

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on Japanese imports," 2) that the joint venture would be able to build the new car at lower cost "than if GM were forced to rely immediately on some other production source," and 3) "the joint venture offers a valuable opportunity for GM to complete its learning of more efficient Japanese manufacturing and management techniques." *Id.* at 387-88. Commentators have viewed the learning efficiencies as the most significant factor in the Commission's decision. See, e.g., Brodley, *Limited Scope*, *supra* note 62, at 223; see *supra* note 65. The FTC projected that this learning benefit could be extended throughout the automobile industry and eventually to other industries, leading to a "more efficient and competitive U.S. industry." *GM-Toyota*, 103 F.T.C. at 388 (Miller statement). Having weighed the pro- and anticompetitive effects, the Commission decided that, with FTC-imposed restrictions, the joint venture would be decidedly procompetitive. See *id.* at 386-88.

70. See *GM-Toyota*, 103 F.T.C. at 386-87 (Miller statement); see *infra* notes 72-73, 75, 77.

71. See *GM-Toyota*, 103 F.T.C. at 386-87 (Miller statement).

72. *Id.* at 387. The venture is restricted to manufacturing no more than approximately 250,000 new automobiles for GM, roughly the yearly production of one "module." *Id.* at 383 (Order). A module is "an integrated manufacturing facility . . . capable of producing not more than approximately 250,000 New Automobiles per year." *Id.* This number does not include any vehicles made for Toyota. *Id.* at 383-84. Additionally, the joint venture can be expanded with prior approval of the Commission. *Id.* at 387 (Miller statement). The Commission failed to mention, however, that in addition to the *GM-Toyota* joint venture, GM plans to import small cars built in Japan with Suzuki and Isuzu and has plans with Daewoo Motor Co., a 50% GM owned corporation, for a comparable venture in South Korea. Note, *The GM-Toyota Joint Venture: Legal Cooperation or Illegal Combination in the World Automobile Industry*, 19 TEX. INT'L L.J. 699, 705 (1984) (citing Bettner, *70 mpg. But Will It Sell?*, *Forbes*, Feb. 13, 1984, at 82). Such foreign based ventures will not have the beneficial impact on United States employment that a domestically based venture would.

The joint venture must not last for more than twelve years. See *GM-Toyota*, 103 F.T.C. at 384. After the twelve-year period, which may not extend beyond December 31, 1997, the joint venture may continue its existence in order to "win[d] up [its] affairs," exclusive of manufacturing. *Id.*

The majority of the FTC stressed that these restrictions on the size and duration of the venture guarantee that GM will compete in the small car market independently of the joint venture. *Id.* at 387 (Miller statement). Chairman Miller stated that it was "ensure[d]" GM will retain its incentive. *Id.*

the parties may exchange.<sup>73</sup> However, the restrictions on communications concerning the joint venture are voidable when “necessary to accomplish . . . the legitimate functions” of the joint venture.<sup>74</sup> Finally, the FTC imposed detailed reporting requirements on the joint venture and its parents.<sup>75</sup>

According to the majority of the FTC,<sup>76</sup> prohibition of the exchange of competitively sensitive information unnecessary to the venture’s functioning and establishment of strict reporting requirements guarantee that the joint venture will not result in collusion.<sup>77</sup> These reporting requirements enable the Commission to monitor the venture to detect any potential antitrust problems.<sup>78</sup> Limited by these restrictions, the joint venture provides significant benefits to competition and to United States consumers without posing significant new anticompetitive risks.<sup>79</sup>

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73. *See id.* at 384 (Order). There is an absolute restriction on the communication of all marketing plans and non-public information concerning prices, costs, sales and production forecasts relating to products other than that of the joint venture. *Id.* This is a variety of Chinese Wall provision, forbidding discussion on certain topics. *See Brodley, Limited Scope, supra* note 62, at 226. “Information is presumptively public if it is reported in a publication other than one authored by GM or Toyota.” *Id.* at 383 (emphasis in original). Additionally, GM and Toyota may not discuss between themselves, or with the joint venture, non-public information concerning the joint venture’s model and design changes, sales or production forecasts, or the price of supplies from GM or Toyota to the joint venture. *Id.* at 384.

74. *Id.* This escape clause has been criticized. *See infra* note 83 and accompanying text.

75. *See GM-Toyota*, 103 F.T.C. at 385-86. All parties to the joint venture must keep accurate records of their communications relating to model and design changes, sales and production forecasts, and the cost of products supplied to the venture by the parents. *Id.* at 385. These files must be made available to the FTC upon request for six years. The parties must also periodically submit signed statements from managers involved in the venture indicating their intention to comply with the Order, and the companies themselves must periodically detail their compliance with the terms of the Order. *Id.* at 385. Lastly, the FTC must be informed of any changes that affect compliance. *Id.*

76. *GM-Toyota*, 103 F.T.C. at 385 (Miller statement). Chairman Miller stated that it was “ensure[d]” that the venture would not result in collusion. *Id.* at 387. Commissioner Calvani echoed Chairman Miller’s confidence: “[l]imiting information exchanges between the two companies . . . to communications necessary for producing the joint venture vehicle closes the only potential channel for collusion [remaining].” *Id.* at 399 (statement of Commissioner Calvani) [hereinafter cited as Calvani statement].

77. *See supra* note 76; *see also supra* notes 22, 36 (discussion of collusion).

78. *Id.* at 387 (Miller statement).

79. *Id.* Concerns about the pricing formula, the possibility of collusion, and the effect of the joint venture on Toyota’s incentive to begin production in the United

### E. *The Dissent Advocated Traditional Antitrust Enforcement*

The two-dissenting Commissioners questioned the benefits of the GM-Toyota joint venture to a competitive marketplace.<sup>80</sup> Both Commissioners doubted the validity of the benefits to the consumer,<sup>81</sup> criticized the equality and effectiveness of the potential learning efficiencies,<sup>82</sup> and dismissed as futile

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States do not amount to "significant antitrust dangers" after imposition of the restrictions. *Id.* But see *infra* notes 80-84 (objections of the dissenting Commissioners).

80. See *id.* at 388 (Pertschuk statement); *id.* at 392 (Bailey statement).

81. *GM-Toyota*, 103 F.T.C. at 387 (Miller statement). One procompetitive benefit cited by the majority is a likely increase in the total number of automobiles available to consumers. *Id.* However, it must be noted that the FTC limited the output potential of the venture. See *id.* at 383 (Order). Furthermore, GM itself predicts no increase in industry output as a result of the joint venture, anticipating instead that the sales of the joint venture car will correspondingly diminish the sale of GM and Toyota vehicles. *Id.* at 396 (Bailey statement). The Bureau of Economics prepared a report criticized by Commissioner Bailey for dismissing GM's "damaging admission." *Id.* The car to be produced by the joint venture will also not be a truly new product providing consumers with an additional choice because it will closely copy the Toyota Corolla. See *id.* at 393. The Bureau of Competition report to the Commissioners stated that any differences between the joint venture vehicle and the Corolla would be "modest." Aside from cosmetics the two cars would be "essentially identical." *Id.* (citing Bureau of Competition Staff Memo, I, 10). For an example of a new product, see *Broadcast Music v. Central Broadcasting System*, 441 U.S. 1, 21-22 (1979). The product was described as "different" and having "certain unique characteristics" with distinct appeal to consumers. *Id.*

Finally, the two dissenting Commissioners contended that any potential consumer benefit could be achieved by GM in a joint venture with an alternative partner, one smaller than Toyota. See *GM-Toyota*, 103 F.T.C. at 396 (Bailey statement); *id.* at 389 (Pertschuk statement). GM could have engaged in a joint venture with a smaller Japanese automobile manufacturer and thereby considerably reduced the antitrust risks posed by a cooperative venture between the first and third largest producers in the market. See *id.* at 396 (Bailey statement). Because much of the early thrust of the antitrust laws was directed at controlling, if not eliminating, huge companies with tremendous market power most of the traditional antitrust concerns could be greatly reduced by requiring GM to select a joint venture partner with a smaller market share than Toyota. See *supra* note 36. Although it would be more expensive for GM, a joint production venture with a smaller Japanese automobile manufacturer less efficient than Toyota would closely match any benefits conferred on consumers by the GM-Toyota joint venture. See *GM-Toyota*, 103 F.T.C. at 396-97. The Bureau of Competition prepared a report stating that a GM-Isuzu joint venture would hinder dissemination of learning efficiencies throughout the labor force because GM owns a large share of Isuzu and the "UAW would likely perceive Isuzu as GM's 'alter ego' under the labor laws, and be unwilling to grant significant concessions." *Id.* at 389-90 (Pertschuk statement) (citing a Bureau of Competition staff memo). This theory was criticized by Commissioner Pertschuk as lacking evidentiary support and as "principally speculation." *Id.* at 390. In any event, other Japanese small car manufacturers in addition to Isuzu and Toyota could have participated in a joint venture with GM.

82. *GM-Toyota*, 103 F.T.C. at 387 (Miller statement). The FTC indicated and

the majority's attempt to eliminate the possibility of collu-

most commentators agree that the most important of the anticipated benefits of the GM-Toyota venture is GM's opportunity to learn more efficient Japanese manufacturing and management methods. *See id.* at 387-88; Brodley, *Limited Scope*, *supra* note 62, at 223, 225. "The primacy of the learning/demonstration effect rationale is . . . apparent." *Id.* It is the reasoning of the FTC that the acquisition of these learning efficiencies by GM would eventually lead to the dissemination of this knowledge throughout United States industry. *See GM-Toyota*, 103 F.T.C. at 388. This learning or management efficiency would presumably allow United States automobile makers to narrow the cost advantage reportedly enjoyed by the Japanese. *See id.* at 397. However, this assumption raises serious questions. Learning or management efficiencies cannot compensate for that 40% of the cost advantage that stems from the difference between the cost of United States and Japanese labor. *See id.*

Some commentators argue that learning or managerial efficiencies should not be given weight in antitrust analysis. *See* Clanton, *Horizontal Agreements, The Rule of Reason, and the General Motors-Toyota Joint Venture*, 30 WAYNE L. REV. 1239, 1261-64 (1984). Management efficiencies are considered by some to be either unquantifiable or existent in every managerial change. *See* P. AREEDA & D. TURNER, ANTITRUST LAW ¶ 936, 1108d; Fisher & Landes, *Efficiencies*, 71 CALIF. L. REV. 1580 (1983). The FTC has also rejected managerial efficiencies in recent years. *See FTC Statement Concerning Horizontal Mergers*, 1 TRADE REG. REP. (CCH) No. 546, at 181 n.20 (June 16, 1982); special supplement at 2 TRADE REG. REP. (CCH) 4225 (Aug. 9, 1982). *But see* Muris, *The Efficiency Defense Under Section 7 of the Clayton Act*, 30 CASE W. RES. L. REV. 381 (1980). Cooperation that benefits only one of the firms in the venture has been held to be insufficient to justify anticompetitive effects. *See* *General Cinema Corp. v. Buena Vista Distribution Co.*, 532 F. Supp. 1244, 1273-74 (C.D. Cal. 1982). However, *General Cinema* involved a clearly anticompetitive elimination of competitive price bidding. *Id.* at 1258.

It is unclear that requisition of learning efficiencies will reverse the trade differential. Another source of the Japanese trade advantage is the current valuation of the United States dollar against the Japanese yen, a condition that the joint venture will not affect. *See* Samuelson, *Where Iacocca and Common Sense Err*, N.Y. Times, Sept. 15, 1985, at D3, col. 1. In recognition of the significance of the dollar to world trade the United States, Japan, Britain, West Germany and France agreed to join together to reduce the dollar's value and have enjoyed limited success thus far. Kristoff, *Dollar Plunges to 16-Month Low in Reaction to 5 Nation's Accord*, N.Y. Times, Sept. 24, 1985, at A1, col. 4; *Dollar Declines Broadly To Hit a 20-Month Low*, N.Y. Times, Nov. 23, 1985, at B44, col. 5. Late in 1985, the U.S. dollar had fallen "only 6.8 percent on average" against the fifteen major currencies. Kilborn, *How the Big Six Steer the Economy*, N.Y. Times, Nov. 17, 1985, § 3, at p. 1, col. 2. Early in 1986, the dollar fell to 194 yen. *Dollar at Lowest Level Against Yen in 7 Years*, N.Y. Times, Jan. 30, 1986, at D20, col. 5. More recently, the dollar fell to 180 yen. *Dollar in Broad Decline In Reaction to Rate Cuts*, N.Y. Times, Mar. 4, 1986, at D14, col. 5. Economists state that although the weakening of the dollar will help to reduce the trade deficit, "a much bigger drop is needed to bring about a substantial adjustment." Farnsworth, *Year's Trade Deficit Hit a Record \$148.5 Billion*, N.Y. Times, Jan. 3, 1986, at D1, col. 1; *see also* Silk, *The Yen Also Rises*, N.Y. Times, Mar. 5, 1986, at D2, col. 1. The dollar has fallen 26.5% from its peak in 1985, but still must decline another 23.7% to reach its 1978 level. Silk, *The Yen Also Rises*, N.Y. Times, Mar. 5, 1986, at D2, col. 1. Lawrence B. Krause, a senior fellow at the Brookings Institution, thinks that the dollar must go to 100 yen to achieve a trade equilibrium. *Id.* John Williamson of the Institute of International Economics esti-



sion.<sup>83</sup> In addition, one dissenting Commissioner argued that

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mates that the United States trade deficit, which totaled U.S.\$150 billion in 1985, could be reduced below U.S.\$50 billion if the dollar falls to 130 yen. *Id.* Edward M. Bernstein, former research director of the International Monetary Fund, believes the dollar must fall to 120 yen to reach equilibrium. *Id.*

However, according to Edward Yardeni, chief economist for Prudential-Bache Securities, Inc., the deflation of the dollar is merely a temporary solution. *See Subduing the Dollar*, N.Y. Times, Oct. 27, 1985, § 3, at 1, col. 1. Furthermore, the strength of the dollar versus the yen is not perceived by all observers to be the primary cause of the trade deficit. Karczmar, *A Weaker Dollar Won't Slow Imports*, N.Y. Times, Oct. 30, 1985, § 4, at 3, col. 1. "Even a significant drop in the dollar's value will not substantially reduce the trade imbalance." *Id.*

Another factor cited as contributing to the trade deficit with Japan is the frugality of the Japanese consumer. *See Chira, Wealthy Japan's Spartan Style*, N.Y. Times, Oct. 30, 1985, at D1, col. 3; *Come On, Japan, Live Better!*, N.Y. Times, Oct. 30, 1985, at A26, col. 1.

The learning efficiencies gained have also been attacked as "highly speculative . . . if they exist to any degree," *GM-Toyota*, 103 F.T.C. at 388 (Pertschuk statement), because Toyota will manufacture most of the more complicated components of the car outside of the United States, and because GM observers at the Fremont plant will oversee only basic assembly procedures. Additionally, Toyota has the authority to shift the joint venture's production to Japan. *See id.* at 380; *2 U.S. Units Possible For Toyota*, N.Y. Times, Dec. 29, 1983, at D3, col. 4. Such a move would logically limit GM's opportunity to learn through daily observation.

The potential for GM's attaining learning efficiencies through a joint venture with Toyota might also be duplicated in a joint venture with an alternative partner, one necessarily smaller than Toyota, just as a joint venture with an alternative partner could closely duplicate the benefits to consumers. *See GM-Toyota*, 103 F.T.C. at 389 (Pertschuk statement). The majority of the FTC, in approving the project, relied on a Bureau of Economics report that estimated a GM joint venture with Toyota would be more beneficial for GM than a venture with a smaller Japanese automobile maker. *Id.* This estimate is unsupported. The Bureau of Economics report "provides speculative estimates of the marginal gain from GM's joining hands with Toyota, as opposed to Isuzu or others . . . these estimates deserve the healthiest of skepticism." *Id.* at 389. The majority's reasoning is illogical. If the benefits of a GM-Toyota partnership are unique, then allowing GM, the leading firm in the industry, *id.* at 394 (Bailey statement), to acquire Toyota's techniques might, in itself, be anticompetitive. *See id.* at 389 (Pertschuk statement). In response to this, the Bureau of Competition has stated that Ford and Chrysler have ample opportunity to duplicate GM's learning efficiencies with another Japanese firm. *Id.* However, the efficiencies learned from Toyota cannot be at once both unique and easily duplicated. *Id.*

83. *Id.* at 386-87 (Miller statement). Although the majority of the Commission stated confidently that the possibility of collusion was eliminated by the imposed restrictions, *id.*, the two dissenting Commissioners noted that a horizontal joint venture in a highly concentrated market is the combination most prone to collusion and spill-over collusion. *See id.* at 393 (Bailey statement); *id.* at 388 (Pertschuk statement); *United States v. Penn-Olin Chemical Co.*, 378 U.S. at 170-72; *Brunswick*, 94 F.T.C. at 1265-66; *Brodley, Joint Ventures*, *supra* note 9, at 1552; *Pitofsky, supra* note 9, at 1035-36. Because the structure of the GM-Toyota joint venture "necessitates coordination" of marketing and research efforts, *GM-Toyota*, 103 F.T.C. at 395 (Bailey statement), the dissenting Commissioners determined that the collusion problem was "in-

the venture would cause price escalations throughout the automobile industry.<sup>84</sup>

#### F. *The Importance of the GM-Toyota Decision as Precedent*

Given the high concentration<sup>85</sup> and the high barriers to entry<sup>86</sup> in the United States automobile manufacturing market, it would be inconsistent for the FTC to now prohibit similarly structured ventures.<sup>87</sup> Nevertheless, some have labelled the

curable," *id.*, and that the majority's restrictions and reporting requirements were "mostly cosmetic and unenforceable." Proposed Consent Agreement, 48 Fed. Reg. at 57,252 (Pertschuk statement).

In addition to the provision allowing direct negotiations by GM and Toyota whenever the pricing formula yields an unprofitable price, daily operations at the Fremont plant would allow GM and Toyota to "glean enough additional hard data to vastly improve educated guesses about each other's competitive activities." *Id.* at 395 (Bailey statement). "There does not have to be a complete swap of technical plans for competition to be dulled." *Id.*

Finally, the language of the FTC decision itself in allowing the exchange of any information "necessary to accomplish . . . the legitimate purposes," *id.* at 384, of the joint venture is too vague to be strictly enforced. *Id.* at 396 (Bailey statement). The language is "a highly significant loophole," vague enough, in fact, to have allowed Toyota to suggest to GM a pricing schedule for the joint venture car relative to the price of the Corolla prior to the FTC's final decision. *Id.* at 395-96.

84. *See id.* at 394 (Bailey statement). Collusion would be likely to cause an increase not only in the joint venture vehicle's price, but also in prices throughout the entire auto industry. *Id.* Toyota will be inclined to raise the Corolla's price, because the increase would translate into a higher price for the joint venture vehicle to GM and any decrease in the Corolla's price will result in a savings to GM. *Id.* This is because the Corolla is heavily weighted in the pricing index for the joint venture vehicle. *Id.* at 381. Because GM and Toyota are the industry price leaders, *id.* at 393 (Bailey statement), the other market participants would be likely to increase their prices. *Id.* at 394. The cycle would be renewed when these new, higher prices are reflected in the next year's market basket, ensuring "an ascending spiral of lockstep pricing." *Id.* These potential price increases would be reflected throughout the entire line of cars since manufacturers maintain a "consistent dollar gap . . . between each model further up the line." *Id.*

85. *See GM-Toyota*, 103 F.T.C. at 393 (Bailey statement). The automobile market is oligopolistic. *Id.* An oligopolistic market is one in which a few relatively large sellers account for all or the bulk of the output. 2 P. AREEDA & D. TURNER, *supra* note 82, at ¶ 404a.

86. *GM-Toyota*, 103 F.T.C. at 393 (Bailey statement). "Entry barriers to [the United States automobile manufacturing market] are obviously quite high." *Id.*; *see also supra* note 58 (discussion of barriers to entry).

87. *Id.* at 392 (Bailey statement). It has been suggested that the *GM-Toyota* precedent might even extend to a joint venture with two domestic parents. "If one can convince the Justice Department or the FTC of legitimate procompetitive benefits flowing from the joint venture . . . I think a domestic joint venture would be analyzed very much the same way [as *GM-Toyota*] from a legal standpoint." Halverson, *Market Definition, Mergers and Joint Ventures, Panel Discussion*, in 1984 *FORDHAM CORP. L. INST.*

*GM-Toyota* decision sui generis and an improper standard for adjudication.<sup>88</sup> However, it remains to be seen how the FTC could “deny to other companies what [they] have authorized for the industry giants.”<sup>89</sup> Soon after the *GM-Toyota* consent decree, both Chrysler and Ford announced agreements to begin production joint ventures with Japanese automobile manufacturers.<sup>90</sup> Neither has yet been challenged.

### III. IMPLEMENTING INDUSTRIAL POLICY THROUGH THE ANTITRUST LAWS

Implementation of an industrial policy through relaxation of the antitrust laws imposed on international joint ventures is a superior form of industrial policy because it is easily achieved<sup>91</sup> and because of the inherent opportunity it offers to control any potentially damaging effects.<sup>92</sup> A policy of this type is especially preferable to trade barriers.<sup>93</sup> The flexibility of the FTC, its authority to establish reporting requirements, and ability to monitor ongoing operations make it well suited to

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262 (B. Hawk ed.) This is especially so if there is a “pervasive Washington feeling” that the potential venturers are members of a distressed industry. *Id.* at 263.

88. *GM-Toyota*, 103 F.T.C. at 398 (Douglas statement). Commissioner Douglas cautioned that the *GM-Toyota* decision was “sufficiently unique [sic] as to augur against making any inferences as to how the Commission might view other production joint ventures.” *Id.*; see also Brodley, *Limited Scope*, *supra* note 62, at 223. “[*GM-Toyota*] can be understood as motivated primarily by the desire to promote United States competitiveness in the face of international competition, and as such it has limited significance as a legal precedent,” because promotion of United States competitiveness in the world market “does not provide a suitable legal standard for adjudication.” *Id.* at 223, 227. Brodley adds that courts have a difficult time in weighing efficiencies. *Id.* at 227-28.

89. *GM-Toyota*, 103 F.T.C. at 392 (Bailey statement). Allowing a joint venture between the first and third largest companies on the market signals that “any similarly-structured joint venture between any other members of the industry must be sanctioned . . . [i]n effect this is rule making for the industry.” *Id.* The *GM-Toyota* precedent “allows virtually any automobile production joint venture imaginable.” *Id.* at 398 (Pertschuk statement). “The principles of legality for this joint venture cannot be limited to one hermetically sealed experiment in Fremont (sic), California.” *Id.* at 392 (Bailey statement).

90. See *supra* note 12.

91. In contrast to industrial policies requiring the creation of new agencies, an industrial policy achieved through modification of the antitrust laws would not require creation of any new coordinating agency. See *infra* note 119 and accompanying text.

92. The FTC has broad monitoring powers and has imposed extensive reporting requirements on the venturers. See *supra* notes 6, 73, 75 and accompanying text.

93. See *infra* notes 94-101 and accompanying text.

implement an industrial policy.<sup>94</sup> Finally, the antitrust laws are not an inviolate body of law, but are already balanced against, and in some cases subordinated to, other governmental policies.<sup>95</sup>

A. *The Effect of Trade Barriers on Domestic Industry and International Trade*

Most economists agree that the enactment of protectionist legislation would be likely to trigger retaliatory trade barriers that could lead to a global recession.<sup>96</sup> Nevertheless, the United States Congress has continued to seek implementation of trade barriers.<sup>97</sup>

Tariffs, quotas, and other trade barriers cause a reduction in world productivity and therefore a reduction in the economic welfare of the United States.<sup>98</sup> In addition, trade re-

94. See *supra* note 7 (discussion of the FTC).

95. Blechman, *supra* note 7, at 69. The antitrust laws are not a "sacred cow," but are already balanced against the patent laws, the act of state doctrine, which balances antitrust and foreign policy, and the primary jurisdiction doctrine, which balances antitrust against regulatory policies. *Id.*

96. See *supra* note 4 and accompanying text. In 1930, the Smoot-Hawley Tariff Act greatly raised United States import duties, which reached a zenith at 59% in 1932. D. SALVATORE, *INTERNATIONAL ECONOMICS* 215 (1983). This tariff, in conjunction with the Great Depression, led to sharply decreased United States export and world trade, see *id.*, and was partially responsible for the extended duration of the Great Depression. The disastrous effects of the Smoot-Hawley tariff were corrected by the Trade Agreements Act of 1934. *Id.*

97. See, e.g., Roberts, *Textile Curbs Win In Senate*, N.Y. Times, Nov. 14, 1985, at D1, col. 6; *supra* note 2.

98. See D. SALVATORE, *supra* note 96, at 186-88. Trade barriers come within the broad classification of industrial policy, but are in fact the antithesis of the recommendations of this Note. A large nation may initially benefit from implementation of an optimum tariff. "The optimum tariff is that rate of tariff that maximizes the net benefit resulting from improvement in the nation's terms of trade against the negative effect resulting from reduction in the volume of trade." *Id.* at 186. The imposition of a tariff causes a decline in trade that reduces the imposing nation's welfare. The increase in terms of trade for the nation imposing the tariff leads to a more serious reduction in welfare. "[A]s the terms of trade of the nation imposing the tariff improve, those of the trade partner deteriorate, since they are inverse." *Id.* As a result of the decrease in its terms of trade and volume of trade, "the trade partner is likely to retaliate and impose an optimum tariff of its own." *Id.* at 187. This retaliation leads to further reduction in trade volume. The first nation may then itself retaliate. *Id.* "If the process continues, all nations usually end up losing all or most of the gains from trade." *Id.* Finally, even without retaliation, "the gains of the tariff-imposing nation are less than the losses of the trade partner, so that the world as a whole is worse off than under free trade." *Id.*

Another problem with protective trade barriers is that protection for one indus-

strictions do nothing to encourage industrial restructuring in the protected industries.<sup>99</sup> These protective measures “shelter companies and localities from their own mistakes,” rather than make them more efficient.<sup>100</sup> Import restrictions also generally cause price increases.<sup>101</sup>

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trial sector inevitably harms another sector. See Schultze, *supra* note 5, at 4. “For example, the protection accorded U.S. textile manufacturers put clothing manufacturers at a disadvantage in world trade, because they had to pay higher prices for the textiles they used.” Reich, *supra* note 1, at 100. Protection of the steel industry

not only cost American consumers more than an estimated \$1 billion annually in higher prices for U.S. products that contain steel but also penalize all the U.S. industrial purchasers of steel—manufacturers of automobiles, farm machinery, appliances, and machine tools—who now must pay 25 to 35 percent more . . . for the steel they use.

*Id.*

Two additional negative impacts of protectionist legislation also merit consideration. There is evidence that United States protectionist devices have aided Japan and other developing exporters, such as Korea and Taiwan, by making them more “flexible and dynamic . . . precisely because they have been forced to adapt to U.S. protectionist policies.” *Id.* Finally, in addition to slowing global trade in general, protectionist measures have a particularly harsh impact on developing nations, “which desperately need foreign trade.” *Id.* Existing restrictive bilateral trade agreements between the United States and such countries as Mexico, Pakistan, and Brazil “brutally retard these nations’ economic growth, perpetuating poverty and perhaps threatening world peace. And by choking off foreign earnings, they make it hard for these countries to repay loans, thus threatening the stability of Western banks.” *Id.*

Removal or reduction of trade barriers allows the United States to import products that can be produced more cheaply by foreign firms, which in turn allows the United States to specialize in those goods made most cheaply here. FTC Bureau of Economics Staff Report, *Effects of Restrictions on United States Imports*, June 1980, at 1. Specialization and trade lead to greater economic welfare for all those involved. *Id.* Therefore, elimination of trade barriers “increases income and provides consumers with consumption possibilities otherwise unattainable.” *Id.* at 2. Protectionist measures only increase prices. Present restrictions on clothing imports raise consumer prices in the United States by U.S.\$8 billion to U.S.\$12 billion. See *Protectionism That Protects Nothing*, N.Y. Times, Nov. 18, 1985, at A20, col. 1.

The United States recently increased duties on Italian pasta in retaliation for the failure of the Common Market to reach a favorable resolution of a dispute over citrus trade. *Pasta Tariff Up in Retaliation*, N.Y. Times, Nov. 11, 1985, at D5, col. 3. Europeans warned that they would in turn retaliate by raising tariffs on United States walnuts and lemons. *Id.* For a discussion of the European Economic Community, see Note, *Technology Transfers In the EEC: A Look At the Proposed Block Exemption for Exclusive Patent Licensing Agreements*, 7 FORDHAM INT’L L.J. 244, 244 (1984).

99. See Crandall, *What Have Auto-Import Quotas Wrought?* Challenge, Jan.-Feb. 1985, at 40, 43. The steel industry has been receiving protection of one type or another for fifteen years and is still losing to foreign competition. *Id.*

100. Weidenbaum, *Industrial Policy Is Not The Answer*, Challenge, July-Aug. 1983, at 22, 24.

101. *Id.* at 24. The VRA’s with Japanese automobiles increased their prices by well over \$900 per car. See *supra* note 98 and accompanying text.

Barring cooperative ventures, such as the GM-Toyota enterprise, by strict application of traditional antitrust formulas will only further increase the public demand for protectionist legislation.<sup>102</sup> To assuage the protectionist demands, and aid industries unable to meet foreign competition, antitrust enforcers should promote controlled international joint ventures while gradually removing barriers to trade.<sup>103</sup>

### B. *Industrial Policy and the Current Marketplace*

Various industrial policies have been commonly practiced by recent United States administrations.<sup>104</sup> The only real alternative to adopting a unified and effective form of industrial policy is the current assortment of uncoordinated and often antagonistic industrial policies.<sup>105</sup> In light of this choice and

102. See Eizenstadt, *Reindustrialization Through Government-Business-Labor Alliance*, 53 ANTITRUST L.J. 105, 107.

103. See *supra* note 98 (discussion of the effects of trade barriers).

104. See Eizenstadt, *supra* note 102, at 109-10. Examples of recent interventions in the industrial sector include federal government support amounting to the cost of one-half of the research and development in the United States, the Carter Administration's revitalization of Chrysler, and the Reagan Administration's Export Trading Company Act, Pub. L. No. 97-290, 96 Stat. 1233 (1982). Government intervention has often taken the form of direct subsidies and special tax breaks. See Reich, *supra* note 1, at 98.

American industries threatened by foreign competition have also been propped up by a wide assortment of government subsidies, special tax provisions, and subsidized loans and loan guarantees. These forms of assistance have mushroomed since the late 1960s, as global competitive pressures have increased. In 1950, for example, the total cost (in 1978 dollars) to the federal government of special tax credits and tax-depreciation allowances going to individual industries amounted to only \$7.9 billion (or approximately one percent of the gross national product). By 1980, the cost had grown to a staggering \$62.4 billion (almost 3 percent of that year's GNP). In 1950, the cost to the government of subsidized loans and loan guarantees to specific industries (measured in terms of interest charges and loan defaults) was only \$300 million. By 1980 the annual cost had grown to \$3.6 billion. Outstanding targeted federal loan guarantees now total more than \$221.6 billion. Taken together, subsidies, tax credits, and tax depreciation allowances to promote industries rose from \$8.2 billion (or one percent of the GNP) in 1950 to \$66 billion (3.1 percent of the GNP) in 1980.

*Id.* However, industrial policy effectiveness historically has been hindered by a lack of coordination of federal agencies. See Eizenstadt, *supra* note 102, at 110.

105. See Eizenstadt, *supra* note 102, at 117.

The issue is not a choice between less or more government intervention. The government, through Republican and Democratic administrations, is constantly involved in decisions affecting particular industries. With the steel industry, for example, there are a web of government environmental,

the precarious condition of a number of United States industries, antitrust laws "cannot and should not stand in splendid isolation from the real world decisions that have to be made."<sup>106</sup>

### C. Antitrust Laws Have Traditionally Promoted Competitiveness

Use of the antitrust laws to encourage international competitiveness is not inconsistent with the history or purpose of those laws.<sup>107</sup> This Note does not suggest relaxation of the antitrust laws in such traditional areas of concern as price fixing or market division.<sup>108</sup> The antitrust laws have regularly undergone revision,<sup>109</sup> as evidenced by the employment of new analytical tools such as the Herfindahl-Hirschman Index.<sup>110</sup> The incorporation of these new instruments suggests that antitrust enforcers have always considered "various economic and historical factors" in their analyses.<sup>111</sup> Additionally, the antitrust laws, like any other body of law, should be modified when new conditions make the existing law unproductive.<sup>112</sup>

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tax, tariff and quota actions directly affecting the industry, but made without any overall policy. Thus, the real choice is between frequent ad hoc interventions and a more coordinated, synthesized policy.

*Id.* "The strongest argument for an industrial policy is a consideration of what the alternatives (ad hoc government interventions) have brought: high levels of idle capacity, staggering unemployment . . . , and major international trade crises." Note, *Protecting Steel*, *supra* note 39, at 885.

106. See Eisenstadt, *supra* note 102, at 111. "The rules of antitrust law as they had developed were undermined by observation of how the world works." *The End of Antitrust*, Wash. Post, Dec. 5, 1983, at A10, col. 2.

107. See *infra* notes 108-12 and accompanying text.

108. See Clanton, *supra* note 82, at 1239. Price fixing, market division and group boycotts are still strictly forbidden. *Id.* In 1984 criminal enforcement actions against bid rigging and price fixing were brought three times more frequently than similar actions were brought in the 1970s, a decade noted for strict antitrust enforcement. See Greenhouse, *Making Mergers Even Easier*, N.Y. Times, Nov. 10, 1985, § 3, at 1, col. 2.

109. See *supra* notes 30, 31 (amendments to Clayton and FTC Acts).

110. The Herfindahl-Hirschman Index (HHI) and consideration of entry barriers are two examples of new analytical concepts employed by antitrust enforcers. See 1984 Merger Guidelines, *supra* note 7. The HHI, a formula used in market power calculations, consists of the sum of the squares of the market shares of all market participants. See Note, *International Joint Ventures*, *supra* note 39, at 526 n.114.

111. *Brown Shoe Co. v. United States*, 370 U.S. 294, 329 (1962).

112. After an 18-month study, the President's Commission on Industrial Competitiveness concluded that antitrust laws "ignore global market realities." *President's Commission Suggests Ways to Enhance U.S. Competitiveness Worldwide*, 48 ANTITRUST & TRADE REG. REP. (BNA) No. 1203, at 371 (Feb. 21, 1985). Referring specifically to

It is axiomatic that the purpose of the antitrust laws is to protect "competition, not competitors."<sup>113</sup> The majority of the FTC explained that the *GM-Toyota* consent decree would protect competition.<sup>114</sup> Refusal to approve the GM-Toyota joint venture, on the other hand, could have resulted in global, as well as domestic, anticompetitive developments, if GM were to cease small car production.<sup>115</sup>

#### D. Criticism of Industrial Policy

Industrial policy should not be used by proponents of the free market to provoke an instinctively American aversion to governmental interference in the marketplace.<sup>116</sup> Proponents

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section seven of the Clayton Act, Secretary of Commerce Malcolm Baldrige stated that it has become "harmful to America's best interests because it is concerned with an economic environment that no longer exists." Baldrige, *supra* note 1, at 401. In 1914, when the Clayton Act was passed, and in 1980, when it was last amended, the United States was the number one worldwide manufacturer and had little international competition. *Id.* at 399-400. In 1985, the situation is gravely different. *See supra* note 1 and accompanying text. "A lot of people think our antitrust laws are like the Holy Grail, that they shouldn't be tampered with, . . . [b]ut these laws should be reviewed if the economic facts underlying their initial passage have changed." Greenhouse, *Making Mergers Even Easier*, N.Y. Times, Nov. 10, 1985, § 3, at 1, col. 2 (quoting M. Baldrige, Secretary of Commerce).

113. *Brown Shoe*, 370 U.S. at 344. "The essence of the competitive process is to induce firms to become more efficient and to pass the benefits of the efficiency along to consumers." E.I. Dupont de Nemours & Co., 96 F.T.C. 653, 750-51 (1980). However, at an earlier stage in the development of the antitrust laws, more emphasis may have been given to the preservation of small competitors. *See United States v. Topco Assocs., Inc.*, 405 U.S. 596, 610 (1972); *Brown Shoe*, 370 U.S. at 344; *supra* note 18.

[W]e cannot fail to recognize Congress' desire to promote competition through the protection of viable, small, locally owned businesses. Congress appreciated that occasional higher costs and prices might result from the maintenance of fragmented industries and markets. It resolved these competing concerns in favor of decentralization. We must give effect to that decision.

*Brown Shoe*, 370 U.S. at 344; *see also* B. HAWK, UNITED STATES, COMMON MARKET AND INTERNATIONAL ANTITRUST: A COMPARATIVE GUIDE 2 n.5 (1985) (discussion of the effect of the Chicago School and its de-emphasis of concentration in the domestic market); P. AREEDA, *supra* note 23, at 26-40 (discussion of competition and reasons for de-emphasizing competition).

114. *GM-Toyota*, 103 F.T.C. at 386 (Miller statement). The result of the restrictions imposed by the majority of the FTC is that the "venture offers substantial benefits to competition and U.S. consumers without incurring significant anticompetitive risks." *Id.* at 388 (emphasis added). "Markets need not be atomistic to be competitive or otherwise perform well (translation: 'big ain't necessarily bad')." *Miller Interview*, *supra* note 19, at 8.

115. *See supra* notes 39, 47.

116. *See Note, Trustbusting*, *supra* note 44, at 1066. United States antitrust con-



of an industrial policy and those who put their faith in the workings of the free market both agree that there is a serious economic decline in the United States.<sup>117</sup> They disagree only about its remedy.<sup>118</sup>

Critics of an industrial policy involving assistance to industry from several federal agencies contend that setting up an effective coordinating mechanism to assure that the various agencies do not conflict would be prohibitively difficult.<sup>119</sup> These critics also argue that there is no evidence that financial planners in government would be any more successful than those in private business.<sup>120</sup> Such criticism is speculative and largely irrelevant to the type of industrial policy advocated here.<sup>121</sup> Instead of the active governmental intervention envi-

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cepts have roots in the Anglo-Saxon tradition of individualism. *Id.* Reasonable industrial policy has the same goal as reasonable antitrust law: a healthy and competitive economy. Caspari, *Joint Ventures—The Intersection of Antitrust and Industrial Policy in the EEC*, in 1985 *FORDHAM CORP. L. INST.* ch. 22 (B. Hawk ed.) (forthcoming). As stated by Chairman Miller, when analyzing the problems involved in GM-Toyota, it is important to separate "reality from rhetoric." *GM-Toyota*, 103 F.T.C. at 386 (Miller statement). More radical commentators have sought the abolition of United States antitrust laws. See Thurow, *Let's Abolish Antitrust*, *N.Y. Times*, Oct. 19, 1980, § 3, at 2, col. 2.

117. See, e.g., Reich, *supra* note 1, at 97; Schultze, *supra* note 5, at 3; Weidenbaum, *supra* note 100, at 23.

118. See, e.g., Miller, *Reindustrialization Through the Free Market*, 53 *ANTITRUST L.J.* 121 (1984); Reich, *supra* note 1, at 97; Schultze, *supra* note 5, at 3; Weidenbaum, *supra* note 100, at 23.

119. See, e.g., Ordovery, *Transnational Antitrust and Economics*, in 1984 *FORDHAM CORP. L. INST.* 233, 248 (B. Hawk ed.). An industrial policy contemplating cooperation between the federal agencies that administer the various regulations affecting international businesses, for example tax, commerce, and antitrust regulators, in order to give the industry in question the greatest advantage, conceivably requires the creation of another agency to coordinate these actions. Many commentators believe that the creation of such a coordinating mechanism would be extremely difficult. See *id.* "The President [Reagan] never developed a trade policy during his first term . . . in part because the officials involved in trade could not agree among themselves. . . ." Kilborn, *How the Big Six Steer the Economy*, *N.Y. Times*, Nov. 17, 1985, § 3, at 1, col. 2.

120. See Schultze, *supra* note 5, at 7-9. Another criticism of industrial policy is that it causes wasteful reapportionment of resources. According to this argument companies subject to increased governmental regulation will have to allocate increased resources to governmental and "legal activities" such as lobbying and litigation. Weidenbaum, *supra* note 100, at 23. However, relaxation of antitrust strictures will not encourage increased lobbying efforts, because the establishment of well-defined precedents will insure consistent treatment. Similarly, relaxation of antitrust enforcement and the establishment of clear precedents should result in reduced legal expenses, as the FTC and Department of Justice will bring actions less frequently.

121. Critics who attack an industrial policy in which the government adopts any

sioned by most critics of industrial policy, relaxation of the enforcement of the antitrust laws is a passive form of intervention that employs the judgment of private businessmen for many of the initial decisions regarding the joint venture.<sup>122</sup> The FTC's role is to then impose restrictions that insure minimal anticompetitive effects and maximal benefits. In order for this industrial policy to be of greatest benefit to both the United States and the world economies, however, it must be accompanied by a reduction of trade barriers.<sup>123</sup>

### *E. Problems with a Free Market Approach*

Even if market forces<sup>124</sup> would eventually forge a more ef-

and every conceivable type of assistance and protection program, fail to recognize that no one has proposed such a policy. *See, e.g.*, Shultze, *supra* note 5, at 3.

122. Private businessmen would set up the venture, making all the decisions concerning location, timing, product, market, and at least initially, size and structure of the venture, including partner selection.

123. *See supra* notes 96-101 and accompanying text. Reduction of trade barriers improves the global economy, which directly benefits each individual nation's economy. *See supra* note 98. But it must also be noted that

a liberal trade policy which promotes imports also reduces the need for an activist antitrust policy: unconstrained flows of foreign goods and capital investment serve as constraining forces on the ability of the domestic firms to elevate prices and harm domestic citizens. Also, when liberal trade policy exposes domestic firms to competition at home and abroad, it becomes especially important that antitrust policy does not become an efficiency-reducing burden on the home firms in their global rivalry with foreign firms which are not likewise disadvantaged.

Ordovery, *supra* note 119, at 244.

Relaxation of antitrust laws in conjunction with reduction of trade barriers therefore appears to be the best solution to current United States trade deficits.

124. "Free market" today is a purely theoretical concept and in this context means little more than various uncoordinated industrial policies. *See Note, International Joint Ventures, supra* note 39, at 538. The United States automobile market is not a free market. *Id.* One commentator has called the free market a "highly artificial concept." Reich, *supra* note 1, at 108.

The enduring myth of the unmanaged market illustrates the power of ideology over political reality. The broad array of tariffs, quotas, voluntary export agreements, and bailouts for declining businesses that now pervades our economic system is somehow considered an isolated exception to the government's normal role of benign neglect, while our defense-related contracts, targeted tax breaks, and assorted subsidies for particular industries are seen as separate issues, unrelated to industrial development or to the dynamics of the market. Many Americans object to the subsidies foreign governments offer their emerging industries but then fail to acknowledge the seminal role defense and aerospace projects play in the development of our own emerging industries. We demand that foreign governments reduce the procurement preferences they give certain of their domestic industries

ficient industrial base in the United States, a recovery of distressed industries shaped purely by market forces would take years, making it plainly unacceptable to those presently, and perhaps soon to be, out of work.<sup>125</sup> Additionally, free market forces would achieve this restructuring only at tremendous cost, including the loss of capital invested in plants and equipment, and the uprooting of large numbers of workers.<sup>126</sup>

Furthermore, considering the competitive advantages enjoyed by many foreign companies, free market success is speculative.<sup>127</sup> In contrast, the type of industrial policy that the FTC has begun to implement with *GM-Toyota* has already led to similar international joint ventures.<sup>128</sup> For the above reasons, relaxation of antitrust enforcement against international joint ventures is a superior industrial policy, which, in light of the variety of remedial tools available to the FTC, should be widely employed.

#### IV. THE TYPES OF RESTRICTIONS THAT SHOULD BE IMPOSED ON FUTURE VENTURES

The key to the effective relaxation of antitrust standards as applied to international joint ventures is the imposition by the FTC of carefully selected restrictions. The goals of these restrictions are twofold: 1) to limit the potential anticompetitive effects of the venture, including protection of the consumer

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but then demand that our own large, regulated manufacturers buy only from American producers. In short, our mythic assumptions lag behind our economic reality: every industry in America is deeply involved with and dependent on government. The competitive position of every American firm is affected by government policy.

*Id.*

125. See Note, *Protecting Steel*, *supra* note 39, at 884.

126. *Id.* Entire industrial towns would also be disrupted. *Id.*

127. See Hawk, *supra* note 45, at 231. United States firms have to comply with strict antitrust laws to which foreign firms are not subject. *Id.* Foreign governments often promote the international competitiveness of their industries through the coordinated effort of their financial and regulatory agencies. See Blechman, *supra* note 7, at 76. For example, the EEC sponsors several joint ventures including Airbus (a transportation project) and Esprit (an electronics project). *Id.* The EEC gives "block exemptions" from antitrust scrutiny to industries they wish to encourage. Caspari, *supra* note 116. Finally, United States exporters face over 200 foreign trade barriers. See Farnsworth, *200 Foreign Barriers to U.S. Exports Listed*, N.Y. Times, Oct. 31, 1985, at D1, col. 1. Japan has the most trade barriers of any foreign country. *Id.*

128. See *supra* note 12 (discussion of international joint ventures similar to the GM-Toyota joint venture).

when foreign competition abates, and 2) to derive maximum procompetitive benefits from the venture, particularly benefits to the global competitiveness of United States industries.<sup>129</sup> Central to all the restrictions imposed on a joint venture is the concept that the venture will be limited to that which is "reasonably necessary"<sup>130</sup> to attain the desired procompetitive benefits. The need for restrictions to maximize procompetitive benefits to United States industries may be less obvious than the need for restrictions to protect consumers. However, many previous protectionist measures enacted by the United States for the benefit of specific industrial sectors were based on an understanding that that sector would take steps, while protected, to restructure itself in order to better meet global competition.<sup>131</sup> In most cases these steps were not taken.<sup>132</sup>

#### A. *Restrictions Designed to Limit Potential Anticompetitive Effects*

The most basic restrictions are in the form of output and duration limitations, such as those imposed by the FTC on the GM-Toyota venture.<sup>133</sup> Output and duration limitations will tend to reinforce whatever disincentive to collusion existed absent the joint venture, because they remind the venturers that

129. See Proposed Consent Agreement, 48 Fed. Reg. at 57, 316. The FTC majority stated there was little possibility of the venture's exerting anticompetitive market power. *Id.*

Given the characteristics of the automobile market, it appears that the joint venture will not result in an increased risk of tacit or explicit collusion. Automobiles are highly differentiated in terms of quality, performance, appearance, and durability. The demand for cars shows cyclical swings. Because firms have unequal cost structures, each firm has a different profit-maximizing price. These and other characteristics make a collusive agreement difficult to establish and maintain.

*Id.* (footnote omitted).

130. See *GM-Toyota*, 103 F.T.C. at 376 (Complaint).

131. See Reich, *supra* note 1, at 99. Federal protection to the textile, footwear, color-television, automobile and steel industries has been "premised on the . . . industry's implicit agreement to use the opportunity to retool . . . because that agreement was never made formal, the government and the public have no recourse now that these investment plans are falling short . . ." *Id.* The steel industry, in particular, despite extensive protection, is spending its cash on diversifying into other sectors rather than restructuring. See Teitelman, *Smart fish in a shrinking pond*, *Forbes*, Dec. 30, 1985, at 46. U.S. Steel, for example, the largest steel-maker in the United States, "has cut capacity 24% in the last six years and is now diversifying into everything from banking to the oil business." *Id.*

132. Teitelman, *supra* note 131, at 46.

133. See *GM-Toyota*, 103 F.T.C. at 383 (Order); see also *supra* note 72.

they will eventually be competitors again.<sup>134</sup> However, as output limits can decrease the efficiency of a joint venture,<sup>135</sup> their application must be carefully considered. It is possible that, in *GM-Toyota*, the FTC could have achieved the same disincentives to collusion solely through duration restrictions. Such restrictions may have provided sufficient reminder that the extent of the cooperation was limited. As duration restrictions may also decrease efficiency, however, flexible duration restrictions based on changes in the intensity of foreign competition may maximize efficiency.<sup>136</sup>

Restrictions on information exchanged and compliance monitoring procedures, such as those required by the FTC in *GM-Toyota*,<sup>137</sup> must be imposed in all cases to reduce the potential for collusion. The type of information restricted may vary according to the venture involved, but should always include pricing and marketing data.<sup>138</sup> Because exchange of pricing information is particularly dangerous to competition, highly structured pricing systems, which operate to set automatic prices independently of the venturers, should be imposed whenever possible.<sup>139</sup> Effective monitoring may require an FTC observer at management meetings, or, when feasible, at the daily operations of the venture.<sup>140</sup>

Another restriction that can reduce potential anticompetitive effects is the requirement that a joint venturer seek an alternative partner.<sup>141</sup> A cooperative venture between the first and twentieth largest market participants presents fewer anticompetitive risks than an identical venture between the first

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134. See *United States v. Morgan*, 118 F. Supp. 621, 688-91 (S.D.N.Y. 1953).

135. See P. AREEDA, *supra* note 23, ¶ 117. Some industries, such as the automobile industry, require huge production in order to achieve efficiency. See *id.*

136. See P. AREEDA, *supra* note 23, ¶ 117. In the face of continuing pressure it may be desirable to extend the duration of the venture.

137. See *supra* notes 73-75 and accompanying text.

138. See Clayton Act, 15 U.S.C. §§ 13(a), 14.

139. See *GM-Toyota*, 103 F.T.C. at 394-95 (Bailey statement). Commissioner Bailey noted that a "non-competitor-based" pricing formula "triggered by a cost index" not under control of one of the parents was suggested to the Commission for application in *GM-Toyota*. *Id.*

140. The parties to the venture should bear the cost of the observer if an observer is deemed necessary.

141. See *GM-Toyota*, 103 F.T.C. at 389 (Pertschuk statement); see *supra* notes 22, 36 (discussion of traditional antitrust concerns).

and third largest market participants.<sup>142</sup> It is not clear that Toyota was the best partner for GM in terms of efficiencies gained and in terms of anticompetitive potential.<sup>143</sup> Alternative partners should be analyzed carefully by the FTC and the decision approving a particular parent should be justified fully.<sup>144</sup>

### B. *Restrictions Designed to Maximize Procompetitive Benefits*

A major goal of the industrial policy recommended in this Note is the creation of jobs in the United States. Therefore international joint ventures coming under this policy might be required to maintain a percentage of production facilities in the United States. United States-based production is also central to dissemination of learning benefits among domestic workers. This restriction was not placed on the GM-Toyota venture; either parent could move the production site to Japan, or elsewhere.<sup>145</sup>

Requiring the United States parent to invest a percentage of its profits into research and development and employee education could also encourage long-term competitiveness. The United States lags behind Japan in percentage of profits invested in research and development, and behind all Western nations in employee education, factors often cited as harmful to the United States' future competitiveness.<sup>146</sup>

142. See *supra* notes 22, 36 (discussion of traditional antitrust concerns).

143. See *GM-Toyota*, 103 F.T.C. at 389 (Pertschuk statement).

144. The FTC should indicate in their decision why the non-domestic parent was accepted. The FTC majority did not indicate why Toyota rather than a smaller Japanese automobile manufacturer was chosen. See *id.* It is possible that the procompetitive aspects of the joint venture could have been achieved in large part through an alternative partner. See *id.* at 396 (Bailey statement); *supra* note 81.

145. See generally *GM-Toyota*, 103 F.T.C. at 383-86 (Order); see *supra* note 82 (Toyota may move the location of the venture).

146. See Aho, *Trying Harder*, N.Y. Times, Oct. 6, 1985, (Book Review), at 32. The United States must "fundamentally [alter] the allocation of resources to research and development, education . . . [w]hile many of the brightest young people in this country go to law school, Japan, with half the population, graduates more engineers. With two-thirds the gross national product, Japan invests more in absolute terms in plant and equipment." *Id.* Additionally, United States industries must allocate more resources to worker retraining programs, to prepare workers to perform the increased number of more highly skilled jobs which will result from restructuring. See Reich, *supra* note 1, at 102. "Alone of all the Western industrialized nations the United States lacks any retraining program available to the majority of its labor force." *Id.*

Regulation of the manufacturing of the joint venture product may be necessary to ensure the greatest dissemination of learning benefits and a high demand for United States labor. It is estimated that over sixty percent of each GM-Toyota joint venture vehicle will be built in Japan solely by Toyota.<sup>147</sup> GM can gain little knowledge about the manufacture of this portion of the car, and United States labor can be employed to assemble only the remaining forty percent of the vehicle. Regulations of joint ventures between companies with a line of products may require subject matter restrictions. For example, in the GM-Toyota joint venture, joint production of only a single vehicle model was necessary to achieve the anticipated procompetitive benefits.<sup>148</sup>

Because the dissemination of learning efficiencies throughout United States industry was a primary concern of the Commission in *GM-Toyota*, steps should be taken to facilitate this process.<sup>149</sup> Dissemination could be insured by requiring the United States parent to allow its competitors access to the newly acquired information, in some fashion or after some period of time, in order to allow the parent to make a reasonable profit.<sup>150</sup>

### CONCLUSION

Because the FTC may consider and impose any restriction necessary to guard against anticompetitive effects,<sup>151</sup> companies in all distressed sectors<sup>152</sup> should be prompted to examine their options under the *GM-Toyota* precedent. The *GM-Toyota*

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147. See Proposed Consent Agreement, 48 Fed. Reg. at 57,252 (Pertschuk statement).

148. See *GM-Toyota*, 103 F.T.C. at 383 (Order).

149. See *id.* at 388 (Miller statement).

150. Denial of access to information should be permitted only when necessary to the success of the venture. See Brodley, *Analyzing Joint Ventures With Foreign Partners*, 53 ANTITRUST L.J. 73, 80 (1984); cf. *GM-Toyota*, 103 F.T.C. at 389 (Pertschuk statement) (if the information is unique, allowing GM to acquire it may be anticompetitive).

151. See *Brunswick*, 657 F.2d at 982. The FTC has " 'wide discretion in its choice of a remedy deemed adequate to cope with' " any anticompetitive practices. *Id.* (quoting *Jacob Siegel Co. v. Federal Trade Commission*, 327 U.S. 608, 611 (1946)).

152. In addition to the automobile sector, distressed sectors include, inter alia, the steel, footwear, textile, and semiconductor sectors. See *supra* note 11. The burden of establishing that a company is from a distressed industrial sector falls on the company wishing to initiate an international joint venture.

consent decree, though perhaps imperfect,<sup>153</sup> is an important step towards needed industrial restructuring in the United States. An industrial policy encouraging international joint ventures combined with the reduction of protectionist trade barriers will stimulate the United States and world economies. Proper application of the many flexible restrictions available to the FTC can minimize the potential anticompetitive effects of these international joint ventures and maximize their procompetitive benefits.

*Paul C. Curnin*

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153. See *supra* notes 80-84 and accompanying text. The *GM-Toyota* consent decree has been called "disappointingly blurry." Clanton, *supra* note 82, at 1264. But see Halverson, *supra* note 7, at 183 (*GM-Toyota* suggests a "new willingness of the antitrust enforcement agencies" to consider economic reality). Although the dissenting Commissioners raise some questions yet to be fully answered, the *GM-Toyota* precedent is a practical and expedient response to one of the most serious economic problems currently facing the United States.