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The Joint Enterprise: Collaboration Between the Public and Private Sectors

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Government involvement in business ranges from full state ownership of enterprises to laissez-faire. In the United States, free enterprise ideology now tolerates various forms of state ownership, in large part because governmental business ventures have consistently responded to "societal requirement(s) which the private sector cannot or will not fulfill."[1] This article proposes a new form of collaboration between the federal government and private entities designed to achieve benefits neither the public nor private sector can achieve alone. The authors refer to it as the joint enterprise, and believe it to be uniquely well-adapted to the attainment of both discrete public objectives and overall industrial innovation and expansion.

Joint enterprises between government and industry have received official consideration on at least one occasion in the past. In 1971 the Department of Transportation (DOT) and the National Aeronautics and Space Administration (NASA) prepared a report, the Civil Aviation Research & Development (CARD) Policy Study,[2] in response to a need for technological progress in aviation and concern over a depression in the United States aerospace industry and rising competition from abroad. The DOT and NASA, and Congress in reviewing the CARD study, gave close attention to the extensive involvement of foreign governments in their aerospace industries.[3] The study recommended joint enterprises as

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1. Miller, *Public and Private Enterprise in the United States: Co-Existence in an Unsteady Equilibrium*, in PUBLIC AND PRIVATE ENTERPRISE IN MIXED ECONOMIES 298 (W. Friedmann ed. 1974).

2. *See* DEP'T TRANSP. & NAT'L SPACE ADMIN., CIVIL AVIATION RESEARCH & DEVELOPMENT POLICY STUDY (1971) [hereinafter cited as CIVIL AVIATION STUDY].

3. *See* HOUSE SUBCOMM. ON AERONAUTICS AND SPACE TECHNOLOGY, CIVIL AVIATION RE-

a means of stimulating technological and industrial progress. However, none were subsequently formed.

The joint enterprise discussed in this article is similar to, but represents an improvement upon, the version proposed in the CARD study. While the CARD study used the term "joint enterprise," suggesting a partnership between government and industry, it in fact envisioned that the government's role would involve only "leadership and economic participation on a limited basis."[4] The present plan elevates the government to the status of a full partner. This plan also proposes a variant referred to as the tripartite enterprise, in which a university partner provides government and industry with basic research.[5] Also, the present plan is proposed for adoption not only in the aerospace field, but in any industry important to the public interest.

This article first outlines the structures of the joint and tripartite enterprises. It then addresses two legal concerns facing an operational enterprise, the potential tort liability of enterprise participants and antitrust restrictions. Tort liability is a threshold concern of any joint venture or partnership, and antitrust law is a basic constraint on the operations of any business. The article proceeds to show that the problems they pose for a joint enterprise can be minimized or avoided. In the third part of the article the authors demonstrate the special utility of the joint enterprise.

Many virtues and drawbacks of the enterprise model are left unaddressed by this article. However promising it may be, a proposed departure from the traditional relationship between the public and private sectors should be embraced cautiously. The authors merely hope to show that the joint enterprise warrants a place on the national agenda for further study and experimentation.

I. THE ENTERPRISE MODEL

A. *The Enterprise Agreement*

Certain features of the joint enterprise[6] resemble those of a partnership or joint venture,[7] but others distinguish it in critical ways. The joint enterprise, like a partnership, requires an agreement between participating parties to undertake a

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SEARCH AND DEVELOPMENT: POLICIES, PROGRAMS AND PROBLEMS, H.R. REP. NO. 1423, 92d Cong., 2d Sess. 50 (1972).

4. *See* CIVIL AVIATION STUDY, *supra* note 2, at 6-31.

5. The authors are indebted to Dr. J. Henry Glazer, Chief Counsel of NASA's Ames Research Center, for the idea of adding an academic participant. Dr. Glazer played a significant role in the creation of a joint venture between the Ames Research Center and various universities. The venture represents a significant development in federal and academic collaboration. *See* A JOINT VENTURE BETWEEN THE NASA-AMES RESEARCH CENTER AND PARTICIPATING CALIFORNIA LAW SCHOOLS TO ENCOURAGE AND SUPPORT BASIC, EXPLORATORY, AND APPLIED LEGAL RESEARCH OF MUTUAL BENEFIT TO THE PARTIES, NASA doc. NCA2-OA280-001 (the NASA-Ames University Consortium Agreement).

6. The term "enterprise" has sometimes been given a specialized meaning similar to the one intended here. The authors use the term "enterprise" to emphasize the differences between the form of collaboration discussed here and a conventional partnership or joint venture.

7. A joint venture resembles a partnership in that its members associate together as co-

specific activity.[8] But unlike a partnership, which requires an agreement to carry on a business for profit,[9] the enterprise need not have profit as a common purpose of all its participants. The only legitimate purpose of the governmental participant may be to advance the public interest. Industrial and academic participants will serve their own interests, including one in financial gain, but will share with the government the purpose of promoting the public policies enunciated in the enterprise agreement. It is essential that that agreement make clear the scope of the public purposes and the means of achieving them. Otherwise, collaboration between government and the private sector could be dangerous.[10]

The joint enterprise is also different from a traditional partnership by virtue of the fact that one of the parties—the federal agency—may indeed be unable to reap a financial gain from its successful operation. In the absence of specific congressional authorization, a federal agency is prohibited from increasing its budget, by any means, beyond the amount provided by Congress.[11] Federal appropriations regulations forbid "unauthorized augmentations."[12] As a result, a federal agency participating in a joint enterprise would be precluded from accepting any profits earned. There may also be fundamental objections to federal agencies' engaging in business for profit. However, neither those objections nor the regulatory prohibition are based on the Constitution.[13] Congress can create, and has created, federal enterprises authorized to operate for profit. Congress could thus constitutionally permit a federal participant in a joint enterprise to share in enterprise profits.[14]

> owners of a business enterprise, agreeing to share profits and losses. However, a partnership ordinarily engages in a continuing business for an indefinite or fixed period of time, while a joint venture is formed for a single transaction or single series of transactions, thus being more limited in both scope and duration.

Rickless v. Temple, 4 Cal. App. 3d 869, 894, 84 Cal. Rptr. 828, 844 (1970).

8. "A joint venture exists where there is 'an agreement between the parties under which they have a community of interest, that is, a joint interest, in a common business undertaking....'" Connor v. Great Western Sav. and Loan Ass'n, 69 Cal. 2d 850, 447 P.2d 609, 615, 73 Cal. Rptr. 369, 375 (1968); *see also* Pinkowski v. Coglay, 347 F.2d 411 (7th Cir. 1965).

9. *See, e.g.*, CAL. CORP. CODE § 15006 (West 1977).

10. The unregulated integration of private business and governmental leadership is a classic attribute of the fascist state. The joint enterprise would involve no attenuation of the distinction between public and private institutions. The authors recognize, however, that measures should be taken to prevent abuse of the form of collaboration they advocate here. *See generally* R. SARTI, FASCISM AND THE INDUSTRIAL LEADERSHIP IN ITALY 1919-1940 (1971).

11. The prohibition against any intervention is a corollary of the separation-of-powers doctrine....The objective of the theory against augmentation of appropriated funds is to prevent a government agency from undercutting the congressional power of the purse by exceeding the amount Congress has appropriated for that activity. Congress' power derives from Article I § 8 of the Constitution, directing that no money should be drawn for the Treasury but as a consequence of appropriations made by law.

OFFICE OF GENERAL COUNSEL, UNITED STATES GENERAL ACCOUNTING OFFICE, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW, ch. 5, at 61 (1982).

12. *Id.*

13. In McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819), the Supreme Court validated a bank chartered by Congress. The government was a minority stockholder of the bank, whose management was in private hands.

14. For example, Congress chartered AMTRAK as a co[illegible]ation empowered to make a profit. *See* Rail Passenger Service Act of 1970, Pub. L. No. 91-518, 84 Stat. 1327.

The authors urge that while the joint enterprise should not necessarily provide the federal participant with financial gain, the federal participant should be able to require that a share of enterprise profits be reinvested so as to advance the purposes of the venture. Profits that are in part the product of the taxpayers' contribution should not accrue to the private party alone. For example, NASA and a pharmaceutical company might agree to construct a permanent space platform and laboratory.[15] If the company agreed to contribute two million dollars, representing the reasonable value of goods and services it was to receive from its use of the facility,[16] and profits flowing from commercial use of the facility amounted to eight million dollars, the company would realize a net profit of six million dollars. If the government were unable to share in the profits other than to recoup its expenditures, a windfall would accrue to the private party.

A variation on the form of collaboration advocated here, the tripartite enterprise, provides a nonstatutory means of dedicating a share of the profits to public purposes. A third party, academia, joins government and industry in implementing the goals of the enterprise. A university, like the government, is ordinarily not motivated by the desire for profit. But unlike the government, a university may, with few or no constraints, accept (as consideration for its participation) profits realized by the enterprise. With the addition of the university as a party, enterprise profits, or a portion of them, can be allocated to furthering the goals of the enterprise. To the extent that the federal agency's interests and those of the university participant coincide, the allocation to the university of enterprise profits serves federal research and development interests.

Under this tripartite enterprise arrangement, a share of the profits realized by the industrial participant would be paid to the university, which, after consultation with the governmental and industrial parties, would devote the money to any purpose consistent with the enterprise agreement. A new line of research undertaken by the university with private funds would thus carry out a public purpose within both the charter of the government agency and the enterprise agreement. The government would benefit from the university's use of enterprise profits to further the goals of the enterprise. The university would not only receive a share of the profits in its own right, which it would spend to further its interest in education in accordance with its charter, but would benefit by undertaking research sponsored by the government agency with the reinvested enterprise profits. The industrial participant, of course, would still receive a share of enterprise

15. The charter of a federal agency must contain an enabling grant authorizing participation in a joint enterprise. NASA's enabling grant is in the National Aeronautics and Space Act of 1958, § 203(b)(5), 42 U.S.C. § 2473(b)(5) (1982). In Lodge 1858, Am. Fed'n of Gov't Employees v. Webb, 580 F.2d 496 (D.C. Cir. 1978), *cert. denied*, 439 U.S. 927 (1978), the Court of Appeals for the District of Columbia Circuit broadly interpreted NASA's authority to enter into cooperative agreements.

16. The two million dollars represents neither a profit for, nor a gift to, NASA. It is a reimbursement for services rendered to a private entity, which NASA is permitted to accept. For example, COMSAT regularly pays NASA for its assistance. *See* Communications Satellite Act of 1962, § 201(b)(5), 47 U.S.C. § 721 (1982).

profits. The tripartite enterprise is thus a symbiotic economic arrangement through which all parties gain.

B. *Contributions of Value and Management of the Enterprise*

Just as when a traditional partnership is formed, each party contributes something of value to the joint enterprise. The nature and extent of each party's contribution is bargained for at the outset, and depends on the parties' respective resources and the goal of the venture. The tripartite enterprise involves a contribution of basic research by the academic institution. The government supplies the ingredients of applied research, such as basic funding, technical expertise, and facilities. The private concern supplies the ingredients of technology transfer, including additional money, expertise, facilities, manpower, and managerial talent.

The management of the enterprise consists of representatives from the governmental and industrial participants, and in the case of a tripartite enterprise, a representative from the academic participant. These representatives serve as coequals on the management board consistent with their respective statutory or corporate charters and in accordance with other requirements of law.[17] For example, although NASA might be prohibited by law from reaping profits realized by the joint enterprise, a NASA representative would certainly participate equally in making decisions concerning the use of those profits to further enterprise objectives. The overall success of the enterprise would be the paramount concern of all participants' managerial representatives.

As described here, the joint enterprise would represent a new development in the relationship between the public and private sectors in the United States. Historically, there have been three main forms of government involvement in business.[18] The government has created public corporations whose ownership and control rest entirely in public hands. It has established regulatory bureaucracies through which it exercises control over privately-held concerns. Finally, the government has given subsidies to private concerns it neither owns nor controls.

The joint enterprise incorporates features of each of these forms of government involvement in business. It enables the government to retain ownership of, or at least rights to use, a share of the venture and its profits. The joint enterprise has a regulatory element because the government serves as one of three equal partners in its management and thus oversees its operations and the allocation of a share of its profits. Third, the government's contribution of money and resources to the joint enterprise is like a subsidy to the extent that its purpose and effect are to promote the development of an industry.

17. "[T]here may be joint participation in the management and control of a joint venture where the contributions of the respective parties to the enterprise are unequal and not of the same character." Rosen v. E.C. Losch, Inc., 234 Cal. App. 2d 324, 332, 44 Cal. Rptr. 377, 382 (1965).

18. *See* W. SHEPHERD & C. WILCOX, PUBLIC POLICIES TOWARD BUSINESS 406 (1979).

II. Legal Issues Facing The Enterprise

A. *Tort Liability of Enterprise Participants*

Federal law might require that tort liability be allocated differently among enterprise participants than it is among partners or joint venturers. State statutes generally permit suits against partnerships and joint ventures and provide for joint and several liability on the part of partners and joint venturers.[19] In the case of the joint enterprise, tort liability probably could not be joint and several because of the federal participant's sovereign immunity.[20]

The university's sovereign or charitable immunity could possibly also interface with the imposition of joint and several liability. Both public and private educational institutions have occasionally been held immune from suit for their torts and those of their officers, agents, and employees engaged in school functions.[21] However, public institutions generally enjoy immunity only to the extent that the state has immunity from liability, and by and large state governments now lack such immunity.[22] Likewise, while charitable immunity has often been held to shield private schools from liability, courts have sometimes refused to grant them such immunity.[23] The academic participant in a tripartite enterprise would probably be liable for the torts of the enterprise.

Statutory limitations on the tort liability of the federal participant might discourage businesses, and most universities, from participating in joint enterprises. To the extent that the federal participant is immune from tort liability, the other participants would be forced to shoulder disproportionate shares of the burden. The United States is insulated from liability arising from, for example, the commission of discretionary acts, customs assessments, and the operations of certain agencies such as the Tennessee Valley Authority.[24] Yet the basic rule is that the United States is liable for tort claims "in the same manner and to the same extent as a private individual under like circumstances,"[25] and this abrogation of federal sovereign immunity is to be read liberally.[26] Thus a considerable amount of uncertainty surrounds the question of whether a federal participant's activity will be governed by that general rule or by, for example, the rule providing immunity for discretionary acts.

The enterprise model must therefore provide adequate assurances of shared risk. Enterprise projects will generally be very large or innovative undertakings, and involve a substantial risk of liability for damages. The prospect of unequal exposure to tort liability would constitute a significant disincentive to participa-

19. *See, e.g.*, Cal. Corp. Code § 15015 (West 1977).
20. *See infra* notes 24-26 and accompanying text.
21. *See* Annot., 33 A.L.R. 3d 703 (1970); Annot., 38 A.L.R. 3d 480 (1971).
22. *See* Annot., 33 A.L.R. 3d at 709.
23. *Id.*
24. *See, e.g.*, 28 U.S.C. § 2680 (1982).
25. 28 U.S.C. § 2674 (1982).
26. *See* Indian Towing Co. v. United States, 350 U.S. 61, 68 (1955); Scanwell Laboratories, Inc. v. Thomas, 521 F.2d 941, 947 (D.C. Cir. 1975), *cert. denied*, 425 U.S. 910 (1975).

tion by private parties. That disincentive could be avoided in two ways. First, Congress could waive sovereign immunity for federal agencies participating in joint enterprises. Second, the federal government could offset its immunity by contributing a proportionately greater amount to the costs of the enterprise. The appropriate allocation for insurance or liability reserves would be calculated and the government contribution increased accordingly.

B. Antitrust Restrictions on Enterprise Operations

Competition has been a dominant consideration in the formulation of American economic policy.[27] Antitrust laws such as the Sherman Act[28] are the most obvious expression of the American determination to preserve the role of competition in the economy. Because the enterprise may involve cooperation between businesses in a given industry or cause a participant to dominate a market, it comports the possibility of promoting anticompetitive behavior.

In assessing the potential antitrust liability of a business participating in a joint enterprise, useful comparisons with defense contracting can be drawn. In the cases of both the enterprise participant and the defense contractor, the government may be the only customer for a particular product or service. Also, in both cases the business working with the government may become entrenched in the market by being the first to develop and produce a highly technical product requiring a considerable amount of time for research and development before manufacturing begins. In the defense industry, this situation has led to charges of monopolization[29] based on section 2 of the Sherman Act.[30]

In two cases decided in 1980, federal district courts reached different results regarding antitrust liability where the government is the only actual or potential customer for a product. The District Court for the Western District of Missouri denied summary judgment to a corporate defendant who, through a government defense contract, acquired special information and with it the alleged power to control prices and exclude competition.[31] Presented with similar facts, the District Court for the Central District of California held that a monopoly created by a government contract is beyond the reach of section 2 where the government has "absolute ability to make the market."[32] These cases reflect the unsettled state of the law in this area, which poses unknown hazards for businesses collaborating

27. "[T]he unrestrained action 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." Northern Pac. Ry. v. United States, 356 U.S. 1, 4 (1958). Sections 1 and 2 of the Sherman Act were designed to further these goals and are generally regarded as forming the core of substantive antitrust law. L. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST § 3, at 13 (1977).

28. Sherman Act, 15 U.S.C. § 1-7 (1982).

29. *See, e.g.*, American Standard, Inc. v. Bendix Corp., 487 F. Supp. 265 (W.D. Mo. 1980).

30. Section 2 provides in relevant part: "Every person who shall monopolize, 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, shall be deemed guilty of a felony...." 15 U.S.C. § 2 (1982).

31. American Standard, Inc., v. Bendix Corp., 487 F. Supp. 265 (W.D. Mo. 1980).

32. Northrop Corp. v. McDonnell Douglas Corp., 498 F. Supp. 1112, 1124 (C.D. Cal. 1980).

with the government in a joint enterprise. At the same time, the cases reflect the courts' willingness to take into account the unique characteristics of a market dominated by the government when evaluating a claim of monopolization.

"Teaming,"[33] or co-production agreements, similar to joint development efforts and common in defense contracting, have been subjected to numerous antitrust challenges.[34] Without special legislation, joint enterprises, even those limited to research and development, may be subject to similar challenges. For instance, the joint enterprise may reduce competition in a market. If either of two private participants would have entered the market alone, the benefits of deconcentration are lost and barriers to others' entry are heightened.[35] Second, a successful joint enterprise may eliminate future competition, as close association may reduce competitive zeal.[36] Restrictive spillover agreements ancillary to the venture pose another danger. These possibilities make it necessary for a business to plan its participation in a joint enterprise carefully.

In the first place, the parties may be able to avoid antitrust liability if they can show that, but for the joint enterprise, none of them would be involved in the particular market. The Justice Department finds no infraction of the law where actual or potential competitors cooperate toward a definite goal if the joint venture is necessary because an individual or a smaller cooperative undertaking would lack necessary financial or technical capacity, or could not face an attendant political risk.[37] The collaboration must be for a limited purpose or duration. This helps to identify agreements that go beyond the parameters of the project

33. 32 C.F.R. § 4-117(a) (1983) defines a team agreement as a relationship "whereby two or more companies form a partnership or joint venture to act as a potential prime contractor or whereby a potential prime contractor agrees with one or more other companies to act as his subcontractor(s) under a specified government procurement or program."

34. *See generally* Hibner, *Antitrust Considerations of Joint Ventures, Teaming Agreements, Co-production and Leader-follower Agreements*, 51 ANTITRUST L.J. 705 (1982).

35. Such concerns were at issue in the well-known case of United States v. Penn-Olin Chemical Co., 378 U.S. 158 (1964). In remanding the case to the trial court, the Supreme Court set out the following check list of criteria to determine when, due to joint venture activity, potential competition has been lost:

> [T]he number and power of the competitors in the relevant market; the background of their growth; the power of the joint venturers; the relationship of their lines of commerce; the competition existing between them and the power of each in dealing with the competitors of the other; the setting in which the joint venture was created; the reasons and necessities for its existence; the joint venture's line of commerce and the relationship thereof to that of its parents; the adaptability of its line of commerce to noncompetitive practices; the potential power of the joint venture in the relevant market; an appraisal of what the competition in the relevant market would have been if one of the joint venturers had entered it alone instead of through Penn-Olin; the effect, in the event of this occurrence, of the other joint venturer's potential competition; and such other factors as might indicate potential risk to competition in the relevant market. In weighing these factors the court should remember that the mandate of the Congress is in terms of the probability of a lessening of substantial competition, not in terms of tangible present restraint.

378 U.S. at 177.

36. United States v. Minnesota Mining & Mfg. Co., 92 F. Supp. 947, 963 (D. Mass. 1950).

37. ANTITRUST DIVISION, U.S. DEPT. OF JUSTICE, ANTITRUST GUIDE FOR INTERNATIONAL OPERATIONS (1977), *reprinted in* [1969-1983 Transfer Binder] TRADE REG. REP. (CCH) ¶ 50,309 (March 9, 1977).

and are therefore suspect. Additionally, the venture, if lengthy, should maintain a day-to-day staff independent of its parent organizations to decrease the potential for collusive compacts. Enterprise participants may then be able to avoid liability by demonstrating that cooperation is critical to their expansion and that it might in fact lead the partners to compete in new arenas in the future.

The current political climate appears to favor relaxation of the antitrust laws bearing on research and development efforts. Legislation now pending in Congress[38] would grant immunity to industries participating in joint research and development ventures. Enactment of this or similar legislation would eliminate some antitrust considerations for businesses taking part in joint enterprises.

Universities are ordinarily nonprofit institutions, and should become involved in commercial activities only in a manner consistent with their educational goals. It might thus appear that the antitrust laws would not apply to an academic participant in a joint enterprise. However, in a recent decision, *American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp.*,[39] the Supreme Court held a nonprofit technical and scientific society to be in violation of the antitrust laws. The Court found that the Society had the power to restrain competition and engage in anticompetitive activity by publishing approximately four hundred engineering codes and standards. While only advisory, the codes were widely disseminated and had a powerful influence on manufacturers and purchasers throughout the industry. The Court stressed that, in light of the American Society of Mechanical Engineers' (ASME) reputation, its unofficial statement condemning Hydrolevel's product as below the ASME standard was sufficient to cause serious injury to Hydrolevel's business.[40] It was significant that ASME's statement was made by the vice president of the subcommittee which drafted the code in question, and that the vice-president misrepresented ASME's code in order to benefit Hydrolevel's competitor, in which he held an interest. The Court imposed civil liability on the organization as well as its agent acting with apparent authority, to "ensure that standard-setting organizations will act with care when they permit their agents to speak for them."[41]

According to the dissent in *Hydrolevel*, the lesson of the case extends beyond standard-setting organizations.[42] One commentator has remarked that "reading the Court's decision broadly, it can be interpreted as extending liability to all types of nonprofit organizations, including professional, charitable, educational, and religious groups."[43]

While the breadth of the *Hydrolevel* ruling is unclear, the decision suggests that there are circumstances in which a university could face antitrust liability by virtue of its role in a tripartite enterprise. A task of the enterprise's basic research arm may be to compare and rate products or procedures useful to the venture.

38. S. 1841, 98th Cong., 2d Sess. (1984).
39. 456 U.S. 556 (1982).
40. *Id.* at 571.
41. *Id.* at 577-78.
42. *Id.* at 578.
43. Note, *Nonprofit Professional Association Liable for Treble Damages Under the Sherman Act for the Antitrust Violations of Its Agents Acting Within the Scope of Their Apparent Authority*, 23 SANTA CLARA L. REV. 663 (1983).

The university and its agents must exercise caution when passing judgment on any such product or procedure. They must fairly document all factual findings and conclusions. Conceivably, the university must recognize that through the enterprise it will obtain much information of actual or potential commercial significance. The withholding or disclosure of such information may have a direct effect on the marketplace, and thus must be done so as to avoid charges that it was incident to "a contract, combination, or conspiracy in restraint of trade."[44] The Court has already determined that the nonprofit organization or its agents need not intend to benefit by its anticompetitive conduct to incur liability.[45]

Congress did not subject the United States or its instrumentalities to the antitrust laws,[46] and the courts have thus held the federal government to be immune from those laws.[47] In some circumstances, indeed, the government extends its immunity to private entities acting at its behest. The Defense Production Act,[48] for example, provides immunity from civil and criminal antitrust liability to persons carrying out voluntary production agreements in accordance with the Act. Congress might also exempt enterprise participants from antitrust liability if their activities were sufficiently important. However, Congress is unlikely to grant such exemptions, since it generally reserves them for critical matters of national defense. A federal agency's designation of a corporation as an agent of the government will not extend the government's immunity to the corporation.[49] Nor will an agency's authorization confer on a private entity a defense to antitrust liability. In one case, for example, a natural gas company was found susceptible to suit under the Clayton Act[50] for having acquired the stock of a pipeline company, although the Federal Power Commission had authorized acquisition of the pipeline company's assets.[51] Despite federal participation in the joint enterprise, therefore, no special protection from antitrust liability will be imparted to the other participants.

Defenses to antitrust claims may be available to parties participating in a joint enterprise with a foreign government. The defense of "foreign compulsion" may be raised if the foreign government's law has in some way coerced the other participants into violating American antitrust laws, and provides no lawful means

44. Section 1 of the Sherman Act specifies that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states ... is declared to be illegal." 15 U.S.C. § 1 (1976).

45. *See Hydrolevel*, 456 U.S. at 576.

46. *See* Sea-Land Serv., Inc. v. Alaska R.R., 659 F.2d 243, 244 (D.C. Cir. 1981). *But see* Comment, *The Federal Government's Antitrust Immunity—Trade As I Say, Not As I Do:* Sea-Land Service, Inc. v. Alaska Railroad, 56 ST. JOHN'S L. REV. 515, 529 (1982), suggesting that "the legislative purpose, context and history of the Sherman Act demonstrate that the United States is within the reach of the antitrust laws."

47. *See* Comment, *supra* note 46, at 517.

48. Defense Production Act of 1950, 50 U.S.C. app. § 2158 (1982).

49. Union Carbide & Carbon Corp. v. Nisley, 300 F.2d 561, 577 (10th Cir. 1961), *cert. denied*, 371 U.S. 801 (1961).

50. 15 U.S.C. § 12-27 (1982).

51. *See* California v. Federal Power Comm'n, 369 U.S. 482 (1962).

of compliance.[52] The act of state doctrine[53] may also provide a defense. According to that doctrine, an exercise of sovereign power by a foreign state or its authorized agent on its own territory cannot be questioned in an American court. Thus, there could be no inquiry into the legality of participants' acts undertaken pursuant to the mandate of a foreign government participant if the enterprise were operating on the foreign government's territory.

III. The Utility of the Enterprise

The joint enterprise is superior in significant ways to each of the three alternative forms of government involvement in business described in the first part of this article.[54] The joint enterprise may be better able than a public corporation to stimulate the private sector. It also is more consistent with American free enterprise ideology, in that it relies on the premise that healthy growth in the private sector is optimal. The enterprise also avoids pitfalls inherent in an enormous regulatory system. That system suffers because regulated industries typically come to unduly influence or control their government watchdogs. Further, maintenance of a regulatory bureaucracy, regardless of whether it is effective, requires an inordinate public expenditure to achieve a given result. The enterprise reflects the notion that a participant can acquire information about, understand, and control an industry more effectively than an observer. The government can itself accomplish what it seeks to have done, rather than use its resources merely to compel another party to do so. The joint enterprise also reflects the notion that "welfare" for industry in the form of direct subsidies to encourage development is less acceptable than actual participation in development. The enterprise results from a bargained exchange of resources between the private and the public sectors through which the fruits of the government's contribution will in part return directly to the public sector with the growth of the venture.

The enterprise can only succeed, however, if it benefits all participants. From the vantage point of industry, the enterprise is attractive for the very reasons joint ventures are formed.[55] Collaboration spreads the risks of development. Greater efficiency is derived from the commingling of expertise, manpower, and facilities. Each participant can contribute in its area of strength, reducing the need for improvisation and the use of inferior methods. Sharing resources also reduces individual costs. The resultant savings and pooling of funds permit additional

52. *See* Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287, 1293 (3rd Cir. 1979).

53. The act of state doctrine holds that "[t]he courts of one country will not sit in judgment on the acts of the government of another done within its own territory." Underhill v. Hernandez, 168 U.S. 250, 252 (1897). In International Ass'n of Machinists & Aerospace Workers v. OPEC, 477 F. Supp. 553 (C.D. Cal. 1979), *aff'd*, 649 F.2d 1354 (9th Cir. 1981), American plaintiffs sued under the antitrust laws for injuries suffered in the United States as a result of OPEC cartel activities outside the United States. The 9th Circuit found OPEC's activities to have been governmental in nature and therefore immune from suit under the act of state doctrine.

54. *See supra* text accompanying note 18.

55. *See* Pfeffer & Nowak, *Patterns of Joint Venture Activity: Implications for Antitrust Policy*, 21 ANTITRUST BULL. 315 (1976).

capital formation. This in turn makes possible projects too costly for industry or any other sector to undertake alone.

Similar benefits accrue to government and academia. Universities, for example, receive increased funding for basic research. Unlike a typical government research grant, the tripartite enterprise affords the university an opportunity, through the university's involvement in management, to influence the choice of areas of study. Additionally, the university's involvement in management provides it with some control over the application of its research efforts, and ensures that it will not be deprived of benefits arising from commercial development and technology transfer.

In conclusion, the joint enterprise model has significant advantages both for society and for the participating parties. The enterprise can also contribute to United States foreign policy and international cooperation. The participants in a joint enterprise could include foreign governments, businesses, and educational institutions. Economic development is often hindered by ideological conflicts and the inability of different political and economic systems to cooperate. The joint enterprise can provide a flexible means for such systems to cooperate on mutually advantageous tasks.

The enterprise model is well suited to an era of global interdependence. Some American industries have already demonstrated greater interest in joint ventures and willingness to experiment with international collaboration.[56] Foreign governments have also recognized the potential for increased development through joint venture arrangements, and have enacted legislation to permit participation from abroad in venture projects.[57] So, too, the world community has provided a model of joint ownership and control in the administration of seabed resources.[58] The joint enterprise outlined here could help meet a growing need for new forms of business collaboration that stimulate industrial development and social progress.

56. *See* Coorsh, *Who Do You (Anti)Trust?* CONSUMERS RESEARCH, Feb. 1984, at 67 (Toyota-GM deal); *Green Light,* TIME, Jan. 2, 1984, at 123 (GM-Toyota venture).

57. For example, Yugoslavia, Romania, Hungary, and the People's Republic of China have enacted such legislation. *See generally* Note, *The Legal Framework for American Direct Investment in Eastern Europe: Romania, Hungary, and Yugoslavia,* 7 CORNELL INT'L L.J. 187, 191 (1974); Jaslow, *Practical Considerations in Drafting a Joint Venture Agreement with China,* 31 AM. J. COMP. L. 209 (1983).

58. The Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, U.N. Doc. A/CONF. 62/122, establishes an International Seabed Authority, possessing the power to issue exclusive mining rights. Review of the LOS provision and comment on the role of joint venture activity in seabed mining can be found in Bailey, *The Future of the Exploitation of the Resources of the Deep Seabed and Subsoil,* 46 LAW & CONTEMP. PROB. 71 (1983).