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Attacking the Trade Deficit

Dennis Unkovic*

In the United States (U.S.), policy planning for industrial development is not new. The federal government currently formulates and implements policies designed to foster the growth of the industrial sector. The current debate should not focus on the merits of a comprehensive national industrial policy over federal non-involvement, rather it should address the degree to which the federal government should become involved in specific areas affecting industrial development. This article will analyze the appropriate role for the federal government in its efforts to eliminate the current U.S. balance of trade deficit.

The U.S. suffered a shocking trade imbalance in 1983. Unfortunately, 1984 was much worse, and most experts agree that the deficit will continue to deepen in the foreseeable future. This problem demands attention because it affects the overall health of the U.S. economy. Increasing pressure for a definitive federal response is emerging from Congress, injured sectors of U.S. industry, organized labor, and Wall Street. Although representatives of these groups span the political spectrum, few oppose action at the federal level. Partisan politics will not result in a genuine long-term solution to the trade imbalance. The reasoned attention of all policy makers is required.

The U.S. must decide if a comprehensive national industrial policy focusing


2. The 1983 U.S. trade deficit was $57.6 billion based upon F.A.S. exports of $200.5 billion and imports of $258 billion if valued on a customs basis (international freight, costs, and insurance excluded). If imports are viewed from a C.I.F. basis, the deficit increases to $69.4 billion. U.S. TRADE Outlook, BUS. AM., Feb. 20, 1984, at 2-5.

3. U.S. Commerce Secretary Malcolm Baldridge expects the deficit to climb to over $130 billion in 1984. The deficit figure for October 1984 was $8.9. 1 INT’L TRADE REP. (BNA) No. 23, at 728-29 (Dec. 12, 1984).


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exclusively on pre-selected industries will counteract the mounting U.S. trade deficit or if a less centralized response is more likely to be successful. A limited federal response directed at all manufacturing and service sectors would help ameliorate this complex problem. This article reviews traditional governmental responses to the trade deficit and then analyzes the Export Trading Company Act of 1982, a concrete example of the type of limited federal approach suggested above.

I. TRADITIONAL GOVERNMENTAL RESPONSES TO THE U.S. TRADE DEFICIT

A trade deficit exists when a nation imports more goods and services than it exports. A continuing trade deficit adversely affects any government's financial structure and the underlying health of its industrial sectors. A government facing a trade deficit must simultaneously pursue two courses of action. On the one hand, it must decide if, and to what degree, it will erect artificial barriers to foreign competition in order to minimize import injury to domestic industries. On the other, it must find a way to increase domestic exports.

A. Import Restraints

In response to constituent pressure, Congress has created several types of legislative barriers to imports. Its most recent initiatives, contained in the Trade and Tariff Act of 1984, were enacted into law on October 30, 1984. Most of these barriers are applicable only to so-called "unfair" imports. The statutes themselves define "unfair." If imports do not meet these criteria, they may still be barred by the escape clause of the Trade Act of 1974. "Unfair" imports are subject to several legislative sanctions.

Section 731 of the Trade Agreements Act of 1979, the antidumping provision, makes it illegal for a foreign manufacturer to sell its products in the U.S. market at less than their fair value in the home country. This statute establishes a


procedure to guarantee that the price of a good sold in the U.S. equals the price charged in the manufacturer's home market. The basic factual issues to be resolved in section 731 cases are whether the imported goods are being dumped on the U.S. market at below home market selling prices and whether U.S. manufacturers have consequently suffered injury. The U.S. steel industry has frequently sought protection from foreign competitors under the 1979 antidumping provision. Amendments contained in Title VI of the 1984 Act will make it easier to prove the allegations necessary to obtain protection. The new act also streamlines procedural hearing requirements and makes it easier for small companies to bring antidumping suits.10

Imports can also be challenged when a foreign country directly or indirectly subsidizes the production or exportation of products. To counteract these subsidies, section 701 of the Tariff Act of 1930 authorizes the U.S. government to impose a countervailing duty on imported goods.11 The countervailing duty adds a premium equal to the amount of the actual subsidy in the country of origin, thus eliminating foreign producers' advantage over U.S. producers. The 1984 Trade Act eases requirements for the application of countervailing duties. It allows the U.S. Government to adjust the price of the foreign import where "upstream" subsidies have been bestowed on the producer by a foreign government.12

Other solutions to "unfair" import competition are contained in section 337 of the Tariff Act of 1930.13 These statutes are designed to prevent unfair methods of foreign competition that might lead to destruction of, or substantial injury to, an efficient U.S. industry. Additionally, the President has the power, under section 301 of the Trade Act of 1974, to retaliate against foreign practices which are found to be "unjustifiable, discriminatory, or which unreasonably restrain U.S. commerce."14 Through development of a reciprocity theory, Title III of the 1984 Act clarifies and strengthens this power.15 Other unfair import laws afford relief where a communist country disrupts the U.S. market16 or where the national security of the United States is threatened by specific unfair activities.17

Statutory authority also exists to halt the import of goods which are harmful to the economy, although they may not be defined as legally "unfair." Under section 201 of the Trade Act of 1974, the Escape Clause, domestic producers may petition the International Trade Commission for temporary relief from imports.18 The theory behind section 201 actions is that certain domestic industries need a reasonable time to adjust to unexpectedly strong foreign competition. Fair import provisions can buy a short space of breathing room for American producers.

Despite the 1984 Trade and Tariff Act's apparent bias toward freer application of import restraints, there are continuing difficulties with the mechanisms de-

signed to block or delay fair and unfair imports. First, the necessary fact-finding procedures take a significant amount of time. Whether undertaken by the International Trade Commission, the Department of Commerce, the Department of the Treasury, the U.S. Trade Representative, or the White House, there are always delays between the filing of the petition and governmental response. Second, legal and administrative costs discourage all but the most severely affected or well-organized domestic industry groups. Finally, the direct involvement of the White House, required by many of these procedures, means that political considerations inevitably affect their outcome. As a result, the protective import statutes at best tend to maintain the status quo or temporarily roll back imports. They do little to correct the overall trade problem, since they affect only a narrow range of imports and do nothing to encourage exports.

B. Export Development

In addition to administering statutory import restraints, the government participates in activities designed to increase exports. The International Trade Administration of the U.S. Department of Commerce (ITA) encourages U.S. companies to participate in trade shows and trade fairs outside the U.S. to showcase U.S. products and services for foreign buyers. The ITA employs country specialists who are knowledgeable about geographic regions and product areas. These specialists provide advice to U.S. exporters without charge.\(^1\)

The U.S. and Foreign Commercial Service, now part of the U.S. Department of Commerce, provides the ITA with an international resource network. Foreign Commercial Officers with private business backgrounds are stationed in U.S. embassies and consular offices worldwide. They provide on-the-spot advice to U.S. businessmen overseas and answer commercial inquiries generated by the 47 ITA offices in cities throughout the United States.

The Commerce Department is not the only governmentally-financed export advisor. Other parts of the federal government provide specialized help for exporters. For example, the U.S. Department of Agriculture maintains extensive programs to assist U.S. agricultural producers in exporting.

The need for adequate financing of export-related transactions is a universal problem. The Export-Import Bank of the United States is the major vehicle for the quasi-governmental financing of and credit guarantees for U.S. exporters of goods and services. Until recently, the bulk of the loan guarantees provided by the Export-Import Bank went to large infrastructure projects and major industry groups such as the U.S. airframe companies. Congressional and self-imposed restrictions on the scope of the Export-Import Bank’s authority made it difficult for the Export-Import Bank to provide financing packages that were competitive with those offered by its counterparts in other countries. However, during the last 18 months the Export-Import Bank has begun to shift its attention away from big transactions, choosing instead to emphasize aid to medium and smaller-sized exporters.

The Agency for International Development (AID) is another example of a governmental attempt to help U.S. exporters. In the guise of foreign assistance, AID projects can be useful to U.S. exporters. By offering foreign governments financial aid which is tied to the purchase of U.S. goods and services, AID generates U.S. exports.

Although the Export-Import Bank and AID help to finance export-related transactions, the major responsibility for encouraging U.S. exports has devolved on the ITA. In the past, most federal efforts have gone to protecting specific domestic industries.

In a free society, governmental activities can only cut back historically high levels of imports to a limited degree. Therefore, the government must find ways to increase the quantity of exports so as to offset imports. This is a difficult task because the vast majority of exports come from very few companies. The size, growth patterns, and resources of the U.S. domestic economy placed U.S. companies in an enviable position for 40 years. Traditionally, most U.S. companies could satisfy their growth needs through the domestic market; they did not need to look to export markets. Even today, less than one in ten U.S. companies export goods and services. Those that do are large multinational entities accustomed to importing and exporting. They are the companies that benefit from existing government programs designed to encourage exports.

The concentration of export activity among large U.S. multinationals is illustrated by a survey showing that less than one percent of the U.S. manufacturers who export account for more than 80 percent of U.S. manufactured exports. The only conclusion possible is that most small and medium-sized companies do not export at all. If the trade equation is to be balanced, they must be encouraged to enter into significant export activities.

Countries such as Japan, the Republic of Korea (South Korea), and the United Kingdom have never been able to rely on their domestic markets and resources. Trade for them is a matter of economic survival, not convenience. The U.S. trade deficit is reality manifesting itself in an outmoded American perception of the world. While in 1960 only 25 percent of U.S. goods were subject to foreign competition, the figure is now 75 percent. Increasingly pervasive foreign competition makes it all the more imperative that the U.S. increase exports to lower its trade deficit.

II. ATTACKING THE TRADE DEFICIT—THE TWO OPTIONS

If exports are to be increased by the entrance of new companies into international trade, the U.S. must adopt a new approach to the trade deficit which either

21. Id.
22. A Commerce Department study revealed approximately 20,000 medium-sized producers that do not presently produce products that would be competitive in world markets. H.R. REP. NO. 629, 97th Cong., 2d Sess. 8 (1982).
bolsters or supplants existing programs and eliminates existing disincentives. There are two alternatives.

A. A National Industrial Policy: Aid for Select Industries

Congress has the power to enact legislation establishing a national industrial policy. This approach would place the federal government in the role of the private entrepreneur. The government would select for export assistance those industries it believed capable of world market competitiveness. Special tax incentives, direct and indirect governmental financial assistance, and preferential treatment would be given to encourage those industries chosen to undertake and maintain an aggressive export posture.

The Japanese experience exemplifies this approach. Over the last 25 years, the Japanese have targeted key industrial sectors including automobiles, steel, and, most recently, new generation electronics technology. The positive results achieved by a number of Japanese companies have led some U.S. policy makers to decide that the U.S. should implement its own version of a national industrial policy.

There are at least three serious problems in attempting to adopt for the United States the structured, governmentally-controlled national industrial policy approach of other countries. First, the symbiotic relationship between the government, financial institutions, private industry, and labor which exists in a country like Japan is unlikely to be matched in the United States. Unfortunately, that type of cooperation simply cannot be legislated into existence.

Second, the highly politicized U.S. system is unlikely to tolerate government selection of certain industries for special assistance. It is hard to imagine the steel industry readily accepting that the aluminum industry has been chosen for special tax treatment and export incentives.

Third, the risks involved in guessing about the future by selecting a few industries for assistance are too great. A wrong choice could have disastrous consequences. Who in 1972 could have accurately foreseen the unbelievable rise in the price of crude oil and the dislocating worldwide consequences? Which government planner in 1973 could have accurately forecast that the Apple Computer Company was right about the sudden growth of the micro-computer? For these reasons, the national industrial policy alternative described above cannot succeed in the United States.

24. One major disincentive for businessmen has been the possible application of U.S. antitrust laws to U.S. companies that join together for collective exporting activities. Fear of involvement in antitrust litigation initiated by the U.S. Department of Justice or their competitors has kept many away from exporting. Whether or not this perception of the antitrust spectre is realistic, the reluctance to form joint export groups is a fact of life in the U.S. The Foreign Corrupt Practices Act of 1977, 15 U.S.C. §§ 78a note, 78m, 78dd-2, 78f, and the Export Administration Act of 1979, Pub. L. No. 96-72, 93 Stat. 503 (codified in scattered sections of 7, 22, 26, 42 & 50 App. U.S.C.), which deal with foreign boycott requests, have also discouraged small and medium-sized companies from trying to export their products and services. The Internal Revenue Code cannot be overlooked, as its system of taxation for foreign transactions can be particularly unfriendly to the uninitiated exporter.
B. *The Export Trading Company Act of 1982: Export Stimulus for American Industry Generally*

There is another way to attack the problem. The federal government could turn its efforts to increasing both the quantity and range of goods and services exported by the U.S. In doing so it should not target just a few key export sectors as it is unwise, for the reasons discussed previously, to place inordinate emphasis on one or more sectors to the exclusion of others. Rather, it should create a federal program spearheaded by legislative provisions encouraging small and medium-sized companies to export and fostering more aggressive activities by current exporters. Participation should be left to the industries themselves, not dictated by centralized government planning. Flexibility is key to this effort. At the same time, the government should deemphasize trade laws designed to protect U.S. industries which cannot be competitive in international markets in the long run.

Congress took a key first step toward developing an atmosphere conducive to exports with the passage of the Export Trading Company Act of 1982.\(^{25}\) It is an excellent example of specifically-tailored legislation granting flexible options to all U.S. industries. The Export Trading Company Act demonstrates that a workable framework for encouraging export activity is possible without centralized governmental planning. This type of law, as opposed to a comprehensive national industrial policy targeting only certain industries, holds promise as a valuable tool for dealing with our trade deficit problem.

1. *History of the Export Trading Company Act of 1982*

Seventy years ago, the Federal Trade Commission (FTC) undertook an extensive study in response to complaints from U.S. companies that wanted to increase their export sales.\(^{26}\) The Commission found that U.S. exporters focused their complaints on two major barriers—the risk of antitrust prosecutions of U.S. companies acting collectively overseas and the lack of adequate financing for export transactions.

The Webb-Pomerene Act of 1918 was a partial congressional response.\(^{27}\) The Act gave limited antitrust immunity to groups of U.S. exporters collectively selling products, not services, overseas.\(^{28}\) However, of the 250 diverse Webb-Pomerene Associations formed during the past sixty years, fewer than forty are still in operation. Most are product-driven export associations that do not promote exports generally.\(^{29}\) In 1970, the FTC completed a retrospective analysis of the effectiveness of Webb-Pomerene Associations.\(^{30}\) The FTC report concluded that since fewer than two percent of U.S. exports were handled by existing Webb-Pomerene Associations, the Webb-Pomerene approach was an inadequate solution to the antitrust uncertainties that Congress had attempted to address.

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As the trade deficit became a persistent phenomenon in the 1970s, Congress again tried to determine why U.S. businesses believed they were unable to compete in foreign markets. Ironically, they found that obstacles for businesses were identical in 1979 and in 1916. The uneven and unpredictable application of U.S. antitrust laws to international operations and the inadequacy of tax incentives and financing aimed at exploiting foreign markets inhibited the export of goods by U.S. companies during both periods.

Congress first attempted to address the issue in 1979. Senator Adlai Stevenson introduced legislation to encourage the formation of U.S.-based export trading companies. His bill contained provisions offering tax, financing, antitrust, and banking incentives, with broad application to U.S. exporters. Although passed by the United States Senate, the legislation died in the House of Representatives in 1980. In 1981, Senator John Heinz of Pennsylvania introduced his own legislative package to encourage U.S. exporting. The Heinz legislation passed the Senate in March, 1981, with bipartisan support. In 1982 the House of Representatives approved its own version. With portions of the House and Senate versions, the Export Trading Company Act of 1982 emerged from the Conference Committee and was signed by President Reagan on October 8, 1982.

The title of the Export Trading Company Act of 1982 (ETCA) is somewhat misleading. ETCA applies only in part to the organization and operation of export trading companies. Only Title II of ETCA applies specifically to export trading companies and banks. It permits qualified U.S. banking entities to become equity partners in export trading companies and to provide new services to exporters. The other provisions of Title II and Titles I, III, and IV of ETCA benefit all U.S. exporters, not just trading companies. Titles III and IV, addressing specific antitrust concerns, offer benefits to most U.S. exporters.

While ETCA is no panacea for all the problems faced by U.S. exporters, the law does create significant new opportunities which can help reduce the current U.S. trade deficit. The following analysis highlights how the flexibility offered

32. S. 144, 97th Cong., 1st Sess. (1981), was known as the Export Trading Act of 1981. After being introduced, changes were made to S. 144 and it passed the Senate as S. 734, 97th Cong., 1st Sess. (1981).
33. ETCA, supra note 6.
34. Trading companies are as old as commerce. The first trading companies were camel caravans. As the sailing ship emerged in the 16th and 17th centuries, the great trading organizations like the East India Trading Company were born. The best known trading companies today are Japanese, Korean, Dutch and British. The largest market-driven Japanese companies are called Soga Shosha. By definition, the trading company is an intermediary between buyer and seller. It can supply any or all of the following services: initial market research, marketing assistance, financing, transportation, insurance, communications, service outlets, and documentation. True trading companies will also on occasion take title to the goods and relieve the seller of any risk. One of the purposes of ETCA was to encourage the formation of U.S. based trading companies to help U.S. companies, particularly small and medium-sized ones, to export. See Unkovic & LaMont, The Export Trading Company Act of 1982: Invitation to Aggressive Export Expansion, 87 DICK. L. REV. 205 (1983).
by this law differs from traditional U.S. government policy and argues against a centralized planning approach embodied in a national industrial policy.

2. Title I of the Export Trading Company Act of 1982

Extensive hearings convinced Congress that the U.S. trade picture could be helped if U.S. companies began to establish trading companies similar to those that the Japanese, Koreans, Dutch, and British have had for years. Export trading companies can serve as efficient export mechanisms, particularly for small to medium-sized companies which are too small individually to support a full scale export-import operation.

Despite the name of the Act, congressional purpose, as expressed in Title I, is far broader than promotion of U.S.-based export trading companies. Title I contains a congressional mandate requiring United States companies to re-assert themselves in the international market. Significantly, it encourages the export of services as well as goods.

Title I of ETCA establishes the Office of Export Trading Company Affairs within the U.S. Department of Commerce. The Office is responsible for administering the “certification” of antitrust-related export activities of individual U.S. companies, groups of companies, and U.S. export trading groups, as authorized under Title III of ETCA. It also acts as a clearinghouse for U.S. companies seeking existing trading companies to export their goods and services or companies interested in joint export arrangements. The Office has already implemented a formalized Contact Facilitation Program using a computerized data bank program to bring together manufacturers and firms providing export services by product line and geographic area.

The congressional intent to encourage exports rather than restrict imports is new, as is the concept of encouraging all potential exporters rather than a designated few. Congress implements this philosophy in Titles II, III and IV.

3. Title II of the Bank Export Services Act of 1982

U.S. exporters have always complained of inadequate sources of private and government financing to underwrite broad-based exporting efforts. U.S. banks historically have been more reluctant to extend credit for export-related transactions than have foreign financial institutions. In part this was due to the fact that U.S. banking laws and practices dictated that banks cover their risks solely by the “spread” on the funds lent. Prior to the passage of ETCA, U.S. banks and their holding companies were prohibited from owning an equity position in trading groups. As a result, they were unwilling to consider innovative financing packages and higher risks because of the limited nature of possible returns.

40. Registration for the program is free. By completing Form ITA-721(7-82), any company or individual can become a part of the data base. Forms are available from the Office of ETC Affairs of the International Trade Administration, U.S. Department of Commerce or from ITA offices located in 47 cities in the United States. Search requests are run on the basis of the type of service provided or sought, geographic location, foreign market interest, and the Standard Industrial Classification (SIC) codes for each product requested.
Title II of ETCA, the Bank Export Services Act of 1982, represents a significant departure from traditional U.S. banking policy. After reviewing the direct involvement of many foreign banks in export-related activities, Congress decided that U.S. banks, with some limitations, should be allowed to take part in the action. In defined circumstances, qualified U.S. financial institutions may now make equity investments in export trading companies, export joint ventures, or their own export-related operations. This opens up a new area of potential business for qualified financial institutions and will hopefully encourage potential U.S. exporters.

The importance of the new ability of U.S. banking entities to invest in trading companies and export-related activities is just beginning to be appreciated. As of September 19, 1984, twenty-nine applications filed with the Federal Reserve had been approved. The applications range from some of the largest U.S. banks, such as Bank of America and Citicorp, to strong regional banking institutions, such as Fleet National Bank of Rhode Island, to a consortium of three small banks in New Jersey. Foreign banks doing business in the U.S. will also take advantage of this opportunity. One foreign bank has already filed with the Federal Reserve and others with representative offices in the United States are investigating the possibility of setting up investment relationships under ETCA.

Section 206 of Title II mandates that the Export-Import Bank designate specific credits for small and medium-sized U.S. exporters. This program is

42. ETCA allows bank holding companies, Edge Act corporations, agreement corporations and bankers' banks to make this type of investment.
43. 12 U.S.C. § 1843(c) (1982). The amount of any qualified investment by a bank holding company, banker's bank, agreement corporation, or Edge Act corporation (which is a subsidiary of a bank holding company), is limited to five percent of its consolidated and capital surplus. An Edge Act corporation that is not engaged in banking activities is limited to 25 percent of its consolidated capital and surplus. To assure that banks will impartially issue credit to their own related export entities, ETCA limits loans to ten percent of the bank holding company's consolidated capital and the surplus. A bank-affiliated export entity may also not receive credit on terms which would be considered more favorable than those offered to borrowers in similar circumstances.

The Federal Reserve Board, during hearings on ETCA legislation was highly critical of the proposal permitting bank equity investment in this area. As a result, Congress, wishing to encourage bank investment in trading companies, limited the Federal Reserve Board to a 60-day period following filing of an application, to disapprove a proposed investment. If the Federal Reserve Board does not act within 60 days, the applicant is free to proceed with the investment. In addition, the discretion of the Federal Reserve in issuing disapprovals was statutorily limited by three narrow criteria. The Federal Reserve Board, after passage of ETCA, issued regulations limiting the flexibility of the banks as to collateralization of loans. This act has been criticized by members of the banking community. As of October 1984, the Federal Reserve Board had not disapproved any application by a qualified financial institution for an export-related investment.

44. The foreign bank is Rabobank Nederland, a branch of Cooperative Centrale Raijjeisen Boeren Leenbank B.A. of the Netherlands.
46. The Export-Import Bank has a number of programs available for various-sized businesses: the ETCA Guarantee Program, Small Manufacturers Discount Loan Program, Medium Term Export Sales Loans, Export Credit Insurance Program in Cooperation with the Foreign Credit Insurance Association, and the Commercial Bank Guarantee Program.
available regardless of whether the U.S. exporter is a trading company. Additionally, the Small Business Administration has initiated its own program for small businesses with lines of credit of up to $500,000.\(^{47}\)

Section 207 of Title II amends the Federal Banker's Acceptance Law.\(^{48}\) U.S. banks now face fewer limits on their ability to issue banker's acceptances, a low risk form of export financing that is particularly beneficial to small and medium-sized exporters. Hopefully, all of the provisions of Title II will result in greater sources of financing for small, medium, and large U.S. exporters.

### 4. Titles III and IV of the Export Trading Company Act of 1982

At the turn of the century, major U.S. antitrust statutes were passed to prevent monopolization, price-fixing, and other conduct considered harmful to a free market system. The underlying legislative intent was to protect the consumer from practices against which he could not protect himself. Since then, U.S. exporters have worried that U.S. antitrust statutes might be enforced against them even though their activities were carried out solely in the international markets. This was of particular concern to U.S. companies competing in the domestic market and desiring to join forces solely for collective export-related activities.

Given the inconsistent stress placed on antitrust enforcement over the last sixty years, the fears of U.S. exporters are understandable.\(^{49}\) While some legal scholars suggest that the U.S. antitrust laws, particularly the Sherman Act, should reach any and all restrictive conduct by U.S. firms outside the United States, other scholars reject this position.\(^{50}\) In 1977, the Antitrust Division of the United States Department of Justice attempted to clarify its own inconsistent pronouncements by issuing the Antitrust Guide for International Operations.\(^{51}\) The Guide affirmed the Department of Justice's position that the Sherman Act does not give U.S. courts jurisdiction over challenges to restrictive conduct of U.S. companies occurring entirely outside of the United States if that conduct does not affect either U.S. consumers or U.S. exporters. Unfortunately, federal judges and juries have not always given the law the interpretation that the Guide suggests.

Titles III and IV of ETCA are two totally distinct legislative attempts to deal with the antitrust concerns of U.S. exporters. Title IV, known as the Foreign Trade Antitrust Improvements Act of 1982,\(^{52}\) had its roots in a bill introduced in the House of Representatives by Congressman Peter Rodino. Congressman Rodino believed that the concerns of U.S. exporters regarding the application of U.S. antitrust laws could be solved by amending certain antitrust statutes to state

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47. The Small Business Administration Export Revolving Line of Credit Program.
49. The Webb-Pomerene Act of 1918, 15 U.S.C. §§ 61-65 (1982), offering only a defense in litigation, is no comfort to exporters and may be considered a failure. The paucity of active Webb-Pomerene Associations is proof of this.
specifically when they applied to international conduct. Section 402 of ETCA adds a new section to the Sherman Act:

This Act shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless

(1) such conduct has a direct, substantial, and reasonably foreseeable effect
   (A) on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; or
   (B) on export trade or export commerce with foreign nations or a person engaged in such trade or commerce in the United States; and

(2) such effect gives rise to a claim under the provisions of this Act, other than this section.

If this Act applies to such conduct only because of the operation of paragraph (1)(B), then this Act shall apply to such conduct only for injury to export business in the United States.

The Sherman Act now contains an objective test to determine permissible international conduct. A similar amendment to section 5(a) of the Federal Trade Commission Act is contained in Title IV. This amendment deals with unfair methods of competition, but apparently does not limit the Federal Trade Commission’s consumer protection jurisdiction which falls within the “unfair . . . acts or practices . . . affecting commerce.” A similar attempt to amend section 7 of the Clayton Act was defeated in conference before ETCA became law. This is unfortunate given the growing importance of joint ventures in the international arena and the potential applicability of section 7. Therefore, while Title IV has helped clarify the scope of U.S. antitrust laws affecting exporters, it is still not a safe harbor. This increases the importance of the protections available under Title III that are independent of Title IV.

Title III of ETCA took a different and more helpful direction. Originating in legislation sponsored by Senator Heinz, Title III sets up a procedure whereby a U.S. citizen, a U.S. company, a trade association, or a group of U.S. companies may request a Certificate of Review—essentially a written guarantee or insurance policy from the United States government affirming that the certified export-related activities will not be subject to the threat of criminal or private treble-damage antitrust lawsuits. A Certificate of Review is only issued by the Secretary of Commerce with the concurrence of the U.S. Attorney General. The Secretary of Commerce and the Attorney General apply four standards of review to export activities to decide whether the conduct is certifiable. ETCA provides that an application must either be approved or denied within 90 days after it is submitted. To date, the application process has moved smoothly and stayed within the 90 day statutory limit.

56. See supra note 35.
The first Certificate of Review was granted on October 25, 1983. Some Certificates of Review have allowed U.S. companies to legally engage in export-related activities that would normally trigger Justice Department or Federal Trade Commission sanctions if carried out in the United States. Early applications have already dealt with complex issues such as exchanging trade and price information, establishing uniform prices among horizontal competitors, allocating international markets among competitors, and exchanging information in connection with bidding international projects.

The possibility of obtaining a Certificate of Review immunizing export activities from antitrust laws is a significant opportunity for U.S. exporters. In addition to limiting antitrust fears, a Certificate of Review encourages the sharing of risks and costs of exporting by like-minded companies. All U.S. companies and trade associations would be well-advised to examine the protection offered by certification.

III. Conclusion

In the 1980s, the United States remains the world's single largest market for goods and services. Aside from the exceptions carved out by trade laws, entry into the U.S. market for many foreign imports is relatively unrestricted. On the export side, too few companies account for too large a percentage of U.S. exports. The spiraling federal budget deficit and a strong U.S. dollar are only partly to blame. An increase in the broadest possible range of U.S. exports of goods and services appears to offer the best hope for victory in the trade deficit battle.

Those who advocate the implementation of a national industrial policy that selects a few key industrial sectors for major attention play a dangerous game. Accurate predictions of worldwide industrial and service demands in the next century are difficult, if not impossible, to make. A wrong guess could be catastrophic. For this reason, a centralized export-targeting process must be avoided. Small and medium-sized companies have to be led, enticed, and coerced into exporting to overseas markets. The Export Trading Company Act is an example of narrowly tailored legislation designed to provide incentives to all potential exporters. It attempts to remove the two major roadblocks to U.S. exports—unavailability of financial resources for exporters and the spectre of U.S. antitrust laws. Nevertheless, additional federal initiatives are needed to strengthen ETCA and to deal with problems ETCA does not address. At a minimum, four proposals deserve immediate evaluation by Congress:

1) Title IV of ETCA, which is currently deficient in two aspects, should be amended. First, section 7 of the Clayton Act should be amended so that interna-

60. The first recipient was International Marketing & Procurement Services, Inc., a Pennsylvania corporation in the sports leisure business selling U.S. products in Saudi Arabia and other areas of the Middle East.

tional joint ventures involving U.S. companies will be freer to operate. Second, Title IV should specifically exclude the possibility of the Federal Trade Commission asserting its consumer protection jurisdiction to challenge extraterritorial activities of U.S. companies.

(2) Title III of ETCA, which now authorizes the issuance of antitrust Certificates of Review for U.S. exporters, should be liberalized. Congress should eliminate all civil liability as long as one holding a certificate acts within the four corners of that certificate. Title III should also make it clear that its immunities protect all employees, directors, officers, agents and shareholders of the Applicant. Currently, the U.S. Government does not extend Certificate of Review exemption to unnamed agents and export intermediaries of a certificate holder. This runs counter to congressional purpose. In short, the broader the scope of protection offered by a Certificate of Review, the greater the incentive for U.S. companies to seek certification under Title III.

(3) Title II of ETCA should also be liberalized. The present statutory level of permissible investment (five percent) and lending limits (ten percent) for bank holding companies ought to be eliminated. Congress at the same time should direct the Federal Reserve to rethink its strict collateral requirements regulating bank-affiliated trading operations. While some regulatory oversight by the Federal Reserve is appropriate, too great a federal role is a major disincentive to many U.S. banks who might otherwise venture into this area. The greater involvement of regional and small financial institutions is truly needed, not just the involvement of large money center banks.

(4) U.S. tax laws should be amended to encourage exports by U.S. companies, particularly the smaller to medium-sized ones. Until recently, a tax deferral was available to U.S. exporters through the Domestic International Sales Corporation (DISC). The Deficit Reduction Act of 1984 replaced the DISC with the Foreign Sales Corporation (FSC). Unfortunately for U.S. companies wishing to export, the benefits available under FSC are less than those originally available under DISC. Meaningful tax incentives are necessary as a true incentive to produce greater numbers and types of U.S. exporters. Congress must revisit the entire issue of tax benefits for exporters.

U.S. companies must want to export. To make this happen, businessmen and politicians must understand that the trade deficit is a serious, non-partisan problem and that the long-term economic viability of the U.S. economy is dependent on increased export of a wide variety of products and services. Genuine cooperation between the White House, Congress, business, labor, and consumers is a prerequisite. This can only be accomplished through leadership and not politics. The Export Trading Company Act is an important step in that direction.

62. This amendment was proposed in the Rodino bill, H.R. 5235, 97th Cong., 2d Sess. § 3 (1982). The language which was to be added reads: "This section shall not apply to the formation or operation of any joint venture limited to commerce other than import commerce with foreign nations." Id.