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The Impact of United States Antitrust Law on the Balance of Trade

David N. Goldsweig

Kenneth D. Enborg

Thomas F. Walton

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David N. Goldsweig, Kenneth D. Enborg,** and Thomas F. Walton****

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I. INTRODUCTION

Although the United States is the world's leading exporter, there is much concern that United States firms are rapidly losing ground to their overseas rivals in increasingly competitive world markets. Indeed, since 1976 the balance of merchandise trade has run against this country by more than $20 billion per year. This contrasts sharply with a previously unbroken string of merchandise trade surpluses between World War II and 1971. Of course, much of the reversal is explained by the surge of oil imports since the OPEC embargo of October 1973. For the first seven months of

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* Attorney, General Motors Corp.; B.A. 1963, Cornell University; J.D. 1966, University of Michigan; LL.M. 1967, University of Chicago; Diploma, 1973, University of Amsterdam, the Netherlands.

** Attorney, General Motors Corp.; B.S. 1970, Wayne State University; M.S. 1973, California State University (Fullerton); J.D. 1977, University of Detroit.

*** Economist, Federal Trade Commission; A.B. 1967, University of Missouri; Ph.D. 1971, University of California at Los Angeles.

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1982, however, the trade deficit was $12 billion[1] despite significant declines in petroleum imports and a major import-reducing United States recession. Undoubtedly, any lack of competitive viability of United States manufacturers vis-à-vis their foreign competition can only partially explain such balance-of-payments problems. Nonetheless, there is cause for concern about the export-promoting and import-fighting potential of United States industry and about the economic well-being and jobs that industry creates for this nation.

These concerns have given rise to assertions that United States antitrust laws and their enforcement have a harmful effect on the export potential of United States firms or otherwise have vitiated the ability of United States industry to compete with foreign-based multinationals. For example, Adlai Stevenson, III, former Senator from Illinois, has said:

> U.S. exporters are tangled in a web of government imposed restrictions and disincentives—[including] antitrust—which their counterparts abroad do not face. U.S. banking regulations and antitrust laws have conspired with the traditional insularity of the U.S. market to prevent the formation of export trading companies, such as those in Japan and Europe. Full-line trading companies, able to handle the front-end costs, risks and complexities of export transactions could be especially important for the United States, linking isolated, small and medium sized producers with global markets.[2]

Others complain that United States firms are handicapped at the *production* stage by the more stringent application of United States antitrust laws to United States manufacturers than is the case with overseas producers in their home countries.[3] According to a former Director of Policy Planning with the Antitrust Division of the United States Department of Justice:

> Even policy makers who are fully aware that outright favoritism would be inconsistent with our international principles are sometimes attracted by the idea that law enforcement officials should 'go easy' on those firms that carry the flag abroad or try to meet

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1. U.S. DEP'T COM., BUS. CONDITIONS DIG., Sept. 1982, at 92.

2. Seminar Report of the seminar conducted by the Japan Society and the International Trade Committee, Section of Antitrust Law, American Bar Association, Feb. 27, 1981, at 14 (remarks of Adlai Stevenson, III) [hereinafter cited as Seminar Report].

3. *See, e.g.*, Davidow, *Antitrust International Policy & Merger Control*, 15 J. INT'L ECON. 527 (1981).

> foreign challenges in our markets. They argue, often with reference to the substantial deficit in the balance of payments that has characterized U.S. trade in the last several years, that either weaker rules or weaker enforcement would facilitate the creation of domestic firms large enough or efficient enough to compete more successfully abroad.[4]

Such concerns were the moving force behind the recently passed Export Trading Company Act of 1982,[5] which provides expanded antitrust exemptions for export trading companies and clarifies the jurisdictional scope of the United States antitrust laws. Upon a showing by a trading company that its export trade activities will not violate the antitrust laws, title III of the Act provides for certification by the Commerce Department, with the concurrence of the Justice Department, of such activities as lawful.[6] Immunity of the certified activities from antitrust liability, however, does not extend to private suits for actual damages under enumerated circumstances. Title IV of the Act provides that the Sherman and Federal Trade Commission Acts will not apply to export trade or commerce with foreign nations unless there is a direct, substantial, and reasonably foreseeable effect on trade and commerce within the United States.[7]

This Article explores the underlying propositions that the United States antitrust agencies have created a barrier to the export of United States industrial goods or have impeded their domestic manufacture with respect to this nation's major trading partners. We conclude that neither proposition is well supported by solid evidence, although improved cooperation among Government and business and a less litigious climate are desirable in this area as well as all other industry-government relations.[8] This Article first considers the impact of antitrust enforcement on the

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4. *Id.* at 527; *see also* Menzies, *U.S. Companies in Unequal Combat*, FORTUNE, Apr. 9, 1979, at 102.

5. Pub. L. No. 97-290. Relevant portions are reprinted at [4 Federal Laws] TRADE REG. REP. (CCH) ¶¶ 25,117, 25,245, 27,000-32; *see* 97 CONG. REC. H8341 (daily ed. Oct. 1, 1982) (The Conference Committee Report on the Export Trading Company Act of 1982) [hereinafter cited as Report].

6. Pub. L. No. 97-290, § 303, [4 Federal Laws] TRADE REG. REP. (CCH) ¶ 27,021.

7. *Id.* § 402, *reprinted at* ¶ 25,117.

8. These conclusions are those of the authors only and do not necessarily represent official policy of either the General Motors Corporation or the Federal Trade Commission.

export or overseas distribution stage of United States domestic producers and then turns to the effect of United States policy on domestic versus overseas production.

II. The Impact of United States Antitrust Policy on United States Export Operations

The case for an adverse effect of the application of United States antitrust laws to export activities of United States producers might involve either private or public litigation. We consider each assertion in turn.

A. Private Litigation Involving Exports

There has been continuing controversy about the extraterritorial reach of United States antitrust laws because federal courts in private actions apply jurisdictional standards which in most cases differ[9] from the enforcement policy of the Justice Department.[10] This potential disparity in jurisdictional standards contributes to the "perception" that the antitrust laws inhibit legitimate export activity.[11]

The major antitrust issue in the export area is whether the United States antitrust laws are intended to protect foreign firms and consumers when the effects of a restraint in United States export trade are felt only in the foreign market. The few private

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9. *Compare* Dominicus Americana Bohio v. Gulf & W. Indus., 473 F. Supp. 680, 687 (S.D.N.Y. 1979) ("It is probably not necessary for the effect on foreign commerce to be both substantial and direct as long as it is not de minimis.") *with* Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287, 1291-92 (3d Cir. 1979). *See generally* Timberline Lumber Co. v. Bank of Am., 549 F.2d 597, 613 (9th Cir. 1976) (establishing balancing tests). Title IV of the Export Trading Company Act of 1982 should help provide uniform antitrust jurisdiction for export transactions. *See supra* note 7 and accompanying text.

10. A standard often used to determine whether a United States court may exercise jurisdiction over an antitrust case is the "effects" test. As a matter of enforcement policy the Justice Department has stated the effects test as being: "When foreign transactions have a substantial and foreseeable effect on United States commerce, they are subject to United States law regardless of where they take place." United States Department of Justice, Antitrust Division, Antitrust Guide for International Operations (rev. ed. 1977) [hereinafter cited as Guide]; *see also* Davidow, *U.S. Antitrust and Doing Business Abroad: Recent Trends and Developments*, 5 N.C.J. Int'l & Com. Reg. 23 (1980).

11. *See* Report, *supra* note 5, at 15; *see also* Atwood, *International Law Issues in the Courts and the Congress*, 50 Antitrust L.J. 257, 266 (1981).

cases highlight this issue. Two lower court decisions focus their attention on maintaining competition in the export of goods[12] and services[13] despite the fact that any injury would fall solely outside the United States. Unfortunately, neither decision was appealed. The Supreme Court's decision in *Pfizer v. Government of India*,[14] holding that foreign governments are "persons" for purposes of section 4 of the Clayton Act,[15] continued the controversy. Despite the broad language in the opinion suggesting that foreign buyers have a legitimate grievance when buying United States price-fixed goods abroad, the holding of *Pfizer* was narrow, and its facts included allegations of a conspiracy affecting both domestic and foreign commerce.

There are indications that the courts are retreating from expansive extraterritorial application of the antitrust laws. Subsequent to *Pfizer*, the Second Circuit in *National Bank of Canada v. Interbank Card Association*[16] clearly stated that anticompetitive effects in foreign markets will not support United States antitrust jurisdiction; an anticompetitive impact on United States commerce is required to support an assertion of jurisdiction. This view accords with the jurisdictional limitations of title IV of the Export Trading Company Act.[17]

The most notable characteristic about private litigation involving exports is its rarity. If private actions were a significant deterrent to United States export activity, one would expect many such cases blunting the creativity of United States producers. Not only are there very few cases, but the few cases are confined to price-fixing and other conspiracies that scarcely can be expected to improve the competitive viability of United States exporters.

B. Government Agency Actions

There may have been, at one time, uncertainty as to the gov-

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12. Todhunter-Mitchell & Co. v. Anheuser-Busch, Inc., 375 F. Supp. 610 (E.D. Pa. 1974), *modified in part*, 383 F. Supp. 586 (E.D. Pa. 1974).

13. Industriana Siciliana Asfalti Bitumi S.p.A. v. Exxon Research & Eng'g Co., 1977-1 Trade Cas. (CCH) ¶ 61,256 (S.D.N.Y. 1977).

14. 434 U.S. 308 (1978).

15. *Id.* at 313.

16. 666 F.2d 6 (2d Cir. 1981). It seems that this Second Circuit opinion would affect the precedential value of *Industriana Siciliana Asfalti Bitumi*, 1977-1 Trade Cas. (CCH) ¶ 61,256.

17. Pub. L. No. 97-290, § 402, [4 Federal Laws] TRADE REG. REP. (CCH) ¶ 25,117.

ernment's antitrust enforcement policy regarding exports, as former Senator Stevenson contends. In recent years, however, this source of possible harm has been mitigated, if not eliminated, by the Department of Justice's *Antitrust Guide for International Operations*.[18] The Guide generally has been well received by antitrust practitioners because it reduces uncertainty in the export area. In addition, for many years the Justice Department's "Business Review Procedure"[19] had been the subject of much criticism because the Department took many months to respond to requests. As a practical matter, this procedure was effectively unavailable as a means of obtaining a statement of the Department's enforcement intentions with respect to export or domestic business transactions. In 1978, however, the Department adopted and publicized[20] a rehabilitated policy of providing export-related business reviews within thirty days of submission of an adequate description of the export transaction. Although many companies are reluctant to disclose their prospective business dealings to an antitrust enforcement agency, requesting a Business Review would be a good way to minimize uncertainty about enforcement risks, if such concerns do inhibit export transactions. Further, a review would prove helpful to antitrust counsel assessing the likelihood of private litigation. After the streamlined Business Review procedure had been in effect for two years, however, only one request had been received.[21] The Justice Department responded favorably by indicating that it would not sue.[22] The low level of such requests makes it extremely difficult to persuasively argue that government enforcement efforts have an adverse effect on United States exports.

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18. GUIDE, *supra* note 10; *see* Fox, *Updating the Antitrust Guide on International Operations — A Greener Light for Export and Investment Abroad*, in this issue at 709.

19. 28 C.F.R. § 50.6 (1981).

20. *See* Testimony of William F. Baxter, Ass't Att'y Gen., *Reagan Administration Seeks Broad Mandate for Special Commission on Export Problems*, ANTITRUST & TRADE REG. REP. (BNA) No. 1043, at A-3, A-3 (Dec. 10, 1981). To publicize this policy change, a joint letter was sent from the Departments of Justice and Commerce to 35,000 businessmen and trade associations explaining the availability of the review procedure and enclosing a copy of the GUIDE, *supra* note 10.

21. *See* Remarks by Charles S. Stark, Chief, Foreign Commerce Section, Antitrust Division, before the Antitrust Law Section of the New York State Bar Association, in New York City, at 5 (Jan. 21, 1981).

22. *Id.*

C. Webb-Pomerene Antitrust Exemption

Since 1918 the Webb-Pomerene Act[23] (Webb Act) has permitted United States businesses to form export cartels for the express purpose of stimulating export trade. At that time, individual small businessmen entering new markets were perceived to be at a competitive disadvantage because United States antitrust laws[24] prohibited collective activity, while foreign competitors and customers could and did act collectively.[25] As a result, Congress passed the Webb Act to permit associations to fix prices and terms of sale, refuse to deal, and engage in other activities in export trade which otherwise would be per se illegal if engaged in domestically.[26] The activities of Webb association members in marketing goods abroad become subject to the substantive reach of the Sherman Act only when those activities have a substantial "spillover" effect on United States export trade or commerce.[27] There has been little criticism that the spillover limitation has unduly hampered exporting. Similar provisions exist in the Export Trading Company Act of 1982. However, the jurisdictional threshold has been raised, and potential antitrust liability has been limited to actual damages, loss of interest on actual damages, and cost of suit.[28]

Contrary to the benefits anticipated sixty years ago, the Webb Act has failed to stimulate the formation of significant numbers

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23. 15 U.S.C. §§ 61-66 (1976 & Supp. IV 1981).

24. This perception was not shared by all. Representative Mondell asserted in the House debates prior to the passage of the Webb-Pomerene Act that "[c]ertainly there is nothing in the Sherman Antitrust law which prohibits or prevents, or has ever prohibited or prevented manufacturers in the United States making those arrangements necessary to sell their goods jointly in the foreign market." 53 CONG. REC. 13,703 (1915).

25. *See* FEDERAL TRADE COMMISSION ECONOMIC REPORT ON WEBB-POMERENE ASSOCIATIONS, A 50 YEAR REVIEW 2 (1967) [hereinafter cited as 50 YEAR REVIEW].

26. For a more expansive discussion of "permitted" and "prohibited" activities involving the export of "goods, wares and merchandise," see generally B. HAWK, INTERNATIONAL ANTITRUST 99-100 (1980). Unlike the Webb Act, the Export Trading Act of 1982 includes "services." Pub. L. 97-290, § 103, [4 Federal Laws] TRADE REG. REP. (CCH) ¶ 27,001.

27. 15 U.S.C. § 62 (1976); *see also* United States v. Phosphate Export Ass'n, 393 U.S. 199, 206-08 (1968); Favretto, *Application of the Sherman Act to Joint Ventures and the Operations of Multinational Corporations*, 50 ANTITRUST L. J. 465, 467 (1981).

28. Pub. L. No. 97-290, § 306(b)(1), [4 Federal Laws] TRADE REG. REP. (CCH) ¶ 27,026.

of new selling agencies, assist new firms in engaging in export trade, or appreciably lower the costs associated with exporting. According to a survey conducted by the Federal Trade Commission, export trade associations directly or indirectly assisted only one and one-half percent of total United States exports in 1976.[29] In 1962 Webb association-assisted exports were two and three-tenths percent of total United States exports although that number is now believed to be inflated.[30] Since 1962 the number of registered associations has averaged slightly over thirty with the average number of active associations being slightly less than thirty.[31] Contrary to what was hoped for, most Webb associations have not had large numbers of small member firms. In 1962 only two associations had more than twenty members.[32] In the 1977 FTC survey, two-thirds of the associations had fewer than ten member firms.[33] Moreover, over the past twenty years only about one-third of Webb associations could be considered "full-functioning" in the sense that they operate as a foreign sales arm of the member firms.[34] Many of the associations primarily provide support services such as market research, statistical services, and credit and collection facilities.[35] Except for the full-functioning association members, it is doubtful that there has been any significant benefit in terms of spreading the costs associated with exporting.

A quick comparison of Webb association members and the products they export with non-Webb association exports illustrates the Webb Act's limited applicability. The vast majority of successful Webb associations has included member firms producing homogeneous or fungible products such as food products, chemicals, cotton, wood, and paper products. In comparison, according to the FTC's 50-Year Review, the five leading United States export products were technically complex and differentiated products such as industrial machinery, electrical equipment,

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29. FEDERAL TRADE COMMISSION, WEBB-POMERENE ASSOCIATIONS: TEN YEARS LATER 15 (1978) [hereinafter cited as TEN YEARS LATER].

30. *Compare* 50 YEAR REVIEW, *supra* note 25, at 40 *with* TEN YEARS LATER, *supra* note 29, at 15.

31. TEN YEARS LATER, *supra* note 29, at 6.

32. *Id.* at 5-7.

33. *Id.*

34. *Id.* at 12.

35. *Id.; accord* 50 YEAR REVIEW, *supra* note 25, at 49-56.

motor vehicles, and aerospace products.[36] None of these products' manufacturers are represented by Webb associations, because the manufacturers of such products usually do not obtain significant benefits from cooperation with competitors under the protective blanket of the Webb Act.[37]

The Webb Act permits its associations to allocate foreign markets and customers and fix prices among its members. Regardless of whether such practices benefit United States exporters in the long run, according to the 1977 survey only twelve associations took advantage of these provisions, although many of the articles of association, by-laws, or membership agreements allow for the possibility of such conduct.[38]

This pattern of limited Webb use confirms a much earlier analysis of export trade association activity. This analysis reasoned that the volume and nature of United States export trade would be determined by the principle of "comparative advantage" at the production stage rather than by any impediments to effective overseas distribution.[39] In other words, unless United States producers could produce products that foreign consumers want and at a lower production cost than their foreign competitors, the ability to fix prices or allocate markets in distribution could be of no practical benefit.

III. The Impact of United States Antitrust Policy upon the Relative Efficiency of United States Versus Foreign Producers

The potential for harm to United States exporters flowing from United States Government policies is, of course, not limited to the distribution of United States-made goods, *i.e.*, to the export operations of United States manufacturers. Thus, critics can and do complain that United States policies discourage productive ef-

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36. 50 Year Review, *supra* note 25, at 38.

37. *Id.* at 37-43.

38. Ten Years Later, *supra* note 29, at 9-10; *see also* Amacher, Sweeney & Tollison, *A Note on the Webb-Pomerene Law and the Webb Cartels*, 23 Antitrust Bull. 371, 375 (1978) ("The Webb-Pomerene law does not appear to make any difference with respect to the international prices forced by the Webb-cartels.").

39. *See* 50 Year Review, *supra* note 25, at 9-14; *see also* Fournier, *The Purposes and Results of the Webb-Pomerene Law*, 22 Am. Econ. Rev. 19 (1932); Ongman, *Is Somebody Crying "Wolf?": An Assessment of Whether Antitrust Impedes Export Trade*, 1 Nw. J. Int'l L. & Bus. 163, 191-94 (1979).

ficiencies of United States firms, while the antitrust policies of our major trading partners encourage the development of export-oriented firms by giving such producers exemptions from the reach of laws against coordination or collusion and by otherwise facilitating growth to an optimal size for international competition.

As one commentator has said: "There is a lot of talk these days about Japan, Inc. Both American and European businessmen seem to think that the Japanese companies can penetrate export markets so easily because they enjoy comfortable, cartelized markets at home under the guidance of the Ministry of International Trade and Industry (MITI). . . ."[40] Or, to quote a prominent antitrust practitioner:

> [A]t present, we cannot legally create a MITI. . . . It would not be possible to have an American industry and its union meet to propose a price increase as a first step toward revitalizing the industry. Japanese businesses are permitted to discuss these issues within limits and under government supervision. If they fix prices, they will be sued; but the line between discussing and price fixing is not the same as in the United States. Their enforcement bites at a different level. We have no mechanism to allow our government, industries and labor unions to sit and talk out their problems.[41]

While a less litigious climate in this country is desirable, it is by no means clear that price-fixing or other violations of traditional antitrust policy will contribute to the health, import-fighting ability, and export potential of United States producers. Indeed, we believe that the basis for United States antitrust laws is that competition and the consumer's interest are best served by the unyielding discipline of stiff domestic competition and not the soft life of cooperation or collusion. Therefore, diluting application of United States antitrust laws to multinational United States producers might weaken—not strengthen—their competitive viability and thus cause further deterioration in the United States balance of merchandise trade. Thus, any proposal to change the construction or interpretation of antitrust policy in this area deserves close attention.

Regarding overseas antitrust policies, undoubtedly much may be learned from the less confrontational approach employed in

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40. Seminar Report, *supra* note 2, at 1 (the Honorable Abraham Ribicoff citing a Wall St. J. editorial).

41. *Id.* at 48 (remarks of Ira Milstein).

Japan. As Mr. Katsuhiro Nakagawa, a special representative of MITI in charge of United States-Japanese trade negotiations, observes:

> The basic principles of American society, individualism and freedom, are sustained in the economy by free market mechanisms. To make market mechanisms effective, the United States has created antitrust regulations to promote favorable conditions for competition. All business conduct is influenced by legal actions, and open fights are common. The Japanese are also human beings, having conflicts of interest, but we do not fight openly to settle issues. To go to court means to lose credibility. These traits stem from traditional Japanese society and probably could not be introduced in the United States. However, a more frank exchange of views among government, business and labor could be encouraged.[42]

Others point out that a number of Japanese firms, such as Honda, have attained significant international success without any help from MITI or cooperation from any other Japanese agency. To quote a *Wall Street Journal* editorial: "It is the need for survival that is driving Japanese business to export. To understand why Japanese companies do so well on world markets, it is important to recognize that they have built up their competitive strengths in perhaps the world's most competitive domestic marketplace."[43] Moreover, there is clear evidence from the United States experience that cartel arrangements reduce competitive efficiency.[44] For example, a major reason for the recent reduction of regulations governing domestic transportation industries was the lack of performance of the regulated firms. The poor performance resulted from entry and exit barriers and rate-setting arrangements that fostered collusive activities and extended the lives of inefficient competitors. Instead of competing to provide better services and lower prices, the cartelized firms diverted their resources to lobbying regulators and legislators in order to protect their monopoly restrictions.[45]

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42. *Id.* at 28.

43. *Id.* at 1 (remarks of the Honorable Abraham Ribicoff).

44. *See, e.g.*, P. SAMUELSON, ECONOMICS, 528-29 (9th ed. 1973). Samuelson argues that relatively more stringent application of United States antitrust laws has actually aided the United States economy versus its European and Japanese counterparts and has done no damage to the United States balance of payments. *Id.* at 562.

45. *See, e.g.*, 3 G. DOUGLAS & J. MILLER, ECONOMIC REGULATION OF DOMESTIC AIR TRANSPORT: THEORY AND POLICY 127-39 (1974); M. FRIEDMAN & R. FRIED-

Although joint efforts on certain kinds of basic research may be desirable,[46] the idea of allowing agreements among exporters regarding the types of products produced domestically and levels of output for each strikes at the heart of the rationale supporting the Sherman, Clayton, and FTC Acts and would be politically infeasible. In short, an argument for allowing collusive arrangements among United States manufacturers who compete in world markets is inconsistent with economic analysis and political reality.

On the other hand, United States antitrust policy toward the growth of domestic firms with potential for overseas sales is not totally exempt from legitimate criticism. In the last decade, there have been a number of investigations and lawsuits involving major industries with the announced prospect of divestiture on the basis of highly creative—some would say destructive—theories of oligopoly.[47] These investigations could scarcely encourage United States industries to grow and attain the size necessary to compete abroad. Nonetheless, the United States is home to many of the world's largest manufacturers, yet there still remains a trade problem. Moreover, whatever their past impact, present antitrust policies are considerably less hostile to domestic growth, where no clear violation of traditional antitrust enforcement is involved. Perhaps most importantly, there are a number of clearly identifiable sources of United States trade problems in the tax, regulatory, and international trade policy areas that are far more important than any conceivable hindrance caused by the antitrust policies of the United States Government.

IV. CONCLUSION

In theory, United States antitrust policy could harm the United States balance of trade by discouraging either the domestic production or overseas distribution of United States manufacturers. Undoubtedly, in the past United States agency actions have impeded the growth and development of domestic producers because of an unfounded hostility to growth and sometimes resul-

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MAN, FREE TO CHOOSE 194-203 (1980); REGULATION OF ENTRY AND PRICING IN TRUCK TRANSPORTATION 3-43 (P. MacAvoy and J. Snow eds. 1977).

46. *See generally* UNITED STATES DEPARTMENT OF JUSTICE, ANTITRUST DIVISION, ANTITRUST GUIDE CONCERNING RESEARCH JOINT VENTURES (1980).

47. Y. BROZEN, CONCENTRATION, MERGERS AND PUBLIC POLICY 359-85 (1982); *see* R. BORK, THE ANTITRUST PARADOX (1978).

tant increases in industrial concentration. However, this attitude has diminished in recent years. Moreover, there is clearly no evidence that price-fixing or other traditional violations of United States antitrust laws will render United States firms more efficient and competitive internationally.

Exemptions to the laws against coordination and collusion for export operations of United States manufacturers have been available for years, though domestic firms have displayed little interest in them. A further extension of these exemptions recently has become available as a result of the Export Trading Company Act. If this Article's conclusions about the impact of United States Government antitrust policies are correct, one should expect to see little improvement in the United States balance of trade as a result of this legislation.