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The Export Trade Association Act of 1981—A Brief Analysis

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I. INTRODUCTION

Concern over the dramatic competitive decline of the United States in the realm of free world exporting has led to the introduction into the United States Senate of S. 144, the Export Trade Association Act of 1981, "[a] bill to encourage exports by facilitating the formation and operation of export trading companies, export trade associations, and the expansion of export trade services generally. . . ."¹ This bill contains two parts. Title I, referred to as the Export Trading Company Act of 1981, is intended to encourage the formation and operation of export trading companies by allowing financial institutions, such as banks, to invest in them. Title II,² referred to as the Export Trade Association Act of 1981 (hereinafter the "Association Act") would provide an exception from antitrust liability for the export trading activities of trading companies and other entities.

This Article will focus on Title II of S. 144, the Association Act, which would amend the provisions of the Webb-Pomerene Act of 1918³ by rewriting it entirely. According to its sponsors, this new legislation clarifies the application of current antitrust laws to ex-

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1. 127 CONG. REC. S256 (daily ed. Jan. 19, 1981) (remarks of Sen. Heinz).

2. S. 144, 97th Cong., 1st Sess., 127 CONG. REC., *supra* note 1, at S258, §§ 201-06 (1981) [hereinafter cited as S. 144] (Subsequent to the preparation of this Article, the Export Trade Association Act of 1981 was passed by the Senate on April 8, 1981, as Title II of S.734. 127 CONG. REC. S3669. The relevant provisions of the bill, as discussed in this Article, were not amended in the final Senate version. The bill has been referred to the House of Representatives for action.)

3. 15 U.S.C. §§ 61-65 (1976).

port trade associations and their activities.⁴ The provisions of the Association Act will be examined in some detail and compared with those of the Webb-Pomerene Act. This analysis will also attempt to pinpoint some areas of potential ambiguity within the language of the amendments and will briefly address some of the implications of the proposed changes.

II. BACKGROUND: THE WEBB-POMERENE ACT AND THE NEED FOR AMENDMENT

The Webb-Pomerene Act had its genesis in the post-World War I concern regarding the maintenance and expansion of newly acquired levels of United States export trade.⁵ A 1916 Federal Trade Commission report on United States foreign commerce⁶ asserted that the existence of powerful cartels in foreign industries presented a major obstacle to the expansion of such trade.⁷ United States firms, unlike their foreign competitors, were deterred from engaging in cooperative efforts in export trading by the Sherman Antitrust Act,⁸ in particular by Section 1, which declared illegal "[e]very contract, combination . . . or conspiracy, in restraint of trade or commerce . . . with foreign nations."⁹ In response to this perceived problem, the Webb-Pomerene Act created an exemption from antitrust restraints for certain export trading activities. The underlying goals of the Act were to counter the competitive disadvantage in international trade vis-à-vis foreign rivals and to encourage small businesses to engage in export trade by allowing them to pool their resources.¹⁰

4. The provisions of Title II of S. 144 are variations of S. 864, the Export Trade Association Act of 1979, introduced by Senators Bentson, Chafee, Danforth, Javits, and Mathias on April 4, 1979. After hearings before the Subcommittee on International Finance of the Senate Committee on Banking, Housing, and Urban Affairs, a revised version was introduced on February 26, 1980 as Amendment No. 1674 to S. 2718. Hearings on the revised bill were held in March and April, 1980, and the bill was passed by the Senate on Sept. 3, 1980 by a vote of 77 to 0. It was not acted on by the House of Representatives. 127 CONG. REC., *supra* note 1, at S256.

5. E. KINTNER & M. JOELSON, AN INTERNATIONAL ANTITRUST PRIMER 178 (1974) [hereinafter cited as KINTNER & JOELSON].

6. FTC, REPORT ON COOPERATION IN AMERICAN EXPORT TRADE (1916), cited in W. FUGATE, FOREIGN COMMERCE AND THE ANTITRUST LAWS 224 (2d ed. 1973).

7. W. FUGATE, *supra* note 6, at 224-25.

8. 15 U.S.C. §§ 1-7 (1976).

9. *Id.* § 1.

10. Note, *The Webb-Pomerene Act: Some New Developments in a Quiescent History*, 37 GEO. WASH. L. REV. 341, 348 (1969). See also *United States v. Concentrated Phosphate Export Ass'n*, 393 U.S. 199 (1968); KINTNER & JOELSON, *supra* note 5, at 177-80; W. FUGATE,

Briefly, the Webb-Pomerene Act provides that an "association entered into for the sole purpose of engaging in export trade and actually engaged solely in such export trade, or an agreement made or act done in the course of export trade by such association . . ." ¹¹ is exempt from the prohibitions of the Sherman Act. Section 1 defines "export trade" as consisting solely of "trade or commerce in goods, wares, or merchandise exported, or in the course of being exported from the United States or any Territory thereof, of such goods, wares, or merchandise, or any act in the course of such production, manufacture, or selling for consumption or for resale." ¹²

There are three express limitations to the antitrust exemption, each designed to preserve domestic competition. The associations, agreements, and actions covered by the Webb-Pomerene Act must not restrain either trade within the United States or "the export trade of any domestic competitor of such association." ¹³ In addition, such export organizations may not take any actions which artificially or intentionally lessen domestic competition. ¹⁴

The Webb-Pomerene Act also provides an exemption for export trade organizations from the antimerger provisions of the Clayton Act. ¹⁵ The purported benefits of the antitrust immunity is offset in part by a provision extending the jurisdiction of the Federal Trade Commission (FTC) under the Federal Trade Commission Act ¹⁶ to unfair methods of competition in export trade, "even though the acts constituting such unfair methods are done without the territorial jurisdiction of the United States." ¹⁷ Authority to investigate possible violations of the Webb-Pomerene Act is vested in the FTC by Section 5, ¹⁸ which also requires the so-called "Webb associations" to file periodic reports with the agency. When the FTC finds that a violation has occurred, it may recommend to the association action to correct the illegal practices. If, after receiving such recommendations, an association fails to comply, the FTC may then refer the matter to the Attorney General who may insti-

supra note 6, at 223-28.

11. 15 U.S.C. § 62 (1976).

12. *Id.* § 61.

13. *Id.* § 62.

14. *Id.*

15. 15 U.S.C. § 18 (1976).

16. 15 U.S.C. §§ 41-58 (1976).

17. 15 U.S.C. § 64. *See* Branch v. Federal Trade Comm'n, 141 F.2d 31 (7th Cir. 1944).

18. *Id.* § 65.

tute legal proceedings against the association for violation of the antitrust laws.¹⁹

Under the Webb-Pomerene Act's antitrust exemption, the member firms of an export trade association may engage in a variety of cooperative activities. They may agree to utilize the association as their exclusive foreign outlet, determine quotas, and set the prices at which each member should supply products to the unit. The association may also fix the prices at which foreign distributors may sell the exported products and enter into agreements which limit those distributors to handling products of member firms. In addition, associations may refuse to handle the exports of non-member United States competitors.²⁰ It has also been established that Webb associations may conduct market surveys, finance sales, assist in cooperative bidding, assist with freight and insurance problems, negotiate with foreign governments, and carry out other customary trade association functions.²¹

Despite the potential advantages afforded to United States firms by the exemption, there has been much controversy over the years regarding the Act's viability.²² Supporters and opponents of the legislation seem to agree, however, that the Webb-Pomerene

19. *Id.* This primary jurisdiction of the FTC has been undercut by United States Export Alkali Ass'n v. United States, 325 U.S. 196 (1945) in which the Supreme Court held that the Department of Justice could initiate suit for alleged violations of the antitrust laws by an export association without waiting for compliance by the FTC with the investigatory and recommendation procedures set forth in the statute. See KINTNER & JOELSON, *supra* note 5, at 180-81.

20. See United States v. Minnesota Mining & Mfg. Co., 92 F. Supp. 947, 965 (D. Mass. 1950). The Court noted that:

these [activities] are all such normal features of any joint enterprise and usually so essential to its stability and to preventing its members from taking individual selfish advantage of the knowledge and opportunities that have come to them as a group that, absent special circumstances revealing their unfairness or oppressive character in a particular setting, they are not outside the license granted by the Webb-Pomerene Act.

Id.

21. FTC, ECONOMIC REPORT ON WEBB-POMERENE ASSOCIATIONS: A 50-YEAR REVIEW 29-30, 48 (1967) [hereinafter cited as FTC 50-YEAR REVIEW]. The list of activities in which Webb associations may *not* engage is somewhat more extensive. For a comprehensive listing, see 127 CONG. REC., *supra* note 1, at S264 (remarks of Sen. Danforth).

22. See generally Note, *An Appraisal of the Webb Pomerene Act*, 44 N.Y.U. L. REV. 341 (1969); Note, *supra* note 10; Curry, *The Webb-Pomerene Law: A Continuing Controversy*, 8 Q. REV. ECON. 27 (1968); FTC 50-YEAR REVIEW, *supra* note 21; Comment, *Export Combinations and the Anti-Trust Laws, The Dilemma of the Webb-Pomerene Act*, 17 U. CHI. L. REV. 654 (1950); Diamond, *The Webb-Pomerene Act and Export Trade Associations*, 44 COLUM. L. REV. 805 (1944); Fournier, *The Purposes and Results of the Webb-Pomerene Law*, 22 AM. ECON. REV. 18 (1932).

Act has failed to achieve its intended results.²³

A 1967 report by the Federal Trade Commission²⁴ indicated that during the period from 1918 to 1965, only 130 active Webb associations registered with the FTC. A follow-up study by the Commission in 1978²⁵ revealed that as of November, 1978, there were only 29 active associations, with a membership of approximately 300 firms.²⁶ The 1967 FTC Report also indicated that, rather than assisting small and moderately-sized firms in expanding their export activities, successful export associations were generally "characterized by a membership consisting of the leaders of an oligopolistic industry involving a homogeneous product."²⁷ Even more significantly, however, the report concluded that "[i]n no major area of the world is the total amount of U.S. exports increased to a significant degree by Webb-Pomerene association activity."²⁸

In view of this unimpressive record, a number of commentators have called for repeal of the Act. They cite not only the Act's ineffectiveness, but other considerations as well. It has been argued, for example, that encouraging anticompetitive combinations in export trade has inevitable, adverse "spillover" effects in the do-

23. W. FUGATE, *supra* note 6, at 252.

24. FTC 50-YEAR REVIEW, *supra* note 21.

25. FTC, Summary and Analysis of Survey of Webb-Pomerene Associations (Nov. 9, 1978) (staff memorandum), *cited in* REPORT OF THE NAT'L COMM'N FOR THE REVIEW OF ANTI-TRUST LAWS AND PROCEDURES 295 (Jan. 22, 1979) [hereinafter cited as NATIONAL COMM'N REPORT], *reprinted in part in* Export Trading Companies and Trade Ass'ns: Hearings on S. 864, S. 1499, S. 1663, and S. 1744 Before the Subcomm. on Int'l Finance of the Senate Comm. on Banking, Housing, and Urban Affairs, 96th Cong., 1st Sess. 159 (1979) [hereinafter cited as 1979 Hearings].

26. This number includes some duplications because of multiple association membership by some firms. NATIONAL COMM'N REPORT, *supra* note 25, *cited in* 1979 Hearings, *supra* note 25, at 162. The report also revealed that more than one-third of the Webb associations have four or fewer members and that two-thirds have nine or fewer members. *Id.*

27. *Id.* The FTC 50-Year Review indicated that:

of the 465 companies that were members of export associations during the 1958-1962 period, only 79 members (17%) had assets of one million dollars or less, and only 101 members (22%) had assets of one to five million dollars. In contrast, larger firms accounted for nearly 80 percent of all exports assisted by the Webb exemption.

FTC 50-YEAR REVIEW, *supra* note 21, *cited in* NATIONAL COMM'N REPORT, *supra* note 25, at 162.

28. NATIONAL COMM'N REPORT, *supra* note 25, at 162-63. According to the FTC 50-Year Review, during the period 1958-1962, "Webb-assisted exports accounted for only 2.4% of total U.S. merchandise exports." *Id.* at 162. In 1976, they accounted for only 1.5% of total U.S. exports. *Id.* at 163.

mestic market.²⁹ Opponents of the Act have also objected that the exemption is not necessary, in that the stated objectives of the Act may not be precluded by current antitrust regulations, and because other devices not limiting competitiveness, such as export agents or brokers, could be used to provide most of the services provided by trade associations.³⁰ Other critics question the statute's theoretical underpinnings, arguing that the existence of foreign selling cartels does not necessarily place United States firms at a competitive disadvantage.³¹ Still others point out that the exemption undermines United States credibility in advocating strong international antitrust rules.³²

In contrast, supporters of S. 144 and its recent predecessors³³ argue that its antitrust exemption is not inherently anticompetitive and that the proposed legislation will contribute to broader efforts aimed at reducing the nation's trade deficit and increasing exports as a percentage of the gross national product.³⁴ They attri-

29. See, e.g., Note, *supra* note 10, at 355; Diamond, *supra* note 22, at 827.

30. See, e.g., 1979 Hearings, *supra* note 25, at 143-44 (Statement of Ky P. Ewing, Jr., Dep. Asst. Att'y Gen., Antitrust Div., Dep't of Justice). The position of the Justice Department on this issue is that:

[i]n general, American businesses do not require antitrust exemptions or clearance to engage in joint exporting ventures or any other joint activity the sole purpose of which is to sell goods or services for consumption abroad. [Emphasis in original] . . . To be actionable, joint activity must have a substantial and foreseeable effect on United States domestic or foreign commerce. Joint activity intended to impact outside the territory of the U.S. and carried on so as not to affect competition between the parties in the United States is unlikely to raise any question under American antitrust law. Accordingly, it has been the consistent position of the Department of Justice that the antitrust exemption found in the Webb-Pomerene Act of 1918 is unnecessary to provide protection for export trade associations since the normal activities undertaken by such associations have as their exclusive focus markets abroad.

Id.

31. See, e.g., Larson, *An Economic Analysis of the Webb-Pomerene Act*, 13 J. L. & ECON. 461, 485 (1970).

32. NATIONAL COMM'N REPORT, *supra* note 25, at 164.

33. See note 4, *supra*. Since 1950, the Webb-Pomerene Act has been the subject of proposed amendments, none of which have been adopted by the Congress. For a discussion highlighting the various attempts at amendment during the period, see W. FUGATE, *supra* note 6, at 243-54.

34. Senator Danforth, addressing the need for the amendments on the floor of the Senate noted that since 1977, the United States has run a trade deficit of over \$25 billion. He also pointed out that since 1960, the U.S. share of free world exports has declined from 15% to 11% and that U.S. exports account for only about 7% of our Gross National Product (GNP), in contrast to Japan, where exports account for 14% of GNP, and West Germany, where they account for 22% of GNP. 127 CONG. REC., *supra* note 1, at S263 (remarks of Sen. Danforth).

bute the past ineffectiveness of the Webb-Pomerene Act exemption in stimulating additional export activity to defects in the statutory language and regulatory scheme.

First, it is argued that the present law is not sufficiently clear as to which activities are exempt and which may still be subject to antitrust provisions. For example, the language of Sections 2 and 5 of the Webb-Pomerene Act would make an association subject to criminal and/or civil penalties for even unintended effects on domestic trade. Associations would also be liable when their activities "substantially" lessen domestic competition, but there is no clear line of demarcation as to when an effect is "substantial."³⁵

Second, the sponsors of S. 144 point out that the Department of Justice and the Federal Trade Commission have been perceived by the business community as too prone to challenge the activities of export trade associations. The threat of government suits (and of private treble-damage actions) has therefore allegedly deterred many firms from taking advantage of the Webb-Pomerene exemption.³⁶

In addition, proponents of S. 144 assert that because the Webb-Pomerene Act provides no immunity for the joint export of services, it has overlooked a significant and growing field of business activity which could form an important area of export trade.³⁷

The remainder of this Article will examine the provisions of the Association Act and will attempt to determine whether the Act adequately meets the criticisms launched against the current Webb-Pomerene Act exemption and regulatory scheme.

III. PROVISIONS OF THE ASSOCIATION ACT

The Association Act would revise the Webb-Pomerene Act "to clarify the antitrust provisions applicable to export trade associations and export trading companies and provide a certification procedure which would enable such associations and companies to obtain antitrust preclearance for specified export trade operations."³⁸ Export trade activities and methods of operation certified under Section 4 of the Association Act would be immune from antitrust liability, whereas those not precleared would be subject to scrutiny

35. 1979 Hearings, *supra* note 25, at 187 (statement of Danial C. Schwartz, Dep. Director, Bureau of Competition, Federal Trade Comm'n).

36. 127 CONG. REC., *supra* note 1, at S264 (remarks of Sen. Danforth).

37. *Id.*

38. *Id.* at S257 (remarks of Sen. Heinz).

on general antitrust principles.

Administrative responsibilities under the proposed legislation would be transferred from the FTC to the Department of Commerce. An office would be created within that Department to promote the formation of export trade associations and trading companies.³⁹

A. Section 1: Definitions

Section 1 of the Association Act would replace Section 1 of the Webb-Pomerene Act⁴⁰ in its entirety. Although the definitions set out in this section are fairly self-explanatory, several of the terms bear special note.

First, the definition of "export trade" is expanded under the Association Act by adding services to goods, wares, and merchandise exported.⁴¹ The term "service" is further defined as an "intangible economic output," including, but not limited to business, repair, and amusement services; management, legal, engineering, architectural, and other professional services; and financial, insurance, transportation, and communication services.⁴² The bill's sponsor testified that the term "is intended to be an all-encompassing definition . . . not limited by usage relevant to any particular point in time."⁴³

As previously noted, proponents of the Association Act argue that the omission of services from the Webb-Pomerene Act's exemption limited that Act's effectiveness.⁴⁴ The prefacing sections of the proposed legislation specifically incorporated a congressional finding that "service-related industries are vital to the well-being of the American economy inasmuch as they create jobs for seven out of every ten Americans, provide 65 per centum of the Nation's gross national product, and represent a small but rapidly rising percentage of United States international trade."⁴⁵ Accordingly, an expressed purpose of the Association Act is "to encourage American exports . . . by making the provisions of [the Webb-Pomerene]

39. 15 U.S.C. § 41 (1976).

40. *Id.* § 61; 127 CONG. REC., *supra* note 1, at S260.

41. S. 144, *supra* note 2, § 203(1).

42. *Id.* § 203(2).

43. 127 CONG. REC., *supra* note 1, at S265 (remarks of Sen. Danforth).

44. *See* note 37 and accompanying text, *supra*.

45. S. 144, *supra* note 2, § 202(a)(5).

Act explicitly applicable to the exportation of services. . . .”⁴⁶

A second definition which should be noted is that of “antitrust laws.” Section 1 defines that term to mean “the antitrust laws defined in the first section of the Clayton Act (15 U.S.C. 12), sections 5 and 6 of the Federal Trade Commission Act (15 U.S.C. 45, 46), and any State antitrust or unfair competition law.”⁴⁷ According to the bill’s sponsors, this definition “is intended to be all inclusive of both Federal and State statutes prescribing the competitive norms within the marketplace. . . . [T]his includes the Sherman Act, the Clayton Act, the Wilson Tariff Act and the Federal Trade Commission Act.”⁴⁸

The scope of this definition represents a significant change from the existing statute, which only provides an exemption for joint export trading activities from the terms of the Sherman Act and the antimerger provisions of the Clayton Act and extends the application of the Federal Trade Commission Act to activities of the Webb associations. This definition of “antitrust laws” therefore expands the immunity available under the current law and undoubtedly makes the proposed statute more appealing to the business community.

Two other definitions set out in Section 1 are particularly noteworthy. The meaning of the term “association” under the proposed Act would remain the same in substance as under the Webb-Pomerene Act. The amendments, however, would limit participants in such associations to persons who are United States citizens,⁴⁹ not a requirement of the existing law. Also, Section 1 includes the definition of the term “export company” from Title I of S. 144.⁵⁰ The proposed legislation broadens the coverage of the existing law in that it exempts from antitrust liability the associations covered by the present Webb-Pomerene Act and also the export trading companies to be established under the proposed Export Trading Company Act of 1981.

46. *Id.* § 202(b).

47. *Id.* § 203(8).

48. 127 CONG. REC., *supra* note 1, at S265 (remarks of Sen. Danforth). The Sherman Act and the Wilson Tariff Act are included in the definition of “antitrust laws” as contained in 15 U.S.C. § 12 (1976).

49. S. 144, *supra* note 2, § 203(6).

50. *Id.* §§ 203(7), 103(a)(5). This definition refers to the Export Trading Company Act of 1980, rather than the Act of 1981.

B. Section 2: Exemption from Antitrust Laws

This Section, which together with Section 4 contains the key provisions of the amendments, is offered as a replacement for Section 2 of the Webb-Pomerene Act.⁵¹ Proposed Section 2(a) provides that the export trade, export trade activities, and methods of operation of an export trade association or company will be eligible for the exemption from the antitrust laws, as provided in Section 2(b) and Section 4, if six requirements are met.

Four of these requirements embody, at least substantively, the requirements of the Webb-Pomerene Act. Proposed Section 2(a)(2) would require that the covered activities not result in "a substantial lessening of competition or restraint of trade of any competitor of such association or export trading company."⁵² Section 2(a)(3) requires that there be no unreasonable effect on prices in the domestic market. These requirements are essentially found in Section 2 of the Webb-Pomerene Act.⁵³ Section 2(a)(5) would exclude from the eligibility for exemption acts which result, or reasonably would be expected to result, in the resale, within the United States, of products promoted by an export trade association or company. A similar provision is contained in Section 1 of the Webb-Pomerene Act.⁵⁴

Under the proposed Section 2(a)(4) the covered activities cannot qualify for the exemption if they constitute unfair methods of competition against other covered associations or activities. This requirement is substantively similar to Section 4 of the Webb-Pomerene Act⁵⁵ which extends the prohibition against unfair methods of competition contained in the Federal Trade Commission Act⁵⁶ to such acts committed against competitors engaged in export trade. The proposed revision does not qualify by reference to a statute the prohibition against unfair methods of competition, and thus may be broader than the current Section 4.

The consistency of these requirements with the current Act raises the question of why it is necessary to alter Section 2 of the Webb-Pomerene Act. The sponsors of S. 144 have argued that the language of their bill injects more certainty into the law regarding

51. 15 U.S.C. § 62 (1976).

52. S. 144, *supra* note 2, § 204(a)(2).

53. 15 U.S.C. § 62 (1976).

54. *Id.* § 61.

55. *Id.* § 64.

56. *Id.* §§ 41-58.

“the circumstances under which . . . international trade conduct is to be held accountable.”⁵⁷ They claim that the clarification in the amendments is the consequence of the codification of judicial standards as to when a restraint on trade is actionable (*i.e.*, when the restraint is something more than the “inevitable consequences”⁵⁸ of the joint activity), and the Department of Justice’s stated view that a violation of the Webb-Pomerene Act occurs when joint exporting activities have a “substantial and foreseeable affect on U.S. commerce.”⁵⁹

Despite this claim, it is not at all clear that the proposed language will provide any greater certainty as to potential liability than exists under the present Act. Reasonable people may still be expected to differ in their interpretation of what constitutes the “inevitable consequences” of the joint activity and as to what restraints on trade are “substantial” and “foreseeable.” If the proposed Act does inject more certainty into the process, it will result primarily from the certification procedures established under proposed Section 4 than to the allegedly more specific requirements for eligibility set out in Section 2. Nevertheless, it may be argued, as the proponents of the bill suggest, that codification of judicial tests provides the business community with a more *obvious* standard of conduct on the face of the statute than currently exists.

The two additional requirements in Section 2(a) do add new substantive considerations for determining eligibility for exemption under the proposed Act. Proposed Section 2(a)(1) requires that the exempted activities “serve to preserve to [sic] promote export trade.”⁶⁰ This criterion was apparently added in order to help ensure that the exemption is not permitted unless the activities for which it is requested help to “maintain the status quo . . . [or] add to . . . export trade.”⁶¹

The criterion found in proposed Section 2(a)(6) requires a determination by the Secretary of Commerce “that the international trading activity of the trade association or export trading company not be solely trade in the ‘licensing of patents, technology, trademarks, or know-how’ with the exception that such trade may be

57. 127 CONG. REC., *supra* note 1, at S265 (remarks of Sen. Danforth).

58. *United States v. Minnesota Mining & Mfg. Co.*, 92 F. Supp. 947 (D. Mass 1950). The court indicated that restraints of trade by a Webb association are not actionable if they are only “inevitable consequences” of an export association. *Id.* at 965.

59. 1979 *Hearings*, *supra* note 25, at 155.

60. S. 144, *supra* note 2, § 204.

61. 127 CONG. REC., *supra* note 1, at S267 (remarks of Sen. Danforth).

present if it is incidental to the sale of goods or services."⁶² This requirement purports to discourage trade in processes which might in the long run decrease the need abroad for United States goods and services.

Section 2(b) specifies that the trading organizations covered by the Act are immune from liability for antitrust violations for all activities and methods of operation approved in the certificates issued pursuant to proposed Section 4. This immunity applies to both federal and state enforcement, and it prevails until the certificate is revoked or invalidated according to the terms of Sections 4(d) and 4(e). This Section appears to immunize from antitrust liability activities or methods of operation of a covered enterprise which are stated in the certificate but no longer meet the requirements of Section 2(a), until the certificate is revoked by the Secretary of Commerce or until court proceedings for invalidation of the certificate are initiated by the Attorney General or FTC. In other words, loss of the antitrust exemption is prospective, for future conduct only, and the immunity lapses only after the affirmative act of the government to revoke or invalidate the certificate.⁶³ This approach is radically different from the existing law. Under this law, an association may at any time be liable for activities outside the scope of the statute or activities having the proscribed effects on domestic competition or competitors.⁶⁴

Section 2(c) of the bill acknowledges that the Attorney General and the FTC may disagree with the decision by the Department of Commerce to certify the activities of certain associations and trading companies. Under the proposed Act, if the Department of Commerce is formally notified of such disagreement, but nevertheless issues the contested certificate, the exemption will not be effective until thirty days after issuance of the certificate. Presumably, this delay would provide sufficient time for the Attorney General or FTC to institute invalidation proceedings under Section 4(e) to prevent activities which reasonably might be expected to have the effects prohibited under Section 2(a) (eligibility criteria).

62. *Id.* at S266.

63. *Id.* But see text accompanying notes 80-82, *infra*.

64. *United States v. United States Alkali Export Ass'n*, 86 F. Supp. 59 (S.D.N.Y. 1949).

C. Section 3: Ownership Interest in Other Trade Associations Permitted

This Section of the proposed Act simply changes the title of Section 3 of the Webb-Pomerene Act, retaining the language of the statute as it now stands.⁶⁵ As such, the statute would continue to permit any corporation to acquire an ownership interest in an export trade association or trading company, as long as such acquisition or ownership did not restrain trade or substantially lessen competition within the United States.

D. Section 4: Certification

This proposed Section replaces Sections 4 and 5 of the Webb-Pomerene Act and sets forth specific administrative, enforcement, and reporting procedures.

Section 4(a) requires that any association or export trading company seeking certification under the Association Act must file a written application supplying at a minimum nine categories of information. Sections 4(a)(1)-(4) require basically the same information that is called for under Section 5 of the current Act. The other five subsections demand more specific information than that required under the existing Section 5. For example, an application must describe the goods, wares, merchandise, or services which the association or trading company or its members propose to export (Section 4(a)(5)), and the activities and methods of operation through which such trade will be undertaken (Section 4(a)(7)). Applicants must also indicate in which countries the proposed export trade will be conducted (Section 4(a)(8)).

A totally new aspect of the application is the requirement of proposed Section 4(a)(6), calling for “[a] description of the domestic and international conditions, circumstances, and factors which show that the association or export trading company and its activities will serve a specified *need* in promoting the export trade of the described goods, wares, merchandise, or services.”⁶⁶ (Emphasis added.) This is intended as “a subjective explanation by the association or trading company as to how its activities will further United

65. The bill makes an unnecessary correction to Section 3 of the Webb Act. Section 205(a)(2) would amend Section 3 of the Webb Act “by striking out ‘Sec. 3. That nothing’ . . . and inserting in lieu thereof ‘Nothing.’” S. 144, *supra* note 2, § 205(a)(2). Section 3 of the Webb Act uses the word “nothing” rather than the words “than nothing.” 15 U.S.C. § 63 (1976).

66. S. 144, *supra* note 2, § 206.

States trade.”⁶⁷ The explanation of need is to be reviewed by the Department of Commerce in determining whether to issue a certificate and for which activities. This is apparently separate from the consideration of whether or not the activities preserve or promote export trade, an eligibility criterion under Section 2(a)(1). It is contemplated that this statement of need not be subject to judicial consideration in the event of a legal challenge under Section 4(e)(1) by the Department of Justice or the FTC alleging that the precleared activities no longer meet the criteria for the Act’s exemption.⁶⁸

Section 4(b)(1) details the administrative procedures for issuance of a certificate. The certificate shall be issued by the Secretary of Commerce on finding that the eligibility criteria of Section 2 are met *and* the proposed activities will serve a specified need in promoting export trade, as described in the application for certification.⁶⁹ The certificate “shall specify the permissible export trade, export trade activities and methods of operation of the association or export trading company and shall include any terms and conditions the Secretary deems necessary to comply with the [eligibility] requirements of section 2. . . .”⁷⁰ The exemption from liability would apply only to those activities and methods of operation noted in the certificate. The determination to issue or deny a certificate must be made within ninety days after receiving the application. In contrast, under the Webb-Pomerene Act, all activities covered in the statutory exemption are immunized.⁷¹

The provisions of Sections 2(a) and 4(a) and (b) are not well coordinated. Section 4(b) requires the Secretary to make a finding both that the export trade or export activities meet the eligibility requirements of Section 2(a) and that these activities will serve a specified need in promoting the export trade for designated goods or services. Section 4(a)(6) does require the applicant to demonstrate the factors upon which the finding of need in promoting export trade can be made. However, the application procedure and information detailed in Section 4(a) does not explicitly require the applicant to state how it meets the eligibility criteria. The procedure in this regard is different, for example, from that used to

67. 127 CONG. REC., *supra* note 1, at S267 (remarks of Sen. Danforth).

68. *Id.*

69. S. 144, *supra* note 2, § 206(b)(1).

70. *Id.*

71. 15 U.S.C. § 62 (1976).

grant exemptions from the provisions of Article 85(1) of the Treaty of Rome, pursuant to Article 85(3).⁷² In order to obtain this exemption, the applicant must affirmatively demonstrate how the practice or agreement in question meets the eligibility criteria set forth in Article 85(3).⁷³ Moreover, it is not clear what the relationship is between the "specified need" referred to in Section 4(a)(6) and the eligibility requirement of Section 2(a)(1) that the activity preserve or promote export trade.

The amendments further provide for coordination and cooperation among the Department of Commerce (the administrative agency), and the Department of Justice and the FTC (the enforcement agencies). Under the procedures set out, a copy of every certificate which the Department of Commerce proposes to issue would be sent to the Attorney General and to the FTC. If either found reason to question the decision to issue the certificate, that agency could, within fifteen days after receipt of the proposed certificate, give written notice to the Secretary of Commerce of "an intent to offer advice on the determination."⁷⁴ If such notice were given, the Attorney General or the FTC could, within 45 days after receipt of the proposed certificate, formally advise the Secretary of Commerce *and* the applicant association or trading company of disagreement with the decision to issue the certificate. Apparently, under the provisions of Section 2(c), the Secretary could issue the certificate despite such disagreement, although the exemption in such cases would not become effective until 30 days after issuance. It is significant that applicants would receive notice of disagreement since under the proposed Act the agency in disagreement could petition the federal district court for a restraining order or injunction to prevent an association or trading company from undertaking specified activities or methods of operation, despite the approval of the Secretary of Commerce.⁷⁵

An expedited certification process is permitted under Section 4(b)(2) when circumstances make the normal 90 day period impractical.⁷⁶ In addition, under Section 4(b)(3), any Webb associa-

72. Treaty Establishing the European Economic Community, March 25, 1957, art. 85, 298 U.N.T.S. 3, 48.

73. See Heading V, Form A/B - Application for Clearance and Notification, 1 COMM. MKT. REP. (CCH) ¶ 2659. For a general discussion, see B. HAWK, UNITED STATES, COMMON MARKET AND INTERNATIONAL ANTITRUST: A COMPARATIVE GUIDE 483-99 (1979).

74. S. 144, *supra* note 2, § 206(b)(1).

75. *Id.* § 206(e)(2).

76. *Id.* § 206(b)(2).

tion in existence as of April 3, 1980, could file for "automatic certification" within 180 days after enactment of the proposed bill. Although the application procedures established under Section 4 would be followed, the language of the statute suggests that the certificate should be issued "unless the Secretary possesses information clearly indicating that the requirements of Section 2(a) are not met."⁷⁷

An association or trading company whose request for certification is denied under any of these procedures has the right, upon request, to a hearing with respect to the denial.⁷⁸

Section 4(c) requires certified associations and trading companies to report to the Secretary of Commerce any material change "in [their] membership, export trade, export trade activities, or methods of operation. . . ."⁷⁹ At the same time, they could apply for an amendment of their certificate, setting out the requested amendment and the reasons for it. This request would be treated in the same manner as an original application for a certificate, but if the amendment were filed within 30 days after a material change, and if it were approved, there would be no interruption in the period for which the certificate was in effect.

Section 4(c) apparently is intended to protect against possible abuses by the associations or companies operating with the benefit of the exemption. Its advantage may be somewhat dubious in that it requires the association or trading company to make a determination of what constitutes a "material change" and places an affirmative duty on the association or company to report the change to the Department of Commerce.

Section 2(b) provides covered enterprises antitrust immunity only for the export trade, activities or operations that are stated in the certificate. Presumably, if the enterprise materially changes its operations, for example, without filing the amendment as required by Section 4(c), the operations as changed may be challenged. If the operations are changed in a non-material manner, it is unclear whether they are subject to attack. Section 2(b) could be read to extend the exemption to non-material changes. If the intent of Section 4(c) is to confer an advantage of retroactivity to material changes, it ought not intend a more onerous consequence of non-material changes—that the immunity attach only on approval of

77. *Id.* § 206(b)(3).

78. *Id.* § 206(b)(4).

79. *Id.* § 206(c).

the amendment. Non-material changes thus may not require amendment; if this is so, they presumably are covered by the original certificate.

Section 4 also contains significant enforcement provisions. Under Section 4(d)(1) the Secretary of Commerce, after notice and a hearing, can require that the enterprise or its operation be modified to conform with the certificate. More importantly, Section 4(d)(2) authorizes the Secretary, after notice and hearing, to revoke the certificate if he finds that "the export trade, export trade activities or methods of operation . . . no longer meet the requirements of section 2. . . ."⁸⁰ Alternatively, the Secretary may amend the certificate so that the actual practice as stated in the certificate conforms to the criteria of Section 2(a). The Secretary apparently is limited to administrative actions to conform actual practice to the certificate or to revoke the certificate if the eligibility criteria no longer are met.

In addition, Section 4(e) authorizes the Attorney General or the FTC to bring an action in federal district court to invalidate the certificate of an association or trading company on the ground that such organization or its activities or methods of operation no longer meet the eligibility requirements of Section 2. In such an action, the *only* issue before the court would be whether or not the eligibility criteria were presently being met. The challenging agency would be required to give an alleged violator 30 days prior notice of a proposed action against it. Again, the various provisions are not internally well-coordinated. The Attorney General or the FTC can act independently from the Secretary of Commerce. Hence the same set of circumstances which would cause the Secretary to administratively seek an amendment to the certificate, may at the same time give rise to a suit by the Attorney General or the FTC to invalidate the certificate. As provided in Section 4(e)(3), only the Attorney General or the FTC would have standing to bring such a challenge. The bill's sponsors intend that Section 4(e)(3) operate very broadly so as to preclude suits by private parties challenging the activities or existence of a violation of Section 2. After revocation or invalidation, a private party may have standing to bring an action under the antitrust laws based on activities *subsequent* to the revocation or invalidation.⁸¹ However, the spon-

80. *Id.* § 206(d)(2).

81. 127 CONG. REC., *supra* note 1, at S268 (remarks of Sen. Danforth).

sors apparently acknowledge that private parties may institute suit at any time for activities which are outside the certificate.⁸² The statute in Section 4(e)(3) purports to grant exclusive jurisdiction to the Attorney General or the FTC only in actions for failure to meet the eligibility requirements of Section 2.

The issue, however, is not so clearcut. Activities which are outside the certificate may also violate the eligibility criteria—for example, conduct resulting in a substantial lessening of domestic competition. Presumably, a private suit for damages or injunctive relief would not be prohibited in this instance. The agencies could sue also for invalidation of the certificate. If the conduct in question is outside the certificate, presumably the provision of Section 2(b) that the subsequent revocation or invalidation of a certificate only prospectively lifts the antitrust immunity would be inapplicable. Conduct within the certificate while the certificate is effective would continue to be immunized. In the example above, the conduct would not be immunized since it is outside the certificate. Section 2(b) explicitly provides that only conduct stated in the certificate enjoys exemption from the antitrust laws.

The provisions of Section 4 are intended as incentives to the business community to engage in cooperative export trading activities. However, the regulatory scheme established by the proposed Act would undoubtedly increase the administrative burden for both trade organizations and the regulatory agencies. When this proposed legislation is considered against the Webb-Pomerene Act, this Act becomes the regulatory extreme and the Webb-Pomerene Act a middle approach. The Webb-Pomerene Act contains statutory eligibility requirements and exemptions, and then merely requires notification and periodic filings. There is no application and review procedure, nor is there an express grant of exemption. This latter aspect may be an advantage of the proposed Act. If an enterprise receives a certificate, the covered activities are unquestionably exempt, whereas under the Webb-Pomerene Act the exemption is less clearly drawn. Most opponents of the Webb-Pomerene Act, *a fortiori*, will be opposed to this legislation. And it is unclear whether its purported certainty makes this Act palatable to the Webb-Pomerene Act's supporters.

82. *Id.*

E. Section 5: Guidelines

Section 5(a) requires the Secretary of Commerce, after consultation with the Attorney General and the FTC, to publish guidelines which would indicate generally what types of export trade, export trade activities, and methods of operation meet the requirements of Section 2. Since the eligibility requirements are so sweeping, articulation of the guidelines will be extremely difficult.

F. Sections 6-12: Other Administrative Concerns

Several of the remaining sections of the proposed Act are noteworthy.

Section 7 would establish an Office of Export Trade within the Department of Commerce to promote and encourage the formation of export trade associations and export trading companies through the use of provisions of the Association Act. This Section would transfer administrative responsibility for the Act from the FTC to the Department of Commerce.

Section 8 would establish a temporary antitrust exemption for existing Webb associations. The exemption would remain in effect either until 180 days after passage of the Act or 180 days prior to the decision of the Secretary of Commerce on such association's application for certification under the Act.

Finally, Section 12 would require a task force to evaluate the effect of the statute on domestic and international trade and to make recommendations to the President based on its findings.

IV. SUMMARY

In an era in which the trend seems to be away from government regulation, this bill offers a new regulatory scheme in an attempt to increase the United States' share of international export trade. Although the statute, if enacted, might make cooperative export trading activities more attractive to the business community, it seems doubtful in view of the history of the Webb-Pomerene Act that these amendments will substantially increase exporting activities. Passage of the Export Trading Act of 1981 will likely continue generating the kind of controversy which has surrounded the Webb-Pomerene Act since its inception.