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GETTING RID OF U.S. BARRIERS TO U.S. EXPORTS

INTRODUCTION

The United States government traditionally has done little to promote the exports of U.S. goods and services. The vast internal American market and a rich endowment of resources have enabled the nation to remain relatively self-sufficient. Global events of the past decade, however, have led to dramatic changes. In 1970, for example, exports and imports of goods and services represented only 6.6 and 5.9 percent of the U.S. GNP, respectively. By 1980, both exports and imports had grown to over 12 percent of GNP.[1] These figures illustrate the nation's growing interdependence on the international economy and the importance of international trade to the expansion of the American economy. If the United States is to compete effectively in world markets, it must adopt policies that promote exports without abandoning the principles of the free market system.

Export growth is clearly an increasingly important part of a healthy U.S. economy, yet the U.S. not only does little to spur exports, it actually erects barriers to increasing exports. Joel Honigberg, president of the International Business Council of MidAmerica asserts that "Our government has still not developed a consistent policy commitment that advocates export expansion."[2] In fact, certain government policies and programs have an adverse effect on the ability or the willingness of U.S. companies to export. These disincentives come in several forms. They may directly prohibit exports for reasons of national security,

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1 The Honorable Murray L. Weidenbaum, "Trade Policy and the U.S. Economy," Tax Foundation's Tax Review, Vol. XLII, No. 7, August 1981, p. 28.

2 Lucia Mouat, "The U.S. itself gets in the way of business, say exporters," The Christian Science Monitor, March 23, 1982, p. 5.

foreign policy, domestic shortages, human rights violations, or nuclear nonproliferation. These policies may reduce exports but cannot be judged in terms of economic costs alone. They must be evaluated in terms of other considerations, such as foreign policy objectives.

This is not the case with other government actions involving exports. In some instances, exports may be reduced indirectly by laws and regulations that raise production costs, increase uncertainties, and lengthen the time needed to complete an export transaction. Such restrictions put U.S. producers at a competitive disadvantage in foreign markets. Examples include laws and regulations that govern the conduct of firms selling goods abroad, such as the Foreign Corrupt Practices Act, antiboycott regulations, and the extraterritorial extension of U.S. antitrust laws. Legislation to improve the environment, product safety, and worker health adds to production costs, which raises prices, thus reducing the competitiveness of U.S. firms.

Exporters have been unable to take full advantage of the benefits of an open trade policy because they have been constrained by excessively burdensome government policies. They argue that trade is risky enough without such added restraints. If U.S. competitiveness in foreign markets is to be improved, an objective re-evaluation of many of these policies is urgently needed.

HOW REGULATIONS DISCOURAGE EXPORTS

Over the years, Congress has passed a number of laws designed to promote such legitimate social objectives as improving the environment, product safety, and worker health. For example, the Clean Air Act of 1970 and the Federal Water Pollution Control Act, both administered by the Environmental Protection Agency, set national standards to limit harmful gaseous, particulate, and effluent discharges into the air and water. The Occupational Safety and Health Act of 1970 was designed to regulate on-the-job exposure to potentially hazardous substances. The Consumer Product Safety Act arose from the desire to improve the effectiveness of various consumer safety laws and regulations. These laws were designed to protect the public from products, byproducts, and discharges that would be hazardous or toxic if left uncontrolled.

The Toxic Substances Control Act was passed to identify and control such substances in the premarket testing stage before they reach workers and consumers. Although these and other well-intentioned laws were passed to protect the public, the benefits accrue only at a price. By increasing production costs, for example, they discourage exports. The costs to industry may arise from delays associated with the compliance with regulation as well as changes in the production process, the products themselves, the working environment, or the distribution, use, or disposal processes. If these additional expenditures are reflected

in higher export prices, they may reduce the demand for U.S. exports. In addition, increased production costs incurred to meet environmental, health, and safety standards are sometimes thought to be an important factor in the transfer of some U.S. industries to other less regulated nations. Such transfers may then increase U.S. imports or reduce the potential level of exports by increasing the competition U.S. firms face in foreign markets.

The business community generally has supported these laws and regulations, but objections have been raised to those considered overly complex and inflexible. In addition, exporters have expressed concern about many regulations that may not be justified given the available scientific and technical evidence, particularly if the perceived costs outweigh the benefits. One response in the Federal Register typified these concerns: "The heart of the problem lies with excesses: i.e., with the attitude that scientific and medical facts need not be substantiated to justify regulations and that the indiscriminate imposition of costs to achieve preconceived goals is irrelevant."[3] Regulatory reform is needed to clarify and simplify regulations, eliminate overlapping or contradictory regulations, and generally reduce the paperwork and administrative costs associated with attaining given standards. In addition, greater emphasis should be placed on rigorous cost-benefit analysis before setting standards, while allowing for more flexibility in meeting these standards once they are set. In many cases, the disincentive effect of a regulation arises from businessmen's uncertainty about how it is applied to their particular industries.

FOREIGN CORRUPT PRACTICES ACT[4]

Another disincentive to U.S. exports is the Foreign Corrupt Practices Act of 1977 (FCPA), which was passed unanimously by Congress after the discovery of widespread illicit payments to foreign officials by many American companies. Because many of the bribes were made by sales representatives, the Act holds the firms in question responsible for the actions of their overseas agents if there is reason to know of any misconduct. The FCPA requires strict record-keeping standards to monitor the anti-bribery sections of the statute, which are jointly enforced by the Securities and Exchange Commission and the Justice Department.

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3 Cited in U.S. Department of Commerce, Report of the President on Export Promotion Functions and Potential Export Disincentives, September 1980, p. 10-2.

4 For an extensive analysis of FCPA, see: Catherine England, "The Foreign Corrupt Practices Act: A Case of Overkill?" Heritage Foundation Issue Bulletin No. 74, November 25, 1981.

One of the major criticisms of the FCPA is that it has cost U.S. firms export opportunities without reducing the level of foreign corruption. By precluding American firms from taking part in questionable transactions, which may be perfectly legal and an accepted practice in many countries, the FCPA restricts the ability of U.S. firms to compete overseas. Because the high standards demanded from American business are not required by any other major trading nation, foreign firms are able to supplant U.S. business concerns in world markets. Moreover, because of the uncertainty about what is considered acceptable conduct under the Act, many firms are either not entering the export market or are acting with a degree of caution that results in an undue loss of exports. Substantial revision of the FCPA is needed to remove ambiguities leading to a needless loss of sales where there is no corrupt intent.

Amendments to make some of the vague language more explicit and reduce ambiguities in enforcement have passed the Senate. Before taking effect, however, these changes must still pass the House.

ANTIBOYCOTT REGULATIONS

The United States should not allow other nations to determine the course of its international trade policy. Accordingly, U.S. antiboycott laws and regulations are designed to limit the extent to which foreign boycotts can affect U.S. domestic commerce or trade with nations other than the boycotting nations. The legal and statutory actions taken by the U.S. government resulted primarily from the boycott by the Arab League of Israel and companies blacklisted by the League. The boycott was imposed in 1948, but it was not until 1973 that it began to have real impact on U.S. commerce. At that time, the oil embargo considerably enhanced the economic leverage of the Arab oil-producing states. By 1975, Congress noted that many American companies had bowed to pressure from the Arab nations and were participating in the boycott that harmed other U.S. firms and adversely affected trade with Israel.

The resulting antiboycott provisions are found in the Anti-boycott Amendments to the Export Administration Act of 1977 (EAA) and the Ribicoff Amendment to the Tax Reform Act of 1976 (TRA).[5] Section 3(5) of the EAA of 1979 states:

> It is the policy of the United States:
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> - to oppose restrictive trade practices or boycotts fostered or imposed by foreign countries against

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[5] The EAA of 1969 first described U.S. policy in response to the boycott. The 1977 amendments were added to the EAA and in 1979 it was extended through 1983 without changing the antiboycott provisions.

other countries friendly to the United States or against any United States person;

- to encourage and, in specified cases, require United States persons engaged in the export of goods or technology or other information to refuse to take actions, including furnishing information or entering into or implementing agreements, which have the effect of furthering or supporting the restrictive trade practices or boycotts fostered or imposed by any foreign country against a country friendly to the United States or against any United States person; and

- to foster international cooperation and the development of international rules and institutions to assure reasonable access to world supplies.[6]

The EAA and Export Administration Regulations enforce this policy by discouraging or prohibiting U.S. persons from complying with international boycotts not recognized by the U.S. government, particularly where such cooperation impedes trade between U.S. persons or between the U.S. and nations friendly to it. The Department of Commerce is responsible for administering these regulations.

The antiboycott provisions of the Tax Reform Act of 1976 deny certain tax benefits to U.S. taxpayers who, either directly or through foreign or domestic affiliates, participate in or cooperate with an unsanctioned foreign boycott. The tax benefits targeted by the international boycott provisions are the foreign tax credit, deferral of taxation on earnings of foreign subsidiaries, and the deferral of tax on the earnings of Domestic International Sales Corporations. Although these tax benefits are designed to encourage international trade, they are not deemed appropriate in cases where U.S. taxpayers participate in boycott activities that restrict trade with foreign countries.

According to the general explanation of the Tax Reform Act of 1976, Congress intended that "these three benefits...should not be made available with respect to operations in connection with which there has been an agreement to participate in or cooperate with an international boycott."[7] The Department of Treasury administers the program, while the Internal Revenue Service is responsible for its enforcement.

The Sherman Antitrust Act can also be used when U.S. businesses participate in unsanctioned international boycotts that

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[6] Cited in Department of Commerce, op. cit., p. 9-13.

[7] Cited in The Operation and Effect of the International Boycott Provisions of the Internal Revenue Code, Department of Treasury, December 1980, p. 1.

are not restricted by the TRA or the EAA. In 1976, for example, the Justice Department brought suit against the Bechtel Corporation for alleged violations of the Sherman Antitrust Act by extending antitrust analysis to certain boycott activities. The Justice Department and the Federal Trade Commission enforce the Sherman Act, but any private party injured by a possible antitrust violation can bring suit for treble damages and injunctive relief.

A number of U.S. companies, particularly those located in Arab countries, claimed that they lost sales because of the antiboycott laws and regulations. Most of the firms involved either lost invitations to bid on business deals that included prohibited boycott terms or were not allowed to fulfill requests for information. In particular, Department of Commerce rules restricting the dissemination of certain information to the governments of boycotting nations are thought to curtail the ability of American business to answer false allegations made by foreign competitors to a boycotting country or boycott office. The United States Chamber of Commerce commented on this problem in a recent report: "The ban on providing information, apart from raising difficult constitutional questions, is an obstacle to firms seeking removal from existing blacklists, to firms threatened with inclusion on a blacklist, and to firms without existing business dealings with boycotting countries which seek to enter those markets."[8] The report went on to note that this may exacerbate problems in the long run by limiting U.S. trade with boycotting nations to firms established in those countries and the replacement of potential new market opportunities by exports from countries other than the U.S.

Another major criticism of U.S. antiboycott policy is the existence of multiple programs. Difficulties created by differences between Commerce, Treasury, and Justice Department laws and regulations have frequently been cited as the cause of lost contracts by U.S. firms operating in the Middle East. These laws are particularly discouraging to small and medium-sized firms that cannot afford the legal counsel required to provide advice on a case-by-case basis as to what is allowable under the regulations. It appears that some companies have sacrificed potential sales because of the high cost of obtaining information regarding the complicated boycott regulations. Similarly, some businessmen have complained that the record keeping and reporting requirements necessitated by multiple antiboycott provisions raise the cost of production. This creates a financial burden that reduces their ability to compete in export markets. Again, this has the effect of deterring some companies from establishing themselves in an export market for countries in the Middle East.

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[8] Chamber of Commerce of the United States, Howard L. Weisberg, (ed.), _A National Export Policy: Recommendations for Expanding U.S. Exports_, 1981, p. 24.

A single antiboycott program should be developed to remedy the discontinuity created by the three existing antiboycott programs. This would remove much of the uncertainty associated with present policy and eliminate costs arising from the duplication of effort to regulate unapproved boycott activities. At the same time, it would defend the rights of Americans to trade freely with other nations.

ANTITRUST LAWS

The primary objective of U.S. antitrust laws is to promote competitive conditions within the domestic economy. The benefits of a freely competitive market are efficiency in the allocation of resources and the satisfaction of consumer choice by providing consumers the products they desire at the lowest price. Thus, government antitrust policy is aimed at reducing or eliminating artificial restraints on the operation of market forces that may allow some firms to raise prices above competitive levels.

The United States, however, is the only major trading country that extends its domestic antitrust laws to its export trade. The extraterritorial extension of U.S. antitrust laws is widely believed to reduce the competitiveness of U.S. exporters in international markets. In many cases it is not the overzealous enforcement of antitrust laws that creates the problem, but the uncertainty surrounding the application of the law to international transactions. Companies may abandon or curb some operations or engage in unduly restrictive transactions that would not be necessary if the risk of violating antitrust laws were more clearly perceived. The uncertainty created by this application of antitrust laws may limit the full potential of export opportunities.

A special antitrust exemption is granted under the 1918 Webb-Pomerene Act for the joint export activities of an association of American companies. The Act allows companies to form export trade associations, known as Webb-Pomerene associations. The Act, to a limited extent, exempts these associations from prosecution under either the Sherman or Clayton Antitrust Acts as long as they engage solely in export trade and do not restrain commerce within the United States. Its purpose was to stimulate U.S. exports and encourage small businesses to expand into foreign markets by improving their ability to compete with foreign competitors.

In enacting Webb-Pomerene, Congress anticipated an eager American business community taking advantage of the opportunity to pool its facilities, resources, and expertise in launching an ambitious joint exporting program. Yet the Act never produced the anticipated export expansion. Even during the peak of 1930 to 1935, there were only fifty-seven Webb-Pomerene associations accounting for 19 percent of total U.S. exports. Today such

associations number only about thirty, with a share of total U.S. exports at less than 2 percent.[9]

Webb-Pomerene has not removed the burden created by the extraterritorial application of domestic antitrust law. This is clear from the small share of exports generated by Webb-Pomerene associations, which can be attributed to two aspects of the Act.

The first involves the definition of "export trade" under the Act: it includes only "trade or commerce in goods, wares, or merchandise." This provision effectively excludes the rapidly expanding service sector. If the Act is to achieve its intended effect, it must broaden its eligibility requirements to include service industries.

The second problems concerns the law's vagueness and the ambiguous antitrust enforcement procedures, which may deter companies from forming export associations because of fear of antitrust implications. Moreover, the Department of Justice and, to a lesser extent, the Federal Trade Commission are seen by the business community as hostile to the Webb-Pomerene associations. In recent testimony before the International Finance Subcommittee, Milton Schulman, Chief Executive Officer of Millen Industries, Inc., a small manufacturing concern, expressed this apprehension: "[Y]ou must understand the extent to which a small businessman, who cannot afford to retain and seek constant high-priced antitrust counsel, fears the antitrust laws and is inclined to stay as far away from possible exposure as he can, even if it means giving up business opportunities."[10] Thus, clarification of the guidelines is imperative if the Act's original objectives are to be achieved.

EXPORT CONTROLS

Most disincentives to exports are the unintended results of other policies. Controls, however, represent a clear decision to sacrifice exports for the sake of other policy objectives. The Export Administration Act of 1979 is the most important statutory source of such controls. Under the Act, the three main reasons for export controls are: national security and foreign policy reasons and for reasons of domestic short supply.[11] While such controls are necessary to preserve national interests, their proliferation confuses and frustrates the U.S. exporter.

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9 Statement of Senator Heinz, Congressional Record, April 8, 1981.

10 Statement of Milton M. Schulman before the International Finance Subcommittee of the Senate Banking Committee, March 5, 1981, p. 3.

11 Export controls for reasons of domestic short supply will not be discussed here because they have faced little opposition and such controls have generally not involved an embargo of exports, but rather the setting of export quotas.

The primary objective of national security controls is to restrict the transfer of strategic goods and technology to assure that these items are not exported or re-exported to countries that could potentially use them against U.S. national security interests. The U.S. attempts to pursue this objective by cooperating with friendly nations as much as possible, while minimizing the overall level of controls to keep them from hindering trade with other countries. Export controls have also been imposed to further foreign policy objectives, such as those relating to human rights, international terrorism, regional stability, and special policies regarding U.S. relations with South Africa, Iran, and various Communist countries.

Though the aims are laudable, these controls pose avoidable problems. First, delays in processing export license applications have led to lost sales. The U.S. Chamber of Commerce argues that the current licensing process needs to be streamlined and clarified to reduce uncertainty and delays in the export process.[12] Second, foreign availability of comparable goods often has diverted orders to non-U.S. suppliers. For example, Charles Leber, vice-president of world-side marketing for Caterpillar Tractor Company points out that the ratio of pipelayer and tractor sales to the Soviet Union from his firm and from Komatsu, a Japanese firm that is his firm's chief competitor, have almost exactly reversed over the last four years, with Komatsu now selling about five times as many machines as Caterpillar.[13] This reversal has occured primarily because of U.S. trade sanctions, according to Mr. Leber. In instances such as this, controls merely displace U.S. firms in international markets. This reduces the effect of such sanctions on the targeted country, while inflicting an immediate economic loss to the United States. Stanley Marcus, former Deputy Assistant Secretary of Commerce, contends that U.S. economic sanctions against countries such as China, North Korea, Vietnam, South Africa, and the Soviet Union have been ineffective and have served primarily to isolate them further from the United States.[14] He also notes that the Arab oil embargo of 1973 did not force any major policy changes in this country, aside from a more conscious effort to achieve greater energy independence.

An argument to curtail exports to the "enemy" can sometimes be made, however, even if comparable goods are available from foreign nations. For example, the recent U.S. decision to expand export controls to the Soviet Union in the area of truck manufacturing was designed to make clear U.S. displeasure with Soviet actions in Poland and Afghanistan. Although U.S. controls may be circumvented, Washington at least has taken the moral high ground. The final decision, however, should be made after carefully balancing both economic and national security considerations.

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[12] Chamber of Commerce of the United States, op. cit., p. 28.

[13] Lucia Mouat, "U.S. industrialists argue that trade sanctions are likely to boomerang," The Christian Science Monitor, March 23, 1982, p. 5.

[14] Ibid.

In sum, export controls for reasons other than strict national security have seldom been successful in either forcing a policy change or in preventing the targeted country from getting the same goods elsewhere. Moreover, economic sanctions have tarnished the image of the U.S. as a reliable supplier and have made it difficult for U.S. business to plan ahead. A final criticism of export controls arises from their lack of consistency. It makes little sense, for example, for the U.S. to excoriate France and West Germany for selling materials to the Soviets to build the gas pipeline, while the U.S. continues to sell grain to the Soviets.

CONCLUSION

High unemployment and increasing competition from abroad has led to proposals to restrict imports as a means of restoring employment and economic growth to the domestic economy. Rather than focusing on imports as the root of this nation's international trade problems, there is a need to re-evaluate present laws and regulations that hinder American exporters from competing as equals in foreign markets. These policies, particularly those restricting the conduct of U.S. firms doing business abroad (the FCPA, the extraterritorial extension of U.S. antitrust laws, and antiboycott regulations), are especially onerous because the U.S. is the only nation to impose such limitations on its exporters. This gives foreign firms a distinct competitive advantage and hinders export expansion.

Although guided by good intentions, these laws and regulations frequently impose excessive costs upon the business community. The major impediments to exporting could easily be corrected by changes in the existing rules and regulations. For example, exemptions from antitrust could be granted to firms marketing their products abroad as long as they did not interfere with domestic commerce. In addition, the three antiboycott programs now used could be consolidated into a single program. These basic reforms would not alter the original intent of these laws, but would greatly reduce the disincentives they create. In many instances, merely simplifying and clarifying existing regulations to reduce uncertainty and to speed up the exporting process would be the best possible steps toward export expansion.

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