

NOTE

COUNTERTRADE AND EXPORT TRADING COMPANIES: HAS THE UNITED STATES JOINED THE SUCCESSFUL TRADING GAME OF JAPAN AND OTHERS?

I. INTRODUCTION

Indonesian rubber is traded for Canadian railway freight cars,¹ German technology is exchanged for Soviet natural gas,² British aircraft for Ecuadorian bananas,³ Pepsi-Cola bottling plants for Stolnichnaya vodka,⁴ and General Motors four-wheel drive vehicles for South American strawberries.⁵ These transactions are commonplace in world markets today, and U.S. companies are discovering that they must become international supermarkets in order to conduct business abroad.⁶

A survey of world trade and recent publications indicates that this form of trading is playing an increasingly important role in international contracts.⁷ The concept of barter, dating back to primitive civilizations, is "enjoying yet another renaissance."⁸ Countertrade is the generic term used to classify modern transactions involving an exchange of goods and services without the use of money.⁹

1. Truell, *Barter Accounts for a Growing Portion of World Trade Despite its Inefficiency*, Wall St. J., Aug. 15, 1983, at 21, col. 5.

2. *Id.*

3. *Id.*

4. NEWSWEEK, June 26, 1978, at 63. Similarly, Coca-Cola agreed to market one million cases of Poland's Krakus beer in exchange for Coke syrup worth more than \$10 million. *Id.*

5. David H. Hill, President, Motor Trading Company, Symposium Presentation at Wayne State University (Oct. 21, 1983) (discussing trade: the reality and the opportunity).

6. Martin, *Foreign Exchange U.S. Firms are Pressed to Offer Barter Terms by Overseas Customers*, Wall St. J., May 18, 1977, at 1, col. 6.

7. See generally L. WELT, COUNTERTRADE: BUSINESS PRACTICES FOR TODAY'S WORLD MARKET (1982) [hereinafter cited as WELT, COUNTERTRADE], OECD, COUNTERTRADE PRACTICES IN EAST-WEST ECONOMIC RELATIONS (1979) [hereinafter cited as OECD, COUNTERTRADE], OECD, EAST-WEST TRADE: RECENT DEVELOPMENTS IN COUNTERTRADE (1981) [hereinafter cited as OECD, EAST-WEST TRADE].

8. Truell, *supra* note 1, at 21.

9. BLACK'S LAW DICTIONARY 137 (5th ed. 1979).

The variety of countertrade transactions in existence today reflect such great divergencies that they evade a detailed classification. See WELT, COUNTERTRADE, *supra* note 7; OECD, EAST-WEST TRADE, *supra* note 7; McVey, *Countertrade and Barter: Alternative Trade Financing by Third World Nations*, 6 INT'L TRADE L.J. 197 (1980-81); EUROPEAN AMERICAN

Trade has become the focus of governmental policy; more and more nations are becoming aware that the formulation of export (and import) policies is valuable and necessary.¹⁰ While international

BANK, INTERNATIONAL COUNTERTRADE (promotional pamphlet 1983); Weigand, *International Trade Without Money*, HARV. BUS. REV., Nov.-Dec 1977, at 28.

Four general types of countertrade can be extracted from a compilation of world trade transactions and scholarly materials. The first is straight or pure barter (*transactions de truc, Bartergeschäfte*), where the exchange of goods occurs under a single contract. WELT. COUNTERTRADE, *supra* note 7, at 15; OECD, EAST-WEST TRADE, *supra* note 7, at 17-18. This type of contract is rare because of disagreements between contracting parties over the value of the traded goods, the risks involved in using one contract to cover both deliveries and counterdeliveries, and the unwillingness of Western banks to finance transactions in which a creditor's proceeds are contingent upon another party's performance. WELT. COUNTERTRADE, *supra* note 7, at 15. When two countries wish to trade with each other on this basis the transactions take the form of bilateral clearing agreements. ECONOMIST, Dec. 14, 1984, at 52; WELT. COUNTERTRADE, *supra* note 7, at 22.

A second type of countertrade, closely related to bilateral clearing arrangements, is switch trading. This type of transaction allows the country with a surplus of bartered goods to transfer all or part of the goods to a third party (usually a switch trading house). The third party finds new markets for the surplus trade and gives the country cash or its equivalent. WELT. COUNTERTRADE, *supra* note 7, at 23.

The third type of countertrade is referred to as counterpurchase (*contri-chats, Gegengeschäfte*). A Western country sells goods to a foreign trade organization or nation and contractually agrees to make reciprocal purchases from that organization or from another commercial body within the same country, within a certain period of time. WELT. COUNTERTRADE, *supra* note 7, at 16; OECD, EAST-WEST TRADE *supra* note 7, at 19. Two legally separate contracts are drawn up, which operate independently of one another except for a single protocol linking the agreements. See McVey, *supra* note 9, at 204 (discussion of the legal reasons for two independent contracts). The parties may agree that the first contract be paid in full with cash or that a certain percentage of the original sale be in currency. OECD, EAST-WEST TRADE, *supra* note 7, at 18.

The final type of countertrade has a variety of names: compensation, import compensation, buy back, or industrial cooperation (*accords de rachat, Rückkaufgeschäfte*). See ECONOMIST, Dec. 14, 1984, at 42; OECD, EAST-WEST TRADE, *supra* note 7, at 23; OECD, COUNTERTRADE, *supra* note 7, at 7-9; WELT. COUNTERTRADE, *supra* note 7, at 17-21; McVey, *supra* note 9, at 216-19; Walsh, *Countertrade: Not Just For East-West Anymore*, 17 J. WORLD TRADE L. 3, 5 (1983) (these agreements are also known as work contracts or as production arrangements in Indonesia). In compensation agreements a Western supplier of machinery, equipment or complete plants agrees to accept payment for a given portion of his deliveries either in the form of goods produced by that machinery, etc., or in the form of goods related less directly to the nature of his deliveries. OECD, EAST-WEST TRADE, *supra* note 7, at 23. These arrangements generally involve substantial sums of money, are complex, and are of longer duration than counterpurchase arrangements. *Id.*; McVey, *supra* note 9, at 216.

10. An Organization of Economic Cooperation and Development (OECD) Committee report indicates the importance of trade:

Trade is also a driving force for growth and progress. Trade opportunities and the dismantling of obstacles to trade are a strong stimulus to seek out new sources of supply and markets and hence to invest and develop economic activity. Trade goes hand in hand with competition; and competition is the most efficient spur to progress.

OECD, DEVELOPMENT COOPERATION 41 (1982).

economic policy will no longer enable countries to build and maintain empires,¹¹ such trade policies can provide for the creation of spheres of economic influence,¹² for greater independence of nations, and for stabilization and stimulation of national economies.¹³

A combination of the growing importance of world trade and the sharpened awareness of world economic interdependence¹⁴ has led to the use of barter/countertrade transactions.¹⁵ To deal with the complexities of these contracts, individuals and industry seek out the services of trading companies.¹⁶

The purpose of this Note is to examine the use of countertrade and export trading companies in the United States. It first reviews the development of countertrade, its use, and legal restraints arising in today's society. Second, this Note considers the Export Trading Company Act of 1982,¹⁷ the current legislation permitting the establishment of trading companies, in order to extract the purpose and impact of trading companies. Finally, these two trade mechanisms are analyzed for the purpose of determining their impact on the position of the United States in international trade.

II. COUNTERTRADE

A. DEVELOPMENT

The development of barter in the United States can be traced

11. The policies of imperialism and colonialism that contributed to the development of Great Britain and the United States are no longer feasible, politically or practically. Note, *The Export Trading Company Act of 1982: Export Trade Comes of Age in the United States*, 34 S.C.L. REV. 757, 761 (1983) [hereinafter cited as Note, *The Export Trading Act of 1982*]; J. HANSON, *TRADE IN TRANSITION EXPORTS FROM THE THIRD WORLD, 1840-1900* (1980).

12. Successful export policies allow nations to dominate other nations, for example, Japan's dominance over U.S. markets in computers and automobiles. See Unkovic & LaMont, *The Export Trading Company Act of 1982: Invitation to Aggressive Export Expansion*, 87 DICK. L. REV. 205, 207 (1983) (growth of Japanese trading companies).

13. M. CZINKOTA & G. TESAR, *EXPORT POLICY: A GLOBAL ASSESSMENT* at v (1982).

14. OECD, *WORLD ECONOMIC INTERDEPENDENCE AND THE EVOLVING, NORTH-SOUTH RELATIONSHIP* 7 (1983) [hereinafter cited as OECD, *NORTH-SOUTH RELATIONSHIP*].

15. See McVey, *supra* note 9, at 197. The statement of former Russian leader Breshnev evidences the international usage of countertrade. Speaking at a 25th Party Congress in 1976, he stated: "[D]evelopment of new forms of international economic relations, which go beyond traditional trade, considerably broaden out possibilities and, as a rule, have a very great effect. I am thinking, in particular, of compensation agreements. . . ." OECD, *EAST-WEST TRADE*, *supra* note 7, at 11.

16. See Lowenstein, *U.S. Firms Move to Countertrading*, Wall St. J., Nov. 4, 1981, at 31, col. 2; McVey, *supra* note 9, at 200. See generally *INDUSTRY WEEK*, Sept. 5, 1983, at 86 (advertisement by trade organization offering barter exchange services).

17. Export Trading Company Act of 1982, Pub. L. No. 97-290, 96 Stat. 1233 (1982) (codified in scattered sections of titles 12 and 15 U.S.C.).

to a notable historic event: when Dutchman Peter Minuit exchanged \$24 worth of trinkets for Manhattan Island.¹⁸ The concept of exchanging goods for other goods dates back to more primitive times, predictably to the dawn of history.¹⁹

In the modern world, barter/countertrade has always represented a large assortment of transactions, but the exchanges were generally associated with East-West trade.²⁰ For years, countertrade has represented the sole means of Western trade with Comecon, the Eastern European trading bloc.²¹

Over the second half of the last decade, countertrade underwent a substantial change, emerging as a trading instrument in North-South²² and U.S. domestic trading.²³ The term thus took on a new meaning. A recent Organization for Economic Cooperation and Development (OECD) publication broadly defined countertrade as an international operation where the seller is required to accept, in partial or total settlement of his deliveries, a supply of products coming from the purchasing country; the contractual link between the two agreements is not necessarily directly related to the export deal.²⁴

The resurgence of barter/countertrade is linked on one hand to international economic cycles,²⁵ and on the other hand to particular stages of economic development of countries.²⁶ More specific problems such as the inability of nations to adequately finance their

18. Arbose, *Exchange Is No Robbery: Or Is It?*, INTL MGMT., June 1978, at 15.

19. J.P. LEVY, *THE ECONOMIC LIFE OF THE ANCIENT WORLD* 5 (1967).

20. See WELT, COUNTERTRADE, *supra* note 7, at 7; OECD, EAST-WEST TRADE, *supra* note 7, at 5. Until the late 1970's the terms were narrowly defined as:

A set of mutually related transactions according to which a hard currency expenditure for the purchase of an Eastern country of goods, equipment licenses or Western know-how is counter-balanced for all or part of its value by a purchase of Eastern products by the Western exporter.

OECD, COUNTERTRADE, *supra* note 7, at 6.

21. Arbose, *supra* note 18, at 15. See generally Mandato, Skola & Wyse, *Counterpurchase Sales in the German Democratic Republic*, COLUM. J. WORLD BUS., Spring 1978, at 82 (discussion of trade with the German Democratic Republic).

22. See McVey, *supra* note 9.

23. See Walsh, *supra* note 9, at 3; deMiramon, *Countertrade: A Modernized Barter System*, OECD OBSERVER, Jan. 1982, at 12; BUS. WEEK, Aug. 4, 1980, at 57; U.S. NEWS & WORLD REP., Mar. 21, 1977, at 47; Truell, *supra* note 1, at 21.

24. OECD, EAST-WEST TRADE, *supra* note 7, at 9.

25. OECD, NORTH-SOUTH RELATIONSHIP, *supra* note 14, at 7.

26. OECD, THE DEVELOPMENT IMPACT OF BARTER IN DEVELOPING COUNTRIES: CASE OF INDIA 9 (1977) [hereinafter cited as OECD, CASE OF INDIA].

import activities,²⁷ the protectionist import relief measures taken by Western nations to bolster key domestic industry,²⁸ the sheer lack of convertible currency in the reserves of much of the world,²⁹ the hunger of commodity rich developing countries for industrial goods,³⁰ and inflation³¹ have been cited as significant events triggering the use of barter exchange transactions.

B. RESTRAINTS

A number of problems have perhaps hampered the growth of countertrade in the United States. One reason is the historical association of barter.³² The growth of Germany's economy at the height of the depression was due largely to the barter deals of Herr Hjalmar, Hitler's fixer of finance.³³ Reflecting on these economic tactics, former U.S. Secretary of State Henry Kissinger has expressed the view of many Americans, condemning barter deals over oil as threatening the world with a vicious cycle of competition, anarchy, rivalry, and depression similar to the events preceeding the collapse of world order in the 1930's.³⁴

Another reason cited for countertrade's negative reputation in the United States is the number of unsuccessful deals entered into by Western firms.³⁵ The key to negotiating a successful contract is knowledge of the subject matter. Americans are not experienced in dealing with countertrade transactions.³⁶ Nevertheless, Western sellers experienced in barter exchanges have found endless red tape in dealing with Comecon countries,³⁷ a limited

27. McVey, *supra* note 9, at 127.

28. *Id.* at 198.

29. ECONOMIST, *supra* note 9, at 42. See also NEWSWEEK, *supra* note 4, at 63; Walsh, *supra* note 9; WELT, COUNTERTRADE, *supra* note 7, at 8-9; G. VERBIT, TRADE AGREEMENTS FOR DEVELOPING COUNTRIES 142 (1969); OECD, COUNTERTRADE, *supra* note 7, at 6 (for a discussion of world monetary and debt problems as an effect on countertrade).

30. ECONOMIST, *supra* note 9, at 42.

31. Truell, *supra* note 1, at 21. See generally ECONOMIST, *supra* note 9, at 42; WELT, COUNTERTRADE, *supra* note 7, at 8-9.

32. The historical association of barter has implications in today's society. BAR LEADER, May-June 1982, at 29 (bar association's prohibitions of lawyers bartering their services through trade associations).

33. ECONOMIST, *supra* note 9, at 52.

34. *Id.*

35. See BUS. WEEK, Jan. 23, 1978, at 41; Lowenstein, *supra* note 16, at 31, col. 2.

36. Weigand, *supra* note 9, at 42.

37. NEWSWEEK, *supra* note 4, at 63.

choice of goods (which indirectly results in companies becoming saddled with goods that are difficult to unload),³⁸ and poor quality combined with inflated prices of goods.³⁹ In addition, some banks attack countertrade as inefficient and costly, claiming it is dangerous as well as distorting to trade patterns.⁴⁰

The major source of problems limiting countertrade transactions in the United States exists on the governmental level. Several U.S. laws and regulations inhibit the growth of countertrade.⁴¹ First, the Internal Revenue Service (IRS) has voiced its concern about the reporting of barter exchanges by taxpayers.⁴² In an effort to overcome the widespread tax evasion accompanying barter exchanges, the International Association of Trade Exchanges was formed to establish tougher standards and a more efficient record-keeping design.⁴³

The Tax Equity and Fiscal Responsibility Act of 1982⁴⁴ (TEFRA) is aimed at enforcing compliance with the tax consequences of direct barter and barter through trade exchanges. The Act requires that trade exchanges (for example, organizations offering bartering services) file information returns with the government detailing the barter transactions of their members.⁴⁵ The final regulations adopted by the IRS pursuant to TEFRA clarify the information returns to be filed,⁴⁶ define the term "broker" to include

38. *Id.*

39. G. VERBIT, *supra* note 29, at 142.

40. Truell, *supra* note 1, at 21. See also *infra* notes 73-75. Even the East German government voiced its skepticism of countertrade arrangements. A Bonn White Paper declared that barter should be used only when products exchanged "are of immediate benefit to their recipients." NEWSWEEK, *supra* note 4, at 63.

41. See *infra* notes 42-66.

42. BUS. WEEK, *supra* note 24, at 57. A recent tax evasion survey reveals that 62% of U.S. taxpayers said their conscience would not bother them if they failed to declare the value of income derived from barter. Maital, *The Tax Evasion Virus*, PSYCHOLOGY TODAY, Mar. 1982, at 74.

43. BUS. WEEK, *supra* note 23, at 57. See 26 U.S.C. § 7069 (1982). For a description of the requirements concerning third party summonses to ascertain names of taxpayers and record-keeping, see § 7609(a)(3)(G), which specifically includes barter exchanges. For a definition of barter exchange, see 26 U.S.C. § 6045(c)(3) (1982).

44. Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. 97-248, 96 Stat. 324 (codified as amended in scattered sections of U.S.C.). *But cf.* H.R. 3964, 98th Cong., 1st Sess. 129 CONG. REC. H7431 (1983) (bill to amend the Internal Revenue Code of 1954 to prohibit the Internal Revenue Service from requiring barter exchanges to submit information on an individual transaction basis).

45. Keller, *The Taxation of Barter Transactions*, 67 MINN. L. REV. 441 (1982).

46. *Final Regulations Issued by IRS on Reporting Gross Proceeds by Brokers*, 58 J. TAX'N 376 (1983).

a barter exchange,⁴⁷ and determine that barter exchanges must report exchanges in cash.⁴⁸

A recent Court of Appeals decision in the Eighth Circuit could strengthen the IRS's position in monitoring the non-cash transactions conducted by barter exchanges.⁴⁹ In reversing the district court decision,⁵⁰ the court ruled that the special statutory procedures required for the issuance of John Doe summonses⁵¹ do not apply to a summons issued to investigate the tax liability of a barter exchange corporation.⁵² It was noted that the summons was not of the John Doe variety because it identified the person with respect to whose liability it was issued; namely, the barter exchange corporation.⁵³ In addition, any ancillary benefit the IRS might receive in conducting the investigation was deemed allowable.⁵⁴

American antitrust laws have been called "wise restraints that make men free,"⁵⁵ but these laws, which assure that the competitive struggle is fairly waged,⁵⁶ are a major barrier to the use of countertrade.⁵⁷ It is possible to view barter as the transactional equivalent of reciprocity.⁵⁸ Reciprocity is defined as mutual patronage: "I'll buy from you if you'll buy from me."⁵⁹

A wealth of case law exists on the subject of American companies entering into agreements that tie the selling of one product to the purchasing of another.⁶⁰ In determining the legality of

47. Treas. Reg. § 1.6045-1(a)(4) (1983).

48. Treas. Reg. § 1.6045-1(3)(2) (1983).

49. 69 A.B.A. J. 514 (1983); *United States v. Barter Systems, Inc.*, 694 F.2d 163 (8th Cir. 1982) (United States initiated an enforcement action against a Nebraska barter exchange for refusal to comply with a summons).

50. 1982-1 U.S. TAX CAS. (CCH) ¶ 9127 (D. Neb. Sept. 16, 1981).

51. John Doe summons procedures provide a check on the IRS's use of the summons to examine tax liabilities of unnamed or unknown taxpayers. 26 U.S.C. § 7609(f) (1982). See Keller, *supra* note 45, at 487. See also *United States v. Bisceglia*, 420 U.S. 141 (1975) (decision that alerted Congress to the possible widespread and uncontrolled use of summonses).

52. *Barter Systems, Inc.*, 694 F.2d at 163.

53. *Id.* at 168.

54. *Id.* at 169.

55. E. KINTNER & M. JOELSON. AN INTERNATIONAL ANTITRUST PRIMER 8 (1974).

56. *Id.*

57. *Id.* Mandato, Skola & Wyse, *supra* note 21, at 88.

58. Allison, *The Anti-Trust Implications of Barter*, 58 CHI. KENT L. REV. 89, 90 (1981).

59. *Id.*

60. *United States Steel Corp. v. Fortner Enterprises, Inc.*, 429 U.S. 610 (1977); *Federal Trade Commission v. Consolidated Foods Corp.*, 380 U.S. 592 (1965); *Spartan Grain Mill Co. v. Ayero*, 512 F.2d 214 (5th Cir. 1975); *Columbia Nitrogen Corp. v. Royster Co.*, 451 F.2d 3 (4th Cir. 1971); *United States v. General Dynamics Corp.*, 258 F. Supp. 36 (S.D.N.Y. 1966).

reciprocal transactions, courts have allowed the practice to the extent that it does not significantly lessen competition.⁶¹ The intent behind a barter deal differs from the intent behind reciprocity. Barter is generally a response to uncontrollable market factors;⁶² the absence of an anticompetitive purpose makes the illegal intent less likely.⁶³ Further, the coercive effect that results from a party imposing an agreement with his economic leverage⁶⁴ is not present in barter exchanges. A firm's use of intermediaries and the semipublic nature of the exchange are evidence of a legitimate trade motive.⁶⁵ Although the barter transaction may differ significantly in intent from reciprocity, caution is still needed because a transaction will be deemed illegal when anticompetitive effects are an actual or probable result.⁶⁶

The possibility of discrimination emerging from barter exchanges has prompted a response from the Department of Justice⁶⁷ and the Federal Trade Commission (FTC).⁶⁸ Both agencies indicate the possibility of legal intervention in the event that barter exchanges result in a substantial disadvantage to small buyers.⁶⁹ Such a response is indicative of the United States' effort to uphold free trade.⁷⁰

At the international level, the United Nations has repeatedly encouraged trade and innovation,⁷¹ but that body is most concerned with arrangements restricting access to markets or interfering with competition.⁷² The General Agreement on Tariffs and Trade (GATT) represents another set of rules aimed at liberalizing the multilateral

61. *Spartan Grain and Mill Company*, 581 F.2d at 423; *General Dynamics Corp.*, 258 F. Supp. at 79.

62. Allison, *supra* note 8, at 97.

63. *Id.*

64. *General Dynamics Corp.*, 258 F. Supp. at 65.

65. Allison, *supra* note 58, at 97. Antitrust analysis takes cognizance of procompetitive and anticompetitive effects. Thus, an anticompetitive barter exchange may be legal if there is evidence of substantial, counterbalancing procompetitive effects. *Id.* at 99. See *Continental TV, Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977) (the Court recognized counterbalancing factors).

66. Allison, *supra* note 58, at 98.

67. PURCHASING, May 21, 1984, at 11.

68. *Id.* Both agencies derive their authority under U.S. antitrust laws.

69. The government's definition of "substantial" is determined from the facts of each case. See *supra* note 61 and accompanying text.

70. Weigand, *supra* note 9, at 42.

71. Development, *Antitrust Laws: United Nations Guidelines—Restrictive Business Practices*, U.N. Doc. A/Res/35/60 (1980), 22 Harv. Int'l L. J. 405 (1981) [hereinafter cited as Development, *Antitrust Law: United Nations Guidelines*]. See G.A. Res. 35/63, U.N. Doc. A/Res/35/63 (1980).

72. Development, *Antitrust Law: United Nations Guidelines*, *supra* note 71, at 405.

trading system.⁷³ The increasing demand for bilateral reciprocity in trade negotiations has contributed to a breach of non-discrimination, a key principle in the GATT.⁷⁴

Several reasons exist as to why trading without money is not prevalent in the United States. The fact that individuals and industries use this method of trading suggests that they must foresee sizable advantages. A review of the current usage of countertrade might provide an answer.

C. CURRENT TRENDS

Some trade experts attribute as much as 20% of world trade to countertrade.⁷⁵ Others claim this figure is inflated and recognize a maximum figure of 5%.⁷⁶ Estimates dealing only with East-West trade are more reliable.⁷⁷ During the period between 1975-80, an analysis of published information suggests that a combination of all types of countertrade could total 15% to 35% of all trade between the West and the Communist nations of Eastern Europe.⁷⁸

Meanwhile, more developing countries are participating in countertrade,⁷⁹ and the International Monetary Fund recently noted a surge in these bilateral trade arrangements.⁸⁰ The root of the cur-

73. The GATT was built on the belief of national leaders that some international mechanism is essential to prevent the pursuit of self-interested national regulation of international trade that harms other nations. J. JACKSON, *WORLD TRADE AND THE LAW OF GATT* § 1.3, at 9 (1969). See F.V. MEYER, *INTERNATIONAL TRADE POLICY* (1978); M.M. KOSTECKI, *EAST-WEST TRADE AND THE GATT SYSTEM* (1978).

74. THE BRANDT COMMISSION 1983, *COMMON CRISIS, NORTH-SOUTH: COOPERATION FOR WORLD RECOVERY* 112 (1982). The 1983 Brandt Commission recognizes the value of bilateral reciprocity as a bargaining device, but it regards the spread of this phenomenon as a dangerous development. Multilateral balancing is the only way to seek a recovery of world trade. *Id.* at 108.

75. Truell, *supra* note 1, at 21.

76. *Id.* It is difficult to assess just how much business is accounted for by countertrade. In the past, companies using this trade device did not make their record of transactions public. Recently, countertrade services have been advertised in trade journals and industry is more readily producing information about its barter exchanges. See *INDUSTRY WEEK*, *supra* note 16, at 86 (trade journal advertisement).

77. The Secretariat of the OECD analyzed the records of 157 firm compensation agreements signed by Western companies during the period of 1969-1979. OECD, *COUNTERTRADE*, *supra* note 7, at 2-3.

78. This figure is reached by combining the results of several sources. *Id.*; *NEWSWEEK*, *supra* note 4, at 63; Martin, *supra* note 6, at 1; deMiramon, *supra* note 23, at 13.

79. McVey, *supra* note 9.

80. Walsh, *supra* note 9, at 3. See also OECD, *CASE OF INDIA*, *supra* note 26. (OECD participates in projects aimed at reinforcing the exchange of experience and information between developing countries).

rent surge is considered to be international economic conditions⁸¹ which cause developing countries to look for nontraditional instruments to promote exports as well as to procure essential imports and raw materials.⁸²

Countertrade practices in U.S. companies are steadily increasing as a means of conducting international sales,⁸³ despite the limiting laws and regulations.⁸⁴ Corporate management has accepted trade without money as a creative solution to difficult marketing and business problems.⁸⁵

Several advantages are discernable in such an approach. First, countertrade is used to generate extra sales.⁸⁶ Potentially lost sales have been salvaged when a countertrade offer is added to the deal.⁸⁷ Second, the market price of a product may be lowered below the quoted price because overpriced goods are accepted in return.⁸⁸ Third, a Western company participating in countertrade is frequently offered precious raw materials or natural resources in return for its manufactured goods.⁸⁹ Fourth, in building an international market, the Western firm takes a broader view of the customer's problems and the country's economic situation. It is forced to acquire an improved "trader mentality"⁹⁰ and to develop a position that can fill the roles of a supplier as well as a buyer.⁹¹ Generally, countertrade has contributed to the internationalization

81. See *supra* note 24 and accompanying text. See also Presentation by David H. Hill, *supra* note 5.

82. OECD, NORTH-SOUTH RELATIONSHIP, *supra* note 14, at 9; Weigand, *supra* note 9, at 42 (countertrade is used to thwart control of a developing country by a few large buyers).

83. Lowenstein, *supra* note 16, at 31, col. 2.

84. See *supra* text accompanying notes 39-61.

85. Address by Thomas A. Campobasso, President of Rockwell International Trading Company, at National Foreign Trade Council Meeting (Sept. 30, 1982) (discussing a multinational corporation's view of the export trading company legislation). See also Presentation by David H. Hill, *supra* note 5.

86. Weigand, *supra* note 9, at 42. See Presentation by David H. Hill, *supra* note 5 (effects in the auto industry).

87. Address by Thomas A. Campobasso, *supra* note 85. U.S. firms are given an opportunity to compete with finance packages offered by competing Japanese and European companies. *Id.*

88. Weigand, *supra* note 9, at 42.

89. McVey, *supra* note 9, at 198 (Brazilian hypothetical). Cf. *infra* note 97 (activities of European and Japanese trading companies).

90. Address by Thomas A. Campobasso, *supra* note 85. U.S. businessmen need to recall their "Yankee trader heritage," prevalent in the American colonies during the eighteenth century. *Id.*

91. *Id.*

of American industry, a phenomenon considered by some to be the course of the world's destiny.⁹²

The renewed awareness of trade in the United States has provided an environment ripe for the use of countertrade practices.⁹³ International economic problems further contribute to the governmental and industrial view of countertrade as an alternative approach to international trading. A question remains as to whether U.S. laws and regulations will allow a choice in the matter.

III. EXPORT TRADING COMPANIES (ETC)

A. BACKGROUND OF THE TRADING COMPANY

Trading companies have always served an integral function in world trade;⁹⁴ the concept is almost as old as commerce itself.⁹⁵ Early companies, despite the variety of forms, were providers of transportation, finance, and the exchange of goods and services between two disparate cultures.⁹⁶

The Europeans and the Japanese rely on the historical roots of trading companies to exercise their strength in the export market of today.⁹⁷ The modern version of the trading company is general-

92. See Presentation by David H. Hill, *supra* note 5 (symposium on trade).

93. Several bills are pending in Congress that direct the United States to enter into countertrade transactions. The majority of the legislation is aimed at bartering U.S. farm products for raw materials from the Third World. See H.R. CON. RES. 56, 98th Cong., 1st Sess. 129 CONG. REC. H454 (1983); H.R. 2428, 98th Cong., 1st Sess. 129 CONG. REC. H1861 (1983); H.R. 3544, 98th Cong., 1st Sess. 129 CONG. REC. H5134 (1983); H.R. 3991, 98th Cong., 1st Sess. 129 CONG. REC. H7552 (1983); S. 1683, 98th Cong., 1st Sess. 129 CONG. REC. S10886 (1983).

Congress has also considered legislation urging U.S. expansion of reciprocal market opportunities in trade. See H.R. 1571, 98th Cong., 1st Sess. 129 CONG. REC. H598 (1983); H.R. REP. NO. 383, 98th Cong., 1st Sess. (1983).

94. Note, *The Export Trading Company Act of 1982*, *supra* note 11, at 760.

95. Unkovic & LaMont, *supra* note 12, at 207.

96. *Id.* See generally H.P. BIGGAR, *THE EARLY TRADING COMPANIES OF NEW FRANCE (1965)* (birth and growth of trading companies in North America).

97. European trading companies date back to the Middle Ages when caravans traveled to the East to trade for Oriental products. Later, joint stock companies were formed to colonize lands rich in natural resources and to trade with these colonies. Unkovic & LaMont, *supra* note 12, at 206.

Japanese trading companies called *Sogo-shoshas* grew out of a threat to Japan's national survival. Industrialization was perceived as necessary to implement a goal of military strength; exporting was necessary for industrialization. Note, *The Export Trading Company Act of 1982*, *supra* note 11, at 762; A. YOUNG, *THE SOGO-SHOSHA: MULTINATIONAL TRADING COMPANIES (1979)*. Japan is now acknowledged as a real threat to United States trade; several alternative solutions have been made to meet the Japanese challenge. See Note, *United States-Japan Trade Relations: Meeting the Japanese Challenge*, 10 BROOKLYN J. INT'L L. 157 (1984).

ly subsidized by the government,⁹⁸ with the primary purpose of facilitating trade and creating new business opportunities.⁹⁹

Acting as intermediaries between buyers and sellers, the trading company provides several useful services. An extensive knowledge of domestic and international markets allows companies to provide detailed informational services about opportunities, clients, procedures, and finances.¹⁰⁰ The financial support aids small firms, who would otherwise be rejected as high risks by banking institutions.¹⁰¹ Relying on its many resources, a trading company is in a better position to evaluate the risks of entering into a particular market or country.¹⁰²

On the economic side, dealing in diverse commodities on numerous markets makes it possible for trading companies to achieve economies of scale and cost reduction.¹⁰³ After the initial investment to establish a contact network, the cost of processing information is marginal; static economies of scale are produced.¹⁰⁴ Dynamic economies result from the ability of the trading company to synthesize into business opportunities the political, economic, social, and climatic occurrences in domestic and international markets.¹⁰⁵ The large variety of goods and services available also make bartering exchanges possible.¹⁰⁶

The many vital services performed by trading companies are demonstrated by the continued use of the historical concept in Europe and Japan.¹⁰⁷ The growth of trading companies in the United States may depend on the degree of support the concept receives from the government, specifically from the legislative branch.

98. See generally PRICE WATERHOUSE & Co., EAST-WEST TRADE (Nov. 1976) (detailed descriptions of several state-owned trading companies).

99. See Note, *The Export Trading Company Act of 1982*, *supra* note 11, at 764.

100. EUROPEAN AMERICAN BANK, *supra* note 9.

101. Note, *The Export Trading Company Act of 1982*, *supra* note 11, at 766.

102. *Id.*

103. *Id.* at 767; YOUNG, *supra* note 98, at 65.

104. Note, *The Export Trading Company Act of 1982*, *supra* note 11, at 767; YOUNG, *supra* note 97, at 66.

105. Note, *The Export Trading Company Act of 1982*, *supra* note 11, at 767.

106. Barovick, *NFTC Conference Spotlights Export Trading Companies*, BUS. AM., Oct. 18, 1982, at 7.

107. The unquestioned success of the Japanese system has met with some opposition from a minority of Japanese businessmen. A growing dissatisfaction with the *sogo-shosha* is related to the overhead costs for establishing companies, the rate of return on the enterprise, and the exporting experience gained by companies after years of dealing with the trading company. Unkovic & LaMont, *supra* note 12, at 241-42.

B. LEGISLATIVE DEVELOPMENT: THE EXPORT TRADING COMPANY ACT OF 1982

In 1914, the Federal Trade Commission (FTC) was established and granted authority to conduct a study of U.S. export trade.¹⁰⁸ The Commission reported that exports were very important to American commerce and that two factors impeded export trade.¹⁰⁹ The factors were: foreign cartels backed by banks and encouraged by government, which were superior to and more effective than their American counterparts;¹¹⁰ and uncertainty over the extent of antitrust law, which prevented American companies from developing export associations.¹¹¹

Several attempts have been made at addressing the antitrust issue. The Sherman Act,¹¹² passed in 1890, represents one of the formidable barriers to firms participating in agreements that restrain trade.¹¹³ In an effort to prevent anticompetitive practices in the early stages, Congress passed the Clayton Act.¹¹⁴ The statute

108. Note, *The Webb-Pomerene Act: A Reexamination of Export Cartels in World Trade*, 19 VA. J. INT'L. L. 151, 153 (1978).

109. FEDERAL TRADE COMMISSION, REPORT ON COOPERATION IN AMERICAN EXPORT TRADE (1916).

110. Foreign trading companies have continually been cited as being superior to American trading companies. S. REP. NO. 27, 97th Cong., 1st Sess. 5 (1981).

111. American companies are hesitant to enter an association with another company when a court or the Justice Department is apt to find the agreement illegal under the antitrust laws. See *infra* note 147.

The attitude continues to exist today, as many businesses demand the reassessment of U.S. antitrust laws. See Hawk, *International Antitrust Policy and the 1982 Acts: The Continuing Need for Reassessment*, 51 FORDHAM L. REV. 201 (1982).

112. The Sherman Antitrust Act provides in relevant part:

Section 1: Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or within foreign nations, is declared to be illegal.

Section 2: Every person who shall monopolize, or attempt to monopolize, or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony.

Sherman Antitrust Act, 15 U.S.C. § 1 (1982).

113. In *United States v. Aluminum Co. of Am.*, 148 F.2d 416 (2d Cir. 1945), the court determined that the "situs of the effects" is of paramount importance in monopolization cases, rather than the situs of the conduct itself. Unfortunately, the Second Circuit directive has many interpretations. *Unkovic & LaMont*, *supra* note 12, at 232.

114. The Clayton Act states:

No person engaged in commerce or in any activity affecting commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall

prohibits various acquisitions, mergers, joint ventures, and other arrangements that may have a potentially anticompetitive effect on the U.S. economy.¹¹⁵ Such an incipient approach creates uncertainty among interested companies concerning the formation and operation of international joint ventures.¹¹⁶

The earliest effort by the United States to help American firms compete in foreign markets against foreign cartels¹¹⁷ was the Webb-Pomerene Act¹¹⁸ of 1918. Unfortunately, the Act did not provide the aid that Congress had envisioned.¹¹⁹ Based on association performance over the past 60 years, it may be concluded that the Webb-Pomerene Act has not significantly increased America's competition with foreign cartels.¹²⁰

In recent years, numerous export trading company bills have been introduced annually in Congress.¹²¹ On October 8, 1982, that year's entry finally rose to the status of law as the Export Trading Company Act of 1982.¹²²

Declaring that America's industrial competitiveness was declining as measured by increased import penetration¹²³ as well as the

acquire the whole or any part of the assets of another person engaged also in commerce or in any activity affecting commerce, where any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

Clayton Act, 15 U.S.C. § 18 (1982).

115. Unkovic & LaMont, *supra* note 12, at 238.

116. *See id.* at 239; *United States v. Minnesota Mining & Mfg. Co.*, 92 F. Supp. 947 (D. Mass. 1950) (ruling on the formation and operation of joint ventures).

117. E. KINTNER & M. JOELSON, *supra* note 55, at 18.

118. Webb-Pomerene Export Trade Act, 15 U.S.C. § 61 (1976 and Supp. 1981).

119. *See Allison, Antitrust and Foreign Trade: Exemption for Export Associations*, 11 HOUS. L. REV. 1124 (1974).

120. *See Schiffman, Introduction: The Role of International Trading Companies*, reprinted in PRACTISING LAW INSTITUTE, THE EXPORT TRADING COMPANY ACT 9 (1983); S. REP. NO. 27, *supra* note 110, at 18.

121. *See* S. 734, 97th Cong., 1st Sess., 127 CONG. REC. S22377 (1981); S. 2379, 96th Cong., 1st Sess., 126 CONG. REC. S2116 (1980); S. 864, 96th Cong., 1st Sess., 125 CONG. REC. S3874 (1979); S. 1663 96th Cong., 1st Sess., 125 CONG. REC. S11493 (1979).

122. Export Trading Company Act of 1982, Pub. L. No. 97-290, 96 Stat. 1233 (1982) (codified in scattered sections of titles 12 and 15 U.S.C.). It is important to note that this Act does not overrule the Webb-Pomerene Act; both pieces of legislation are aimed at increasing American trading in the world market. *See id.*

123. Imports of manufactured goods increased nearly four times as rapidly as exports during the past ten years. S. REP. NO. 27, *supra* note 110, at 4.

The surge of imports, often blamed for destroying U.S. jobs, has created some new ones, too. Many Americans' paychecks are tied directly to imports. For example, the imported

loss of export markets,¹²⁴ Congress viewed every successful program of trade promotion as a step in the right direction.¹²⁵ The export trading companies are viewed as a major tool of competitors in the world market¹²⁶ in addition to potentially increasing U.S. exports significantly.¹²⁷

The four part Act that emerged from the conference committee in 1982 addresses the concerns of major industry, banks, existing trading companies, and small business.¹²⁸ It proposes "to increase United States exports of products and services by encouraging more efficient provision of export trade services to United States producers and suppliers. . . ."¹²⁹

The Act establishes an Office of Export Trade in the Department of Commerce in order to reach the framers' formidable goals.¹³⁰

car industry contributes about 194,000 jobs to the U.S. economy; custom house brokers, who serve as freight forwarders and cargo agents for imports, also report increased revenues and hirings. Wall St. J., Feb. 29, 1984, at 1, col. 6.

124. During the period 1972-82, the United States' share of world markets declined from 21.3% to 17.4%. S. Rep. No. 27, *supra* note 110, at 4.

125. *Id.* at 5.

126. BUS AM., *supra* note 106, at 3. Secretary of Commerce Baldrige predicts the ETCs will create more than 320,000 trade related jobs by 1985. The exports of Japan, West Germany, France, and Hong Kong are handled by such companies and "now American hands are untied, so [that] our companies can compete on the same basis." *Id.* (at introductory note).

127. The House Committee on Foreign Affairs confirmed that export performance of U.S. industries is a significant factor in shaping attitudes of foreign governments and populations toward the United States, and in achieving foreign policy objectives. H.R. REP. NO. 637 (I), 97th Cong., 2d Sess., 10, *reprinted in* 1982 U.S. CODE CONG. & AD. NEWS 2431.

Statistics show that while American manufactured goods stayed in rough balance from 1970-1979, Japan and West Germany had surpluses of \$70 billion and \$60 billion, respectively, since 1977. S. REP. NO. 27, *supra* note 110, at 4. Strong evidence exists that the noted surpluses are a result of specialized export entities; two-thirds of Japan's exports are handled by such companies and West Germany is a major user of export trading companies. BUS. AM., *supra* note 106, at 3.

The House Judiciary Committee, in a hearing on the ETC bill, recognized an additional purpose. The Act is a response to sentiment in the business community that certain federal banking and antitrust laws hamper complete development of American export trade, especially among small and medium size businesses. H.R. REP. NO. 637 (II), 97th Cong., 2d Sess. 7, *reprinted in* 1982 U.S. CODE CONG. & AD. NEWS 2444.

128. H.R. REP. NO. 924, 97th Cong., 2d Sess. 22, *reprinted in* 1982 U.S. CODE CONG. & AD. NEWS 2501.

129. Export Trading Company Act of 1982, § 102(b), 15 U.S.C. § 4001(b) (1982).

130. The ETC Act states in relevant part that "[t]he Secretary of Commerce shall establish within the Department of Commerce an office to promote and encourage to the greatest extent feasible the formation of export trade associations and export trading companies. Such office shall provide information and advice to interested persons and shall provide a referral service. . . ." *Id.* § 104, 15 U.S.C. § 4003.

Previous to the Act's passage, no federal agency was explicitly charged with aiding trading companies. The Office of Export Trade serves to raise the export consciousness of American businessmen and to facilitate a more efficient network of trade services than that which existed prior to the bill's passage.¹³¹ By encouraging contact between producers of exportable goods and firms offering export trade services,¹³² the Department of Commerce division will contribute to the development of ETCs.

A major obstacle hampering the growth of exporters in the United States is the lack of financing available to fund their ventures.¹³³ In a substantial departure from the long-standing policy of separation of banking and commerce,¹³⁴ the Act includes the Bank Export Services Act, in Title II,¹³⁵ as a resolution of the problem. Bank holding companies and other designated banks¹³⁶ can invest in the shares of trading companies¹³⁷ and also make extensions of

131. Unkovic & LaMont, *supra* note 12, at 214.

132. Export Trading Company Act of 1982, § 104, 15 U.S.C. § 4003.

133. *Id.* § 108(a), 15 U.S.C. § 4001(a).

134. H.R. REP. NO. 629, 97th Cong., 2d Sess. 9, reprinted in 1982 U.S. CODE CONG. & AD. NEWS 2467.

Banks can play an important role in the development of ETCs because of their expertise and financial resources. These factors were important in securing a leading role for bank participation in trading companies. *Id.* at 5 (testimony of former Secretary of Commerce Philip M. Klutznick).

135. Export Trading Company Act of 1982, § 201, 12 U.S.C. § 1841, 1843.

A major dissention arose between the House and the Senate over the definitional section of this Title. See *id.* § 203(3)(F)(i), 12 U.S.C. § 1843(c)(14)(F)(i). An export trading company "exclusively engaged in international trade" was interpreted by the House to mean that ETCs could engage only in export transactions. H.R. REP. NO. 629, *supra* note 134, at 12. Upon reaching the conference committee, the bill was recognized as intending that the nonexport activity be conducted only to further the purpose of the Act—export promotion. S. REP. NO. 644, 97th Cong., 2d Sess. 22 (1982).

The managers ultimately agreed that ETCs would periodically have to engage in importing, barter, third party trade and related activities, but the preponderance of trading company activity should not involve importing. *Id.*

In addition to the proposed regulations to implement the banking provisions, a staff memorandum was released by the Federal Reserve Board. The report set forth a preliminary supervisory policy for ETC subsidiaries of bank holding companies. AM. BANKER, Feb. 17, 1983, at 35.

136. The Act states that "it is the purpose of this title to provide for meaningful and effective participation by bank holding companies, bankers' banks and Edge Act corporations, in the financing and development of export trading companies in the United States." Export Trading Company Act of 1982, Pub. L. No. 97-290 § 808, 96 Stat. 1233.

137. Among other criteria, section 203 of the Bank Export Services Act amends the Bank Holding Company Act of 1956, 12 U.S.C. § 1843(c) (1956), amended by 12 U.S.C. § 1843(c)(14) (1982), to provide a limitation on investment. See *id.* Section 203(3) provides that "such investments, whether direct or indirect, in such shares shall not exceed 5 per centum

credit to the entities.¹³⁸ To further encourage financing, Congress authorized the Export-Import Bank to establish a program providing guarantees for loans extended by financial institutions and creditors to export trading companies.¹³⁹

Title III of the Act minimizes the antitrust uncertainties through the issuance of certificates of review.¹⁴⁰ The protection included under the certificate provides generally that no criminal or civil action may be brought by the federal or state government under the antitrust laws for activities covered by the issued

of the bank holding company's consolidated capital and surplus." *Export Trading Company Act of 1982*, § 203(3), 12 U.S.C. § 1843(c)(14) (1982).

138. Section 203 of the Bank Export Services Act provides the criteria for extensions of credit. The relevant section proposes:

The total amount of extensions of credit by a bank holding company which invests in an export trading company, when combined with all such extensions of credit by all the subsidiaries of such bank holding company, to an export trading company shall not exceed at any one time 10 per centum of the bank holding company's consolidated capital and surplus.

Id. § 203(3)(B)(i), 12 U.S.C. 1843(c)(14)(B)(i).

139. The Act establishes the loan program in recognition of the criteria stated in section 206. It provides in relevant part:

[S]uch loans are secured by export accounts receivable or inventories of exportable goods, and when in the judgment of the Board of Directors—

(1) the private credit market is not providing adequate financing to enable otherwise creditworthy export trading companies or exporters to consummate export transactions; and

(2) such guarantees would facilitate expansion of exports which would not otherwise occur.

Id. § 206, 12 U.S.C. § 635a-4.

140. *Id.* § 301, 15 U.S.C. § 4011.

In order to secure issuance of the certificate, the applicant must establish that its specified export trade, export trade activities, and methods of operation will meet the criteria set forth in section 303:

(1) result in neither a substantial lessening of competition or restraint of trade within the United States nor a substantial restraint of the export trade of any competitor of the applicant,

(2) not unreasonably enhance, stabilize, or depress prices within the United States of the goods . . . of the class exported by the applicant,

(3) not constitute unfair methods of competition against competitors engaged in the export of goods . . . of the class exported by the applicant, and

(4) not include any act that may reasonably be expected to result in the sale for consumption or resale within the United States of the goods . . . exported by the applicant.

Id. § 303(a), 15 U.S.C. § 4013(a).

See Zarin, *The Export Trading Company Act: Reducing Antitrust Uncertainty in Export Trade*, 17 GEO. WASH. J. INT'L L. AND ECON. 297 (1983) (detailed review of clarifications and changes in the law achieved by the Act).

certificate.¹⁴¹ Further, the applicant, if found guilty in a private action, would be protected from liability in excess of actual damages, for example, treble damages.¹⁴²

The Foreign Trade Antitrust Improvements Act of 1982, as contained in Title IV of the Act, amends the Sherman Act and section 5 of the Federal Trade Commission Act.¹⁴³ These amendments establish a statutory statement of the recent trends in international antitrust case law¹⁴⁴ and governmental enforcement policy.¹⁴⁵ Export activities are potentially shielded from enforcement under U.S. antitrust laws unless they have a "direct, substantial, and reasonably foreseeable effect" on commerce in the United States or on the export commerce of a U.S. resident.¹⁴⁶ Title IV provides a necessary clarification of the judicial thresholds for enforcement under the respective antitrust acts, but allows the statute to remain flexible enough to be interpreted by decisions based on the relevant considerations in each case.¹⁴⁷

The provisions discussed above address the reasons why more ETCs do not exist today in the United States.¹⁴⁸ It is expected that the Act's passage will encourage greater attention to, and confidence in, export trading companies in their role as the "engines

141. *Id.* § 306(a), 15 U.S.C. § 4016(a).

142. *Id.* § 306(b)(1), 15 U.S.C. § 4016(b)(1).

143. *Id.* §§ 402, 403, 15 U.S.C. §§ 69, 45(a)(3).

144. *Mannington Mills, Inc. v. Congoleum Industries, Inc.*, 610 F.2d 1059 (3d Cir. 1979); *Timberlane Lumber Co. v. Bank of Am.*, 549 F.2d 597 (9th Cir. 1976). See also *United States v. Aluminum Co. of Am.*, 148 F.2d 416 (2nd Cir. 1945) (early "effects" test); *Dominicus Americana Buhio v. Gulf & Western Indus., Inc.*, 473 F. Supp. 680, 687 (S.D.N.Y. 1979); Kinter and Griffin, *Jurisdiction Over Foreign Commerce Under the Sherman Antitrust Act*, 18 B.C. INDUS. & COM. L. REV. 199 (1977).

145. See U.S. DEPT. OF JUSTICE, *ANTITRUST GUIDE FOR INTERNATIONAL OPERATIONS* (1977); J. ATWOOD & K. BREWSTER, *ANTITRUST AND AMERICAN BUSINESS ABROAD* (2d ed. 1981); W. FUGATE, *FOREIGN COMMERCE AND ANTITRUST LAWS* (3rd ed. 1982 and Supp. 1983).

146. *Export Trading Company Act of 1982*, §§ 402, 403, 15 U.S.C. §§ 6a, 45(a)(3).

147. *Unkovic & LaMont*, *supra* note 12, at 227; Reeves, *Antitrust Pitfalls and Practical Solutions*, printed in PRACTISING LAW INSTITUTE, *THE EXPORT TRADING COMPANY ACT 95* (1983); Zarin, *supra* note 140.

148. See Reinsch, *The Export Trading Company Act of 1981*, 14 LAW AND POL'Y, INT'L BUS. 47, 53 (1982). Critics have been quick to cite some disadvantages of the Act; they contend that the cumbersome administrative procedures, the publicity given to an applicant's export activities, and the difficulty in specifying export activities in detail might hinder the Act's progress. Further, the increase in trade restrictions (for example, provision against reimportation into the United States), combined with surveillance by the Justice Department has the potential effect of reviving the exporters' fears of prosecution. W. FUGATE, *supra* note 145, at 43 (Supp. 1983).

of export."¹⁴⁹ The trends in American business serve as a good indication of the impact of the export trading company legislation.

C. CURRENT TRENDS

A majority of the trading companies existing today in the United States are in-house trading units.¹⁵⁰ These subsidiaries are formed within multinational corporations in order to benefit the parent entity's export business.¹⁵¹ However, they do not act as trading companies in the sense of dealing in the goods and services for a variety of producers.¹⁵² Increasing demands are being placed on businesses to increase their level of participation in various trade balancing programs such as offset trading, countertrade, co-production, and barter.¹⁵³

Sometimes one company's internal purchasing requirements are not broad enough to match some countries' export capabilities and needs.¹⁵⁴ In such cases, the in-house trading units are required to seek the services of a larger export trading company which can meet the demands of a variety of producers.

The framers of the Export Trading Company Act of 1982 believe that the legislation will provide for the development of these full-service entities in the United States.¹⁵⁵ Although no definitive statistics are available on the increase in trading companies,¹⁵⁶ the legislation, at the least, improves Americans' awareness of world trade.

149. H.R. REP. NO. 637 (I), *supra* note 125, at 16. According to the House Foreign Relations Committee, in their vote of support, "no stone should be left unturned in the search for means even marginally to expand exports. The ETC Act is but one step toward increasing U.S. jobs by regaining U.S. export markets." *Id.*

150. Golden & Kolb, *The Export Trading Company Act of 1982: An American Response to Foreign Competition*, 58 NOTRE DAME L. REV. 743, 757 n.54 (1983); ROCKWELL INTERNATIONAL, 1982 ANNUAL REPORT (1982) (insert on company's philosophy on in-house trading). For a comparative view of trading companies in the Japanese and American systems and a detailed analysis of the trading company concept, see Dziubla, *International Trading Companies: Building on the Japanese Model*, 4 NW. J. INT'L L. & BUS. 422 (1982).

151. ROCKWELL INTERNATIONAL, *supra* note 150; Delano, *Trading Places, Inc.*, Nov. 1983, at 139, 146.

152. *Cf.* A. YOUNG, *supra* note 97 (diversified services of Japanese trading companies).

153. Address by Thomas A. Campobasso, *supra* note 85, at 5. See *supra* notes 25-31.

154. ROCKWELL INTERNATIONAL, *supra* note 150; Lowenstein, *supra* note 16.

155. Export Trading Company Act of 1982, § 103, 15 U.S.C. § 4002 (enumeration of services to be provided by export trading companies).

156. Recent reports indicate that two U.S. multinationals have embarked on a mission to establish a one-stop, general trading firm. General Electric Trading Co., and Sears World

IV. COUNTERTRADE AND EXPORT TRADING COMPANIES

Countertrade and export trading companies are in the process of making a significant impact on the United States' position in world trade.¹⁵⁷ It is imperative to dissect the trends in U.S. trade in order to determine how these two trade tools are making an impact.¹⁵⁸ Specifically, has the United States joined the successful trading game of Japan and others?

From the initial discussion of both issues earlier in this Note, certain effects are readily visible. Both countertrade and export trading companies have the ability to work together toward the same goal.¹⁵⁹ Countertrade's recent surge is due to its use by countries and industry to help reduce trade deficits as well as to create increased export sales.¹⁶⁰ Congress has stated the purpose of export trading companies as being a means of export promotion.¹⁶¹

Studies of the countertrade environment show that trading associations are frequent participants;¹⁶² these two trade tools complement each other. The export trading company provides a means by which parties can begin participating in creative and innovative countertrade "financing" schemes in international trade.¹⁶³ Full-

Trade Inc., although both subsidiaries of parent companies, are planning to become the entities envisioned by the ETC Act framers. The General Electric trading arm is looking to deal in industrial products similar to its own parent's product line. Sears has created a company whose mission it is to deal in any kind of goods or services—a true general trading company. See AM. BANKER, *supra* note 135, at 28.

These two subsidiaries mark the birth of the new export trading company concept in the United States. Because they are still in an early stage of development, it is too early to determine their impact on U.S. trade. Cf. Cooper & Hines, *American Trading Companies' Impact on International Markets: A Macroeconomic Analysis*, 2 B.U. INTL L.J. 221 (1983) (a comprehensive discussion of economic benefits expected from the expansion of trading companies and suggested methodologies suitable for measuring both the present and future economic impact of ETCs on the U.S. economy).

157. There is overwhelming evidence that U.S. industry is participating in countertrade transactions and that the concept of trading companies is becoming well recognized. See *supra* text and accompanying notes 18-156.

158. The objective of Part IV is to determine whether these practices are having a positive, negative, or neutral effect on U.S. trade.

159. See Unkovic & LaMont, *supra* note 12, at 246.

160. Truell, *supra* note 1, at 21; WELT, COUNTERTRADE, *supra* note 7, at 8-9; McVey, *supra* note 9, at 197-98.

161. H.R. REP. NO. 637 (I), *supra* note 127; Economic Trading Company Act of 1982, § 102(b), 15 U.S.C. § 4001(b).

162. Barovick, *supra* note 106, at 7; Address by Thomas A. Campobasso, *supra* note 85; ROCKWELL INTERNATIONAL, *supra* note 150.

163. Delano, *supra* note 151, at 139.

fledged trading company status¹⁶⁴ will make it easier for firms with in-house countertrade expertise to put these capabilities to more extensive use.¹⁶⁵

The Export Trading Company Act of 1982 solves several problems that have previously hampered the growth of countertrade.¹⁶⁶ The barter exchange has developed extensively since its use by Germany during the 1930's.¹⁶⁷ The historical association is fading from the minds of government officials as the method of exchange becomes accepted as a viable means of increasing exports, reducing deficits, and gaining access to new markets.¹⁶⁸ The congressional discussions on the ETC legislation further evidence the support for countertrade because the concept was specifically recognized as one of the services provided by export trading companies.¹⁶⁹

Trading companies, encouraged by the Act, help "correct" the mistakes made by parties entering into barter transactions; these mistakes usually result in the bad deals referred to by countertrade critics.¹⁷⁰ Most problems occur when a company or government has little or no knowledge of the language and customs of the other contracting party.¹⁷¹ Export trading companies are capable of providing services which include international market research,¹⁷² communication and processing of foreign orders,¹⁷³ foreign exchange,¹⁷⁴ and other services that help parties overcome barriers to foreign trade.¹⁷⁵

Title II of the Act allows for participation of bank holding companies in the formation of trading companies.¹⁷⁶ This combination

164. Such "full-fledged trading company status" refers to those trading companies applying for certificates of review under the ETC Act. See Export Trading Company Act of 1982, § 308, 15 U.S.C. § 4012.

165. For an example of one company's view of the ETC legislation, see Address by Thomas A. Campobasso, *supra* note 85.

166. See *supra* notes 32-74 and accompanying text.

167. See *supra* notes 75-93 and accompanying text.

168. WELT. COUNTERTRADE, *supra* note 7, at 8-11.

169. H.R. REP. NO. 629, *supra* note 135; 48 Fed. Reg. 26445 (1980).

170. See *supra* note 36.

171. *Id.* See Mandato, Skola & Wyse, *supra* note 21 (discussion of the problems encountered in countertrade transactions).

172. Export Trading Company Act of 1982, § 103(a)(2)-(3), 15 U.S.C. § 4002(a)(2)-(3); European American Bank, *supra* note 9.

173. Export Trading Company Act of 1982, § 103(a)(2)-(3), 15 U.S.C. § 4002(a)(2)-(3).

174. *Id.*

175. *Id.*

176. Export Trading Company Act of 1982, Pub. L. No. 97-290 § 202, 96 Stat. 1833.

insures the financial support¹⁷⁷ for trade ventures as well as an increased expertise¹⁷⁸ in the trade process. Congress provided an additional incentive to bankers by establishing a U.S. Export-Import Bank guarantee on loans extended to trading companies.¹⁷⁹ By providing incentives, Congress is indirectly supporting the increasing use of countertrade transactions.¹⁸⁰

A major barrier to the use of countertrade and export trading companies has been conservative government regulations.¹⁸¹ The effects of such limitations have finally been recognized as restraints on trade.¹⁸² The Act specifically acknowledges the need for well-developed export trade intermediaries¹⁸³ and provides for certain exclusions from the Sherman Act.¹⁸⁴ The issuance of certificates of review for export operations, confirming protection from the antitrust laws, assures parties that their conduct is acceptable.¹⁸⁵

The restrictions placed on the certificates¹⁸⁶ and the provisions of the Foreign Trade Antitrust Improvements Act of 1982¹⁸⁷ serve the further purpose of limiting the discriminating and distorting effects on world trade.¹⁸⁸ Both measures encourage a more efficient provision of export trade services to the extent that these services do not substantially, directly, or unreasonably affect commerce.¹⁸⁹

The impact of export trading companies and countertrade practices on trade in the United States seems to be positive in character and of great importance if the United States is to reestablish its place in the world economy. It is predicted that for these reasons, the export trading company will become the vehicle through which the United States will enter into countertrade arrangements. The concepts of trading companies and countertrade, when implemented

177. Export Trading Company Act of 1982, § 203, 12 U.S.C. § 1843(c)(14).

178. H.R. REP. NO. 629, *supra* note 134.

179. Export Trading Company Act of 1982, § 206, 12 U.S.C. § 635a-4.

180. This connection holds true because export trading companies are allowed to participate in countertrade practices to the extent that they support export promotion. *See supra* note 135.

181. *See supra* notes 41-70.

182. Export Trading Company Act of 1982, § 102(a)(8), 15 U.S.C. § 4001(a)(8).

183. *Id.* § 102(a)(7), 15 U.S.C. § 4001(a)(7).

184. Export Trading Company Act of 1982, Pub. L. No. 97-290 §§ 301-403, 96 Stat. 1833 (codified in scattered sections of titles 15 and 18 U.S.C.).

185. *Id.* § 306, 15 U.S.C. § 4016. *But cf. supra* note 147 (enough flexibility exists in the current legislation to allow decisions on the facts of each case).

186. Export Trading Company Act of 1982, 15 U.S.C. § 4013.

187. Export Trading Company Act of 1982, Pub. L. No. 97-290 § 401, 96 Stat. 1833.

188. *See supra* notes 72-74.

189. Export Trading Company Act of 1982, §§ 303, 402-03, 15 U.S.C. §§ 6a-4, 45(a)(3), 4013.

together, solve major problems and represent opportunities for success. The United States has not yet joined the trading game of Japan and others, but it needs only to follow the path set out by the new legislation in order to recapture its status as a world trading power.

V. CONCLUSION

At this point, the long term effects of countertrade and trading companies are only speculative. The question turns on whether such a trading strategy is so connected with the swings in the international economy that its use will fade as soon as there is an economic upturn.¹⁹⁰ If countertrade and trading companies are "here to stay," then a more in-depth study must be conducted into their effects on the international trading system. Perhaps the suggestion¹⁹¹ made concerning the need for increased international surveillance might be taken more seriously if countertrade and trading companies were to result in discrimination and less order in world trading. Presently, countertrade through U.S. export trading companies represents two tools for increasing exports and participating in world trade and, for this reason, should be allowed to continue.

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190. The fact has been established previously that the onset of countertrade and the use of modern export trading companies were due to problems in the international economy. See *supra* note 23.

191. Walsh, *supra* note 9, at 10.