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Abstract

This Note will analyze the market definitions relevant in determining illegal foreclosure effects in export trade. Part I will discuss the Export Trading Company Act of 1982 (the ETCA). Part II will analyze potential illegal foreclosure effects in United States export trade practices. Part III will discuss the product and geographic market definitions relevant to a determination of illegal foreclosure effects. This Note proposes a two step process for evaluating foreclosure in export markets. First, determine if there is or will be a negative effect on United States consumers if competitors' export opportunities are limited. Second, the market should then be defined from the exporters' perspective.

MARKET DEFINITIONS RELEVANT IN DETERMINING ILLEGAL FORECLOSURE EFFECTS IN EXPORT TRADE

INTRODUCTION

When defining markets for the purposes of determining foreclosure in export trade, the market should be defined differently than when the foreclosure occurs in the domestic market. To promote competition in the domestic market, United States antitrust laws[1] prohibit horizontal[2] and vertical[3] ar-

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1. The three basic antitrust statutes are the Sherman Antitrust Act, ch. 647, §§ 1-7, 26 Stat. 209, 209-20 (1890) (codified as amended at 15 U.S.C. §§ 1-7 (1982))(hereinafter Sherman Act), the Federal Trade Commission Act, ch. 311, 38 Stat. 717 (1914) (codified as amended at 15 U.S.C. §§ 41-58 (1982)), and the Clayton Act, ch. 323, 38 Stat. 730 (1914) (codified as amended at 15 U.S.C. §§ 12-27 (1982)). *See also* P. AREEDA, ANTITRUST ANALYSIS 44-53 (3rd ed. 1981). The original United States antitrust statute is the Sherman Act, which condemns contracts, combinations, and conspiracies in restraint of trade, and monopolizations, combinations to monopolize or attempts to monopolize.

> The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as a rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality, and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions.

Northern Pacific Ry. Co. v. United States, 356 U.S. 1, 4 (1958). The Sherman Act is intended to reach combinations or conspiracies which restrain freedom of action in interstate commerce. *Id.* at 4-5.

The Federal Trade Commission Act specifically concentrates on unfair methods of competition. *See* 15 U.S.C. § 45(a) (1982). "Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful." *Id.*

The Clayton Act was passed to supplement the Sherman and Federal Trade Commission Acts. *See* 15 U.S.C. §§ 12-27. Section 2 of the Clayton Act forbids price discrimination practices including selling a product at different prices to similarly situated buyers. *See* 15 U.S.C. § 13. Section 3 forbids tying and exclusive dealing contracts. *See* 15 U.S.C. § 14. Section 7 of the act bans corporations from acquiring competing companies through mergers. *See* 15 U.S.C. § 18. The prohibitions were qualified to the extent that the specified practice was illegal only when "the effect. . . may be substantially to lessen competition" or "tend to create a monopoly in any line of commerce." *See* 15 U.S.C. §§ 13, 14.

In determining antitrust violations, two basic approaches are used: the first is the "rule of reason;" the second is the "per se" doctrine. When applying the rule of reason standard, before judging the legality of an arrangement, a broad inquiry should be made into the nature, purpose, and effect of any challenged arrangement. *See, e.g.*, United States v. American Tobacco Co., 221 U.S. 106, 179 (1911); Standard rangements which foreclose foreign markets to United States competitors.[4] A person[5] with market power[6] in an export trade market can adversely affect domestic competition[7] by limiting the export trade opportunities of export competitors

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Oil Co. v. United States, 221 U.S. 1, 65 (1911). The per se doctrine labels certain practices illegal regardless of the reasons for the practice. Courts, when they apply the per se rule, only have to determine whether the alleged conduct was engaged in and, if so, whether it fell within the definition of conduct proscribed as per se unlawful. *E.g.*, Gough v. Rossmoor Corp., 585 F.2d 381, 386-88 (9th Cir. 1978), *cert. denied*, 440 U.S. 936 (1979). Once it is determined that the conduct alleged did take place then under the per se analysis these restraints are presumed unreasonable "without elaborate inquiry as to the precise harm they have caused or the business excuse for their use." Northern Pacific Ry. Co. v. United States, 356 U.S. 1, 5 (1958). *See generally* , P. AREEDA, *supra*, ¶ 317; SECTION OF ANTITRUST, AMERICAN BAR ASSOCIATION, ANTITRUST LAW DEVELOPMENTS 15-24 (2d ed. 1984). [hereinafter ANTITRUST LAW DEVELOPMENTS].

2. *See infra* notes 57-96 and accompanying text. A horizontal arrangement is an agreement or merger between companies "performing similar functions in the production or sale of comparable goods or services. . . ." Brown Shoe Co. v. United States, 370 U.S. 294, 334 (1961). In *Brown Shoe,* the Government filed an action alleging that a contemplated merger between the G.R. Kinney Company, Inc. and the Brown Shoe Company would violate section 7 of the Clayton Act. *Id.* at 296. The Court held that the district court properly found that the predominantly medium-priced shoes which Brown Shoe manufactured did not occupy a different product market than the predominatly low-priced shoes which Kinney sold. *Id.* at 326. Therefore, a merger of Brown and Kinney would have substantially lessened competition in retail sales in the majority of the markets in which the two corporations were active. *Id.* at 334-36.

3. *See infra* notes 97-145 and accompanying text. A firm is vertically intergrated when it does for itself what otherwise could be done by independent firms in the marketplace. P. AREEDA, *supra* note 1, ¶ 218.

4. *See supra* note 1. Antitrust cases are not always easily classified as either vertical or horizontal. *See, e.g.*, United States v. Columbia Steel, 334 U.S. 495 (1948). Some mergers that are neither horizontal nor vertical are called "conglomerate mergers." *See* L. SULLIVAN, ANTITRUST § 207 (1977). The Supreme Court has held conglomerate mergers unlawful on several grounds. These include: threats to potential competition; *see, e.g.*, United States v. Falstaff Brewing Corp., 410 U.S. 526 (1973); "entrenchment" of a dominant party; *see, e.g.*, F.T.C. v. Proctor & Gamble Co., 386 U.S. 568 (1967); and the creation of opportunities for reciprocity; *see, e.g.*, F.T.C. v. Consolidated Foods Corp., 380 U.S. 592 (1965).

5. A "person" or "persons" includes corporations and associations existing under the laws of the United States or a foreign country. 15 U.S.C. § 7.

6. Market power is the ability of a firm to act in a less than perfectly competitive manner. P. AREEDA, *supra* note 1, ¶ 227.

7. This adverse effect on domestic competition is known as a "spillover effect." *See* Note, *Limiting Spillover and Foreclosure Through Title III of the Export Trading Company Act of 1982*, 52 FORDHAM L. REV. 1300 (1984). If export conduct has an anticompetitive effect only on foreign markets it should not be subject to United States antitrust laws unless United States consumers are harmed. *See* Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287, 1292 (1979).

who also compete in the United States market.[8] Foreclosure[9] is the effect of conduct that reduces or eliminates the opportunities of export competitors. Foreclosure of export markets exists when United States export competitors are willing and able to sell into a foreign market but discover they cannot because another exporter has precluded their opportunities to export into this market.[10] Under United States antitrust laws, foreclosing competitors from any substantial United States market is a per se violation of United States antitrust laws.[11] However, the same activity in an export market may not be a per se violation.[12]

Market definitions are used in determining whether competitors are being foreclosed from the market.[13] The market can be defined from either the buyer's or the seller's perspective.[14] United States antitrust laws are primarily concerned with the negative effects of anticompetitive practices on United States consumers.[15] If a firm has the power to exclude competition in the export market, and that exclusion has anticompeti-

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8. *See* Margulies, *U.S. Export Conduct (Including Cartels) Under U.S. Antitrust Law*, in 1984 FORDHAM CORP. L. INST. 294 (B. Hawk ed. 1985).

9. *See generally* Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320 (1961).

10. *See* Margulies, *supra* note 8, at 294.

11. International Salt Co. v. United States, 332 U.S. 392, 396 (1947). In this case, the country's largest producer of salt for industrial purposes owned patents on the machines for the utilization of these salt products. *Id.* at 394. These machines were distributed under leases which required the lessees to purchase the salt needed to utilize these machines exclusively from International Salt. *Id.*

12. *See* 15 U.S.C. § 6a (1982).

13. *See* L. SULLIVAN, *supra* note 4, § 211.

14. When defining markets from the seller's perspective look at the area to which the seller can reasonably turn to "sell." When defining from the buyer's perspective look to the market in which buyers reasonably turn to "buy." For a discussion of defining markets from the buyer's perspective, see Karp, *A Consumer Oriented Approach to Market Definition under the Antitrust Laws*, 18 U.S.F.L. REV. 221 (1984). For a discussion of the protection of seller's interests see Harris & Jorde, *Antitrust Market Definition: An Integrated Approach*, 72 CALIF. L. REV. 3, 16-17 (1984).

15. "A primary objective of antitrust laws is to preserve competition, and thus ultimately protect the interests of American consumers." Laker Airways, Ltd., v. Sabena, Belgian World Airlines, 731 F.2d 909, 924 (D.C. Cir. 1984) (*citing* Pfizer Inc. v. India, 434 U.S. 308, 314 (1978)). Areeda and Turner state that the objective of United States antitrust law is to maximize consumer welfare by promoting efficient use and allocation of scarce resources. *See* 1 P. AREEDA & D. TURNER, ANTITRUST LAW § 103 (1978). Another commentator has said:

> In cases involving domestic or import commerce, the Department of Justice and the Supreme Court have in recent years adhered to the view that the antitrust laws are designed to preserve competition in domestic markets in

tive effects on United States consumers, that can indicate that an illegal foreclosure effect has occurred in the export market.[16] In making a determination of whether an actual or potential foreclosure of export trade has occurred it is essential to define the relevant product and geographic markets.[17]

This Note will analyze the market definitions relevant in determining illegal foreclosure effects in export trade. Part I will discuss the Export Trading Company Act of 1982 (the ETCA).[18] Part II will analyze potential illegal foreclosure effects[19] in United States export trade practices.[20] Part III will

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> order to prevent a deterioration of consumer welfare, and not designed to protect individual competitors.

Margulies, *supra* note 8, at 284.

Furthermore, case law has also supported the proposition that the antitrust laws were designed to protect consumers:

> [T]he Anti-Trust Act was intended in the most comprehensive way to provide against combinations or conspiracies in restraint of trade or commerce, the monopolization of trade or commerce or attempts to monopolize the same. [citations omitted]. In other words, founded upon broad conceptions of public policy, the prohibitions of the statute were enacted to prevent not the mere injury to an individual which would arise from the doing of the prohibited acts, but the harm to the general public which would be occasioned by the evils which it was contemplated would be prevented, and hence not only the prohibitions of the statute but the remedies which it provided were co-extensive with such conceptions.

Wilder Mfg. Co. v. Corn Prod. Co., 236 U.S. 165, 173-74 (1915).

"The statutes were intended to advance the public welfare by promoting free competition and preventing undue restriction of trade and commerce." Northwestern Oil Co. v. Socony-Vacuum Oil Co., 138 F.2d 967, 970 (7th Cir. 1943), *cert. denied*, 321 U.S. 792 (1944).

16. *See* Margulies, *supra* note 8, at 285; Note, *supra* note 7, at 1322-23.

17. *See* Harris & Jorde, *supra* note 14, at 4; *see also infra* notes 196-202 and accompanying text.

18. Pub. L. No. 97-290, 96 Stat. 1233 (codified as amended at 12 U.S.C. §§ 372, 635a-4, 1841, 1843 (1982); 15 U.S.C. §§ 6a, 45a, 4001-4021 (1982)), *reprinted in* THE EXPORT TRADING COMPANY ACT 183 [hereinafter ETCA STATUTE]. Prior to the enactment of the ETCA the broad language of sections 1 and 2 of the Sherman Act caused uncertainty as to the applicability of the act to export trade practices. Margulies, *supra* note 8, at 287-89.

The Webb-Pomerene Act of 1918, 15 U.S.C. §§ 61-66 (1982), provided antitrust immunity to associations engaged in export trade, and for acts and agreements in the course of export trade, provided the associations did not restrain trade within the United States and did not restrain the export trade of United States competitors. The Webb-Pomerene Act's coverage was limited and did not entirely remove the threat of Sherman Act violations to exporters. *See*, Note *supra* note 7, at 1310-11 n.68.

19. Not all foreclosure effects in export trade are forbidden. Section 6a of the ETCA forbids only those foreclosure effects that have a negative impact on United States exporters. 15 U.S.C. § 6a.

discuss the product and geographic market definitions relevant to a determination of illegal foreclosure effects.[21] This Note proposes a two step process for evaluating foreclosure in export markets. First, determine if there is or will be a negative effect on United States consumers if competitors' export opportunities are limited. Second, the market should then be defined from the exporters' perspective.[22] When litigating the issue it should be the defendant's responsibility to introduce evidence of potential alternative markets,[23] and the plaintiff should have the opportunity to rebut the feasibility of these potential markets.[24]

I. *THE EXPORT TRADING COMPANY ACT*

Historically, the uncertain jurisdictional reach of United States antitrust laws was one of the underlying reasons for the problems experienced by United States exporters in international markets.[25] As a result, United States firms were deterred

20. *See infra* notes 57-145 and accompanying text.

21. *See infra* notes 146-202 and accompanying text.

22. *See infra* notes 158-62 and accompanying text.

23. *See infra* notes 196-202 and accompanying text.

24. *See id.*

25. Among the other changed circumstances that compelled the United States to reassess its international anititrust policy are:
(1) The increased importance of international trade to the United States,
(2) The relative decline of United States industrial preeminence in the world,
(3) The significant increase in enforcement of foreign competition laws,
(4) The increasingly hostile foreign reaction to recent United States antitrust efforts,
(5) The growing demand by developing countries for international regulation of restrictive business practices, monopolies and multinational firms,
(6) The increased commercial role of foreign governments and state-controlled instrumentalities in international trade.

See Hawk, *International Antitrust Policy and the 1982 Acts: The Continuing Need for Reassessment*, 51 FORDHAM L. REV. 201, 206-13 (1982).

"Although the ratio of exports to GNP rose from 4.2 percent in 1972 to 7.5 percent in 1979, U.S. imports, led by massive increases in the cost of oil, grew equally as fast, increasing in importance relative to GNP from 5.1 percent to 8.7 percent in these same years." S. REP. No. 27, 97th Cong., 1st Sess. 4 (1981), *reprinted in*, THE EXPORT TRADING COMPANY ACT 363, 366 (1983) [hereinafter SENATE REPORT]. In 1981, imports had expanded since 1972 from a higher base than exports, and the trade deficit had expanded sharply, with an aggregate deficit over the previous five years exceeding $140 billion. *Id.*

> Because of their superior international competitiveness in manufactured goods, United States major trade competitors have been able to offset their imported energy bills much better than the United States. According to a study done by the National Association of Manufacturers last year, im-

from forming their own export trading companies and engaging in other productive and efficient methods of exporting, investing, and doing business abroad. In 1981, only ten percent of United States manufacturing firms exported,[26] and fewer than one percent of these firms accounted for eighty percent of United States exports.[27] The future expansion of exports was dependent upon the development of export trading companies,[28] because the high costs and antitrust violation risks of engaging in export ventures discouraged producers from participating in export trade activities.[29]

The goal of Congress in enacting the ETCA was to increase the exports of American goods and services by removing restrictions on certain export trade practices and financing.[30] The ETCA was an important aspect of the Govern-

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> ports of manufactured goods increased nearly four times as fast as exports since 1970, with that margin growing in the last half of the decade. The study further concluded that our industrial competitiveness is declining measured both by increased import penetration here and loss of export markets elsewhere. The U.S. share of world markets declined from 21.3 percent to 17.4 percent over the past ten years, the largest relative decline among major industrial exporters. The United States has lost market share in 8 of the 9 EC countries and 12 of the 13 OPEC countries. While the United States manufactured goods trade has stayed in rough balance, Japan and West Germany in 1979 had surpluses of $70 billion and $60 billion respectively.

Id.

26. SENATE REPORT, *supra* note 25, at 5.

27. *Id.*

28. For the purposes of this Note, an export trading company is defined as:

> [A] person, partnership, association, or similiar organization, whether operated for profit or as a nonprofit organization, which does business under the laws of the United States or any State and which is organized and operated principally for purposes of-
> (A) exporting goods or services produced in the United States; or
> (B) facilitating the exportation of goods or services produced in the United States by unaffiliated persons by providing one or more export trade services;

15 U.S.C. § 4002(a)(4) (1982).

29. SENATE REPORT, *supra* note 25, at 5, 18-19.

30. Export Trading Company Act of 1982, 96 Stat. 1233 (1982) (codified as amended at 12 U.S.C. §§ 372, 1841-1843 (1982), 15 U.S.C. §§ 6a, 15, 26, 4011-4021 (1982)). At the time the ETCA was passed, United States exports were responsible for one out of every nine manufacturing jobs in the United States, and generated one out of every seven dollars of total United States goods produced. 15 U.S.C. § 4001. United States trade deficits at that time contributed to the decline of the dollar in the international currency markets and had an inflationary impact upon the United States economy. *Id.* Furthermore, the United States lagged disproportionately behind

ment's strategy to reposition United States industry in international markets.[31] It reformed United States antitrust laws by removing the regulatory obstacles to mergers for exporting purposes, thereby creating greater efficiencies in exporting.[32]

The ETCA is divided into four titles.[33] Title I of the ETCA establishes an office in the Department of Commerce to promote the formation of export trade associations and export trading companies.[34] An export trading company (ETC) is an entity that links United States producers of goods and services with foreign markets.[35] Title II allows bank holding companies to own ETC's and thereby engage in international trade.[36]

Title III establishes a voluntary mechanism that an exporter can use to obtain a Certificate of Review from the Secretary of Commerce.[37] The Title III certification process enables

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other developed countries in the export of goods, services, and agricultural products. *Id.*

31. Lacy, *The ETC Act, 1985*, EXPORT TODAY, Fall 1985, at 69, 73. The ETCA removes the regulatory obstacles in export trade by amending the Sherman and the Federal Trade Commission acts to clarify their application to international trade. *See* 15 U.S.C. §§ 6a, 45(a) (1982). Furthermore, the Title III certification process removes the threat of antitrust violations as well. *See* 15 U.S.C. § 4016 (1982).

32. *See supra* note 31.

33. For the purposes of this Note, Titles III and IV are the most relevant to the topic of foreclosure in export trade. For a discussion of the treatment of United States export conduct prior to the enactment of the ETCA see Margulies, *supra* note 8, at 287-89.

34. 15 U.S.C. § 4003 (1982); *see also* ETCA STATUTE, *supra* note 18, at 185.

35. *See* Raiken, *ETCs Defined*, in THE EXPORT TRADING COMPANY ACT 29 (1983).

36. 12 U.S.C. §§ 1841-1842, 1843(c)(14) (1982).

37. 15 U.S.C. § 4011 (1982). For a discussion on the procedure for issuance of Export Trade Certificates of Review, see the Department of Commerce Guidelines for Issuance of Export Trade Certificates of Review, 50 Fed. Reg. 1786 (Jan. 11, 1985). [hereinafter CERTIFICATE GUIDELINES]. *See also* Fox, *Antitrust and Export Trade*, in THE EXPORT TRADING COMPANY ACT 57, 78-85 (1983); Horizons Int'l Inc. v. Baldridge, 624 F.Supp. 1560 (E.D.Pa. 1986) (review of the procedure for the issuance of a certificate to a joint venture).

After the passage of the ETCA, the Department of Commerce formed the Office of Export Trading Company Affairs (OETCA) to promote the formation of ETC's and to administer the Title III Antitrust Certificate of Review program. Lacy, *supra* note 31, at 69. By the fall of 1985, fifty-seven certificates were issued, giving protection to 218 individuals and firms in manufacture, agriculture, and the service industries. *Id.* at 71.

15 U.S.C. § 4013 (1982) gives the procedure for the issuance of an Export Trade Certificate of Review:

> (b) Within ninety days after the Secretary receives an application for a certificate of review, the Secretary shall determine whether the applicant's ex-

an exporter to receive an advance determination concerning specified export conduct.[38] In order to obtain a Certificate of Review, the conduct must meet certain statutory standards.[39]

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port trade, export trade activities, and methods of operation meet the standards of subsection (a) of this section. If the Secretary, with the concurrence of the Attorney General, determines that standards are met, the Secretary shall issue to the applicant a certificate of review. The certificate of review shall specify-

(1) the export trade, export trade activities, and methods of operation to which the certificate applies,

(2) the person to whom the certificate of review is issued, and

(3) any terms and conditions the Secretary or the Attorney General deems necessary to assure compliance with the standards of subsection (a) of this section.

(c) If the applicant indicates a special need for prompt disposition, the Secretary and the Attorney General may expedite action on the application, except that no certificate of review may be issued within thirty days of publication of notice in the Federal Register under section 4012(b)(1) of this title.

(d)(1) If the Secretary denies in whole or in part an application for a certificate, he shall notify the applicant of his determination and the reasons for it.

(2) An applicant may, within thirty days of receipt of notification that the application has been denied in whole or in part, request the Secretary to reconsider the determination. The Secretary, with the concurrence of the Attorney General, shall notify the applicant of the determination upon reconsideration within thirty days of receipt of the request.

(e) If the Secretary denies an application for the issuance of a certificate of review and thereafter receives from the applicant a request for the return of documents submitted by the applicant in connection with the application for the certificate, the Secretary and the Attorney General shall return to the applicant, not later than thirty days after receipt of the request, the documents and all copies of the documents available to the Secretary and the Attorney General, except to the extent that the information contained in a document has been made available to the public.

(f) A certificate shall be void *ab initio* with respect to any export trade, export trade activities, or methods of operation for which a certificate was procured by fraud.

Id.

38. 15 U.S.C. §§ 4001-4013.

39. *See* 15 U.S.C. § 4012; CERTIFICATE GUIDELINES, *supra* note 37. The statutory standards are:

(a) A certificate of review shall be issued to any applicant that establishes that its specified export trade, export trade activities, and methods of operation will-

(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, wares, merchandise, or services of the class exported by the applicant,

(3) not constitute unfair methods of competition against competitors

After the certificate's issuance, it confers significant protection for the specified conduct from federal and state antitrust suits, and it reduces an exporter's private action liability from treble to single damages.[40] Title IV of the ETCA modifies the Sherman Antitrust Act,[41] and section 5 of the Federal Trade Commission Act,[42] to require, as a jurisdictional threshhold for enforcement actions in export trade activities, a "direct, substantial, and reasonably forseeable" effect on commerce in the United States or on the export commerce of a United States resident.[43]

Titles III and IV both discuss foreclosure. Title III denies certification if the proposed conduct will either have a substantial anticompetitive effect on United States export competitors,[44] or will constitute an unfair method of competition against United States export competitors.[45] Title IV amends the Sherman Act by inserting after section 6: "Sections 1 to 7 of this title shall not apply to conduct involving trade or commerce . . . with foreign nations unless . . . such conduct has a direct, substantial, and reasonably foreseeable effect . . . on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States."[46] The Federal Trade Commission Act[47] was amended to allow unfair methods of competition in foreign commerce,

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engaged in the export of goods, wares, merchandise, or services 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, wares, merchandise, or services exported by the applicant.

15 U.S.C. § 4013.

40. 15 U.S.C. § 4016; *see also* Margulies, *supra* note 8, at 289-90.

41. 15 U.S.C. §§ 1-7 (1982); *see also supra* note 1.

42. 15 U.S.C. §§ 41-58 (1982); *see also supra* note 1.

43. 15 U.S.C. § 6a.

44. 15 U.S.C. § 4013(a)(1) (1982) (substantial anti-competitive effect). However, the mere fact that an applicant's conduct would displace sales of other United States exporters is not enough to deny certification. CERTIFICATE GUIDELINES, *supra* note 37.

45. 15 U.S.C. § 4013(a)(3) (1982) (unfair methods of competition).

46. 15 U.S.C. § 6a(1)(B).

47. 15 U.S.C. §§ 41-58 (1982); *see also supra* note 1. The Federal Trade Commission Act deals specifically with unfair methods of competition. *See* 15 U.S.C. § 45(a)(1) (1982). "Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful." *Id.*

unless there is a "direct, substantial, and reasonably foreseeable effect" on the export trade of United States persons or has an impact on domestic commerce.[48]

The goal of the ETCA was to increase United States exports by encouraging more efficient means of exporting,[49] and this goal should be considered in determining what constitutes a substantial anticompetitive effect[50] or an unreasonable restraint of trade. Restraints in export trade that serve legitimate objectives under the ETCA but which restrain other domestic export competitors should not be automatically declared illegal because the benefits of the increase in exports may outweigh any anticompetitive effects.[51]

Some foreign governments have criticized the ETCA because it allegedly encourages United States exporters to engage in anticompetitive conduct in foreign markets.[52] How-

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48. 15 U.S.C. § 45(a).

49. 15 U.S.C. § 4001(b).

50. 15 U.S.C. § 4013.

51. The 1983 Guidelines for the Issuance of Export Trade Certificates of Review, 48 Fed. Reg. 15,937 (1983), specifically authorizes exclusive arrangements that foreclose trade opportunities in foreign markets of competing United States exporters. *Id.* at 15,938. Arrangements of this type are necessary to achieve the goals of the ETCA. Exclusivity agreements can violate Title III, 15 U.S.C. § 4013(a)(1), (3), because they can have an adverse affect on United States export competitors. Therefore, such arrangements would not be specifically authorized unless they were considered an important element of successful export ventures.

52. Margulies, *supra* note 8, at 286. United States antitrust laws are also frequently criticized for their extraterritorial jurisdictional reach. Note, *The Use of Interest Analysis in the Extraterritorial Application of United States Antitrust Law*, 16 CORNELL INT'L L. J. 147, 163-65 (1983); *see also* United States v. Aluminum Corp. of Am., 148 F.2d 416 (2d Cir. 1945) (*Alcoa*).

The *Alcoa* court states that the Sherman Act can be applied to foreign conspiracies, even though the alleged activities occurred entirely outside the United States and involving no United States parties. The case established an "effects test": United States antitrust laws applied if the foreign conspiracy was intended to affect United States commerce. 148 F.2d at 443-44.

Foreign commentators criticize the *Alcoa* effects doctrine because it conflicts with the general principles of sovereignty. *See generally* Miller, *Extraterritorial Effects of Trade Regulation*, 111 U. PA. L. REV. 1092, 1130 (1963).

> [T]he *Alcoa* pattern of case goes too far when 'jurisdiction' is assumed over foreigners' foreign agreements, merely because it has been possible to allege some 'effects' on United States imports or exports, and because the agreement would have been illegal if made in the United States.

Id. at 1130 (quoting Jennings, *Extraterritorial Jurisdiction and the United States Antitrust Laws*, [1957] BRIT. Y.B. INT'L L. 146, 175 (1958)).

Many foreign governments have "blocking" or "claw back" laws that deter or block United States antitrust investigations. *See* Hawk, *supra* note 25, at 208-09.

ever, the United States's approach to export cartels and other export trade practices resembles the antitrust efforts of other countries.[53] To violate the articles in the Treaty establishing the European Economic Communities[54] (Treaty of Rome), which regulate anticompetitive conduct, the conduct must have the prohibited competitive effects within the Common Market and an effect on trade between member states.[55] The antitrust laws of both France and the Federal Republic of Germany exempt export conduct if it has no effect on the domestic market.[56]

II. *FORECLOSURE RISKS IN EXPORT TRADE PRACTICES*

This section will discuss the potential risks of illegal foreclosure effects in export trade practices. Both horizontal[57] and vertical[58] export trade practices will be discussed. The purpose of this section is to clarify the definition of foreclosure and to introduce some of the common export trade practices used today.

A. *Horizontal Export Restraints*

Horizontal export activity usually involves several manufacturing firms combining to form an export cartel,[59] or a joint venture among service firms.[60] A horizontal merger occurs when a producer acquires another firm that produces or sells, in the same geographical market, either an identical product or a close substitute for it.[61] Horizontal market division occurs

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53. Margulies, *supra* note 8, at 285.

54. Treaty of Rome, March 25, 1957, 298 U.N.T.S. 5.

55. Margulies, *supra* note 8, at 285; *see also* Treaty of Rome, *supra* note 54, at art. 85 & 86 at 47-49.

56. OECD, COMPARATIVE SUMMARY OF LEGISLATIONS ON RESTRICTIVE BUSINESS PRACTICES 47-48 (1978). For a discussion on the West German approach to export cartels, see Hölzler & Braun, *Antitrust Control over "pure" export cartels: the new German approach*, 27 ANTITRUST BULL. 957 (1982).

57. *See infra* notes 59-96 and accompanying text.

58. *See infra* notes 97-145 and accompanying text.

59. *See infra* notes 72-80 and accompanying text. An export cartel is an association engaged solely in export trade. *See, e.g.*, United States Alkali Export Ass'n, Inc. v. United States, 325 U.S. 196, 198 (1945) (an export cartel involved in the export of alkalies); 1 J. ATWOOD & K. BREWSTER, ANTITRUST AND AMERICAN BUSINESS ABROAD § 9.35 (2d ed. 1981).

60. *See infra* notes 82-96 and accompanying text.

61. P. AREEDA & D. TURNER, *supra* note 15, § 900.

when competitors assign exclusive territories among themselves.[62] In the domestic market, arrangements that divide markets between competitors are per se illegal under the antitrust laws.[63] In arrangements which allocate sections of the world as exclusive territories, any world market division involving the assignment of the United States as an exclusive territory has been held illegal in the past.[64]

Price fixing[65] among United States competitors for export purposes is legal if the venture is a certified Title III approved venture,[66] or if the price fixing arrangement does not either produce a direct anticompetitive effect on United States commerce[67] or foreclose the export opportunities of other domes-

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62. *See* Timken Roller Bearing Co. v. United States, 341 U.S. 593 (1951). The Court, in this case, condemned an allocation of territories throughout worldwide markets between the dominant United States producer of tapered roller bearings and British and French firms. *Id.* at 595-97; *see also* United States v. Topco Assoc., Inc., 405 U.S. 596 (1972). *Topco* was the first case in which market allocations were declared per se illegal, whether or not ancillary to price-fixing or other market-rigging arrangements. *Id.* at 608.

63. *See* United States v. Topco Assoc., 405 U.S. 596 (1972). Topco was a cooperative association of approximately 25 regional supermarket chains that operated in 33 states in the United States. *Id.* at 598. Topco's basic function was to act as a purchasing agent for its members. *Id.* The cooperative's bylaws created three categories of territorial licenses that such member could secure from the association. *Id.* at 601. The Court held that these restraints of trade were horizontal in nature and therefore per se violations of the Sherman Act. *Id.* at 608.

64. *See, e.g.*, Timkin Roller Bearing Co. v. United States, 341 U.S. 593 (1951); United States v. Alkali Export Ass'n, Inc., 86 F.Supp. 59 (S.D.N.Y. 1949). In *Alkali Export*, a Webb-Pomerene association's international agreements with foreign companies that allocated exclusive markets for alkalis, assigned quotas in sundry markets, fixed prices on an international scale, and sold through joint agents were not "agreements in the course of export trade" within the meaning of the Webb-Pomerene Act. Therefore, the agreements violated the Sherman Act. *Alkali*, 86 F. Supp. at 70. "Consequently, to hold in this case that defendants, by employing the medium of an export association, may restrain our foreign trade with impunity, uninhibited by the sanctions and proscriptions of the Sherman Act, would be to ignore the plain intent of the statute." *Id.* at 66-67. Although the association in this case was organized under the Webb-Pomerene Act, 15 U.S.C. §§ 61-65 (1982), the wording of the act is substantially similiar to the ETCA. *Compare* 15 U.S.C. § 62 *with* 15 U.S.C. § 4013. *See also* Margulies, *supra* note 8, at 305-11.

65. Price fixing involves agreements among competitors that raise, lower or stabilize prices. ANTITRUST LAW DEVELOPMENTS, *supra* note 1, at 29. *See* Broadcast Music, Inc. v. Columbia Broadcasting Sys., 441 U.S. 1, 9 (1979) ("'price fixing' is a shorthand way of describing certain categories of business behavior.")

66. H.R. REP. No. 924, 97th Cong., 2d Sess. 27-28, *reprinted in* 1982 U.S. Code Cong. & Ad. News 2501 (1982) (Conference Report).

67. *See, e.g.*, Pacific Seafarers, Inc. v. Pacific Far East Line, Inc., 404 F.2d 804 (D.C.Cir. 1968), *cert. denied*, 393 U.S. 1093 (1969).

tic firms.[68] A parent company may set prices or allocate exclusive territories for subsidiaries which it fully controls.[69]

Joint exporting activity poses the greatest risk of antitrust violations to United States exporters.[70] Nevertheless, United States firms have been compelled to form either export cartels or joint ventures. Forming an export cartel or joint venture is often necessary to bargain collectively with either foreign buyers or governments, to secure more favorable trade or tax concessions, or to compete with other foreign trading companies.[71] Therefore, joint exporting is the type of activity most likely to seek Title III certification. Export cartels and joint ventures are the two most commonly used horizontal export trade activities. Export cartels and joint ventures will be discussed in greater detail in the next two sections of this Note.

1. Export Cartels

An export cartel is an arrangement in which competing United States export firms have substituted an agreement on price, output, or market division for independent decision

68. 15 U.S.C. §§ 6a, 45(a) (1982).

69. United States Department of Justice Antitrust Guide for International Operations, Case A at 12 (Revised March 1, 1977) [hereinafter ANTITRUST GUIDE]. The Department of Justice generally looks to see if the parent controls a majority of the voting stock of the subsidiary when determining if the parent fully controls the subsidiary. *Id.* However, the Department of Justice has indicated that it may also apply the same reasoning when the parent is a minority shareholder that maintains effective working control. *Id.* at 12-13.

70. *See* Fox, *supra* note 37, at 60-61.

> An American company engaging in exports could violate the U.S. antitrust laws by a single firm act of monopolization (which is theoretically possible, but rare), or by a contract, combination or conspiracy that unduly restrains domestic competition or the trade of a U.S. exporter or other U.S. trader in foreign commerce. Most often, if there is a risk of violation, it arises from joint export activity.

Id.; *see also* 1 J. ATWOOD & K. BREWSTER, *supra* note 59, § 2.10.

> Although no cases had been brought against joint selling by American exporters, the law's shadow had been cast by the shipping cases and *American Tobacco*. After a lengthy investigation, the Federal Trade Commission concluded that American exporters were at a disadvantage in foreign markets because of the possible illegality of export combinations under the Sherman Act. One disadvantage was the inability to pool costs in order to meet the competition of foreign selling combines. This was felt to be a special disadvantage to small American firms which might not be able to export alone but could afford it in combination with competitors.

Id. (citations omitted).

71. *See* 1 J. ATWOOD & K. BREWSTER, *supra* note 59, § 9.02.

making.[72] If that arrangement operates to restrain exports of domestic firms that do not participate in the cartel, then the risk of illegal foreclosure effects increases.[73] When domestic manufacturers combine to export, their collaborative refusal to sell to independent exporters may be either a restraint of trade within the United States, or a restraint of the export trade of a competitor, even if the exporting manufacturers are certified under Title III.[74] Foreclosure problems may also exist when competing exporters exclude a domestic competitor from access to an export cartel that is essential to successful exporting.[75] This situation could arise when the domestic market for the relevant product is concentrated and noncompetitive, and when the exclusion would seriously damage the excluded competitor's ability to compete in the domestic market.[76] Thus, the exclusion could substantially lessen domestic competition.[77]

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72. 2 P. AREEDA & D. TURNER, *supra* note 15, § 405a.

> The perfect cartel would, like a monopolist, maximize the excess of aggregate revenues over aggregate costs. Thus to maximize industry cost, set price and output so as to maximize net profits, and divide the profits among members according to some agreed-upon formula - in proportion, for example, to pre-cartel market shares. Absent such centralization creating and maintaining a successful cartel is hampered by divergent interests strong temptations to cheat on the cartel price, non-price competition, and changes in market share.

Id. at § 405b.

For years the United States pursued an anticartel policy. *See* United States v. General Elec. Co., 80 F.Supp. 989 (S.D.N.Y. 1948); United States v. National Lead Co., 63 F.Supp. 513 (S.D.N.Y. 1945), *aff'd*, 332 U.S. 319 (1947); United States v. General Dyestuff Corp., 57 F.Supp. 642 (S.D.N.Y. 1944). However, in the 1950's it was recognized that the per se rules of illegality were inappropriate for foreign commerce. 1 J. ATWOOD & K. BREWSTER, *supra* note 59, § 2.17.

73. One of the primary concerns of antitrust enforcement is to protect United States export opportunites against privately imposed restriction. *See* ANTITRUST GUIDE, *supra* note 69, at 5. United States firms engaged in the export of goods, services, or capital should not be foreclosed from competition because a bigger, less principled competitor has imposed a restriction on trade. *Id.*

74. 1 J. ATWOOD & K. BREWSTER, *supra* note 59, § 9.42; United States v. Alkali Export Ass'n, Inc., 86 F.Supp. 59 (S.D.N.Y. 1949). In this *Alkali*, the court held that agreements among cartel members barring sales to independent exporters were illegal. *Alkali*, 86 F. Supp. at 74-77.

75. Margulies, *supra* note 8, at 299; *see also* 1 J. ATWOOD & K. BREWSTER, *supra* note 59, § 7.24. An essential exporting facility is an export market in which, if excluded, an exporter cannot make up the loss by exporting to other markets.

76. Margulies, *supra* note 8, at 299.

77. *Id.*

If the cartel were to engage in the export of a product in which there were no substantial entry barriers into production of that product, and consumers could readily substitute products if the price of the first product were to increase, the Department of Commerce has indicated that it would certify agreements among cartel members.[78] The cartel could establish, by agreement among its members, the prices at which the goods would be purchased and sold for export[79] and could agree to allocate among cartel members the quantities of goods sold for export by the cartel. If the cartel were to engage in activities that involved a homogenous product in which there were high entry barriers to production and the market was highly concentrated, then the Department would put restrictions in the certificate.[80]

2. Joint Ventures

Joint ventures can serve beneficial and procompetitive functions with the increase in efficiency usually offsetting any anticompetitive foreclosure effects. The procompetitive effects of the joint venture should therefore be balanced against any anticompetitve effects.[81] Joint ventures are business organiza-

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78. CERTIFICATE GUIDELINES, *supra* note 37, at 1796.

79. *Id.*

80. *Id.* at 1796-97. For example, the Department would put restrictions on what type of information could be exchanged between the producers. *Id.* at 1797. The Department would require that all meetings and telephone conversations be monitored by knowledgeable counsel and that accurate and complete records of all such discussion should be kept. *Id.* Finally, the certificate would be limited in duration to a period reasonably necessary to develop a business plan. *Id.*

81. J.T. Halverson, *Transnational Joint Ventures and Mergers Under U.S. Antitrust Law*, in 1984 FORDHAM CORP. L. INST. 143, 175-76 (B. Hawk ed. 1985). One commentator has identified three primary anticompetitive risks of joint ventures. Brodley, *Joint Ventures and Antitrust Policy*, 95 HARV. L. REV. 1521, 1530-34 (1982). These are collusion, reductions in potential competition, and the exclusion of competitors from a joint venture which creates significant market power for the joint venture. *Id.* Direct collusion occurs when joint venture operations enable the joint venture partners to jointly regulate their individual outputs. *Id.* at 1530. A joint venture that practices collusion could therefore take on some of the characteristics of a cartel. A reduction in potential competiton may occur because of the interdependence of interest resulting from co-ownership of the joint venture. *Id.* at 1531. Finally, a joint venture may have anticompetitive effects because it excludes or hampers outside firms' access to an essential market. This can occur when competitors with market power form a marketing or input supply joint venture and the joint venture has natural monopoly characteristics. *Id.* at 1532.

tions[82] which have a variety of different forms. The Justice Department has divided joint ventures into two categories. The "one shot" consortium is an entity engaged in a single venture that is limited in time and scope.[83] Other joint ventures are unlimited in time and scope. These unlimited joint ventures usually combine for the production or distribution of products and services.[84] Joint research ventures involve two competitors which combine to jointly research and develop new processes or products.[85] Manufacturing joint ventures are combinations of producers who come together for the purpose of manufacturing a particular product or products.[86]

One shot and unlimited joint ventures raise different antitrust risks with one shot joint venture arrangements tending to have fewer illegal antitrust problems.[87] When competitors with market power form a joint venture, that joint venture may have illegal foreclosure effects because the members of the joint venture may either partially or totally restrict non-member firms' access to an essential exporting facility.[88] Competitors of the venture may have to be granted access to an essential market.[89] These types of ventures should seek Title III

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82. ANTITRUST GUIDE, supra note 69, at 19.

83. *See* ANTITRUST GUIDE, *supra* note 69, case C, at 19-22. The recent General Motors Corporation and Toyota Motor Corporation joint venture is an example of a one shot consortium. *See also In Re* General Motors Corp., 103 F.T.C. 374 (1984). The joint venture was limited to no more than 250,000 subcompact cars per year, for a period of twelve years.

84. ANTITRUST GUIDE, *supra* note 69, case C, at 19.

85. *See id.* case D, at 23-27.

86. *See id.* case E, at 28-32.

87. *See, e.g., id.* case C, at 19-21. *But see id.* case B, at 15-18. "It seems unlikely that Section 7 [of the Clayton Act] would apply here because there is no suggestion that Glint [a fictitious German manufacturer] is engaged in making sales in the United States." *Id.* at 15. For a discussion of this fictitious case see *infra* note 107.

88. Halverson, *supra* note 81, at 175.

> [A] joint venture may injure competition by excluding or hampering outside firms in their access to an essential requirement. This result will most likely occur when competitors with market power form a marketing or input supply joint venture and the joint venture has natural monopoly characteristics. In the extreme, refusal by the joint venture to deal with outside firms may totally exclude such firms from the market.

Id.; *see, e.g.*, Associated Press v. United States, 326 U.S. 1, 8-15 (1944) (refusal by a cooperative news gathering agency to deal with non-member newspapers totally excluded these non-member newspapers from the market).

89. *See* Silver v. New York Stock Exch., 373 U.S. 341, 347-49 (1963); Associated Press v. United States, 326 U.S. 1, 15-18 (1944). In *Silver*, two Texas broker-dealers in securities who were not members of the New York Stock Exchange, arranged for

certification, because they will be treated by the courts or the Justice Department as if they had merged.[90] In comparison, when the joint venture is a one shot consortium engaged in a single venture limited in time and scope, it usually presents no foreclosure problems.[91] Although the risk of an illegal foreclosure effect in a one shot consortium situation is less than if the joint venture were unlimited, the one shot consortium may still want to apply for Title III certification.[92]

A per se violation of the antitrust laws occurs when a joint venture engages in anticompetitive conduct.[93] Per se violations must either have a "direct, substantial and reasonably foreseeable effect" on trade within the United States,[94] or it must interfere with the export trade of a United States exporter.[95] If the price fixing or horizontal market division agreement only has negative impacts outside the United States, the conduct is legitimate.[96]

B. *Vertical Export Restraints*

Vertical restraints do not ordinarily have any substantial anticompetitive effects[97] but they may restrain competition by

direct wire telephone connections to member firms of the Exchange. 373 U.S. at 343. The information communicated through these connections were essential to the conduct of the two Texas brokers' business. *Id.* Temporary approval was originally granted by the Exchange, but without prior notice to the Texas brokers, the Exchange denied the brokers access to these communications. *Id.* at 344. Allegedly, as a result, one broker was forced out of business and the other broker suffered business losses. *Id.* at 344-45. The Court held that the removal of the direct-wire connections constituted a per se violation of the Sherman Act, because it was a group boycott which deprived the two Texas brokers of a valuable business service which they needed to compete effectively as broker-dealers in the over-the-counter securities market. *Id.* at 347-49. In *Associated Press*, a cooperative, engaged in gathering and distributing news to cooperative members, prohibited access to cooperative gathered news to non-members of the cooperative. 326 U.S. at 3-4. The Supreme Court approved the district court decree that was interpreted as meaning that Associated Press news is to be furnished to competitors of members without discrimination through by-laws controlling membership, or through other methods. *Id.* at 12.

90. ANTITRUST GUIDE, *supra* note 69, at 21.

91. *Id.*, case C, at 19-22.

92. CERTIFICATE GUIDELINES, *supra* note 37, at 1797-98.

93. For example, a price-fixing horizontal market division arrangement. *See* ANTITRUST GUIDE, *supra* note 69, cases C, D, & M, at 19-27, 58-61.

94. 15 U.S.C. § 6a.

95. *Id.*

96. *See id.*

97. CERTIFICATE GUIDELINES, *supra* note 37, at 1792.

foreclosing an export market to the domestic competitors of the exporting firm.[98] Vertical integration is an arrangement among firms at different levels of the market structure, such as an arrangement between a manufacturer and its distributors.[99] Vertical restraints in export competition include arrangements such as exclusive selling and exclusive dealing agreements,[100] licensing agreements,[101] and tie-ins.[102] These restraints may threaten the survival of existing export competitors and discourage new entrants into the market.[103] Eventually, these restraints can lead to a higher concentration of firms in the domestic market.[104] If domestic competitors are foreclosed from either expanding exports or are barred from exporting, their ability to compete effectively in the domestic market may be threatened.

Domestic consumers are not always harmed when competitors are foreclosed from an export market.[105] If the effects of being foreclosed from an export market were to lead to the demise of firms, then so long as other potential markets exist and access to production is not prohibitively expensive, new firms would enter the market to replace them.[106] The antitrust risks of vertical mergers in export trade may depend on the concentration of firms in the domestic market, the ease of entry into production, and the availability of potential markets. If the market is not highly concentrated, access to production is not prohibitively expensive, and potential markets do exist,

98. 2 P. AREEDA & D. TURNER, *supra* note 15, § 527(a).

99. United States v. Arnold, Schwinn & Co., 388 U.S. 365, 378-79 (1967).

100. *See, e.g.*, Luria Brothers and Co. v. F.T.C., 389 F.2d 847 (3rd Cir.), *cert. denied*, 393 U.S. 829 (1968).

101. *See infra* notes 131-36 and accompanying text.

102. *See infra* notes 123-24 and accompanying text.

103. 2 P. AREEDA & D. TURNER, *supra* note 15, § 527(a).

> By thus 'narrowing' the opportunities of competitors, it is thought that foreclosure may threaten the survival of one or more existing rivals and discourages potential entrants, leading to higher concentration at one or the other horizontal stage. And that, of course, is the principal, if not the only, significant potential harm to the ultimate consumers of the end-product in question.

Id.

104. *Id.* Market concentration levels refer to the number of firms in the industry. The fewer the firms in the industry, the greater the concentration. *See* L. SULLIVAN, *supra* note 4, at § 22.

105. 2 P. AREEDA & D. TURNER, *supra* note 15, § 527(a).

106. *See infra* notes 196-202 and accompanying text.

then vertical mergers do not pose a substantial threat to domestic competition.[107] If the market is highly concentrated and access to production is prohibitively expensive,[108] a vertical merger could foreclose competitors leading to negative impacts on the domestic market. In this case, the elimination of one firm could lead to significantly higher concentrations of firms in the domestic market. If sellers in the United States were willing and able to supply purchasers, and access to production were not difficult, the demise of one seller might be immaterial.[109]

1. Exclusive Dealing and Selling Arrangements

In an exclusive dealing arrangement, a purchaser agrees to buy goods or services from only one seller for either a specified period of time, or an indefinite period of time.[110] In an exclusive selling arrangement, the supplier appoints a sole dis-

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107. The Department of Justice Guide for International Operations also considers whether the foreign firm to be acquired has the capability of entering the United States market. ANTITRUST GUIDE, *supra* note 69, Case B, at 16. The Antitrust Guide discusses the antitrust violation risks of a hypothetical merger between a United States firm engaged in the manufacture of razor blades, and a small German specialty manufacturer. *Id.* at 15. The Justice Department assumed that the relevant United States razor market was concentrated, and that potential competition might have been an important factor in the present and future market structure and behavior. *Id.* at 17. However, the German manufacturer was an unlikely entrant into the United States market, it was not an industry leader abroad and was limited in size and resources. *Id.* It was unlikely that the German manufacturer was a potential entrant into the United States market. Therefore it seemed unlikely that the Justice Department would challenge this merger. *Id.* at 17-18.

The 1984 Department of Justice Merger Guidelines indicate that they will consider potential competition, market concentration, ease of entry into the market, the acquiring firm's entry advantage, and the market share of the acquired firm, when the department is analyzing non-horizontal mergers. U.S. DEPARTMENT OF JUSTICE, MERGER GUIDELINES, 49 Fed. Reg. 26,823, 26,834-35 (June 29, 1984) (replacing 47 Fed. Reg. 28,493 (June 30, 1982)) [hereinafter cited as 1984 MERGER GUIDELINES]. Although the 1984 Merger Guidelines became effective after the passage of the ETCA, they do not consider the potential foreclosure of competitors to be an issue when analyzing non-horizontal mergers with foreign firms. *See id.*

108. The automobile manufacturing industry is a good example. There are only four firms in the domestic market. Access to production is prohibitively expensive, and could even be considered impossible. If one automobile manufacturer were to vertically merge with a foreign automobile distributer which deprived the other United States automobile manufacturers of an essential exporting facility then this could be an illegal foreclosure effect.

109. 2 P. AREEDA & D. TURNER, *supra* note 15, § 527(a).

110. J. DAVIDOW, ANTITRUST GUIDE FOR INTERNATIONAL MARKETING AND DISTRIBUTION A-13 (1983). Furthermore, agreements prohibiting the purchasers from

tributor abroad to distribute the supplier's product.[111] Typically, the agreement usually covers a defined territory, and the supplier agrees not to make separate deliveries into the distributor's exclusive territory.[112] Exclusive arrangements may result in foreclosure when a United States exporter appoints a foreign distributor and prevents other United States competitors from selling in that territory through that distributor.[113] An exclusive agreement between a United States firm and a foreign distributor does not generally violate the antitrust laws,[114] unless United States competitors are foreclosed from "a substantial share of the line of commerce affected."[115]

One important factor in determining whether an illegal foreclosure effect exists is the extent of interbrand competition.[116] When there are many producers in the product market and little product differentiation,[117] the exclusive arrangement

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dealing with the supplier's competitors on a full requirements contract can be considered exclusive dealing as well. *Id.*

111. *Id.* at A-11.

112. *Id.*

113. Note, *supra* note 7, at 1327-28.

114. Fox, *supra* note 37, at 76.

> An agreement by an American firm to sell abroad exclusively through a certain foreign distributor is within the protection of . . . the Sherman Act. Moreover, no injury to competition anywhere is likely to result. If there were any injury to competition, the harm would be visited upon consumers in foreign markets, who would lose the possible benefits of intrabrand competition (i.e., competition among sellers of the same brand).

Id.

115. Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320, 327 (1961) (quoting Standard Oil Co. v. United States, 337 U.S. 293, 314 (1949)). The line of commerce refers to the type of goods, wares, or merchandise involved in the controversy. 365 U.S. at 327. *See* E-H Int'l, Inc. v. Autek Sys. Corp., 1982-83 Trade Cas. (CCH) ¶ 65,026 (N.D. Cal. Feb 11, 1982), *aff'd*, 698 F.2d 1229 (9th Cir. 1983). In *E-H International* the defendant allegedly pirated the plaintiff's entire trained sales and service work force in Japan and entered into an exclusive dealing contract with them. The court concluded that this exclusive dealing contract did not constitute a restraint of competition in the waveform analyzer market even though the plaintiff was foreclosed from the market. *Id.* at 70,715. The *E-H International* court found that the plaintiff was not actually excluded from the market. *Id.* at 70,716.

116. *See* J. DAVIDOW, *supra* note 110 at A-13. Interbrand competition occurs among manufacturers or distributors of different brands. Intrabrand competition occurs among manufacturers or distributors the same brands.

117. *See* Areeda, *Market Definition and Horizontal Restraints*, 52 ANTITRUST L.J. 553, 567-68 (1983). Differentiated products are those that manufacturers have persuaded buyers to think are distinguishable from their competitor's products. Manufacturers differentiate products through style, brand marks and names, and advertising. *Id.*

is not likely to violate the antitrust laws.[118] If, however, an uncertified United States exporter lacking Title III certification were to require, as a condition to the agreement, that the distributor not sell the goods of a competitor, then the agreement would be valid only to the extent that the excluded competitors and harmed consumers were not located in the United States.[119] If domestic competitors were excluded from the export market, the ETCA would limit the applicability of the Sherman Act to those cases in which the conduct has a "direct, substantial and reasonably foreseeable effect"[120] on the export trade of a United States firm. If a particular foreign distributor were the only distributor in a particular market, and access to this market was "necessary to sustain a sufficient number of viable American competitors in order to preserve healthy competition in the United States,"[121] then the exclusive dealing arrangement would be struck down for having illegally foreclosed domestic competitors.[122] Therefore, exclusive dealing arrangements would present foreclosure risks only when the arrangement would negatively affect the United States market.

2. Tying Arrangements

Tying arrangements in export commerce do not violate the Sherman Act if there are no injuries to the export commerce of a person engaged in such trade in the United States.[123] Tying arrangements[124] are agreements in which a party contracts to sell one product, but only on the condition

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118. *See* J. DAVIDOW, *supra* note 110, at A-13.
119. Fox, *supra* note 37, at 76-77.
120. 15 U.S.C. § 6a(1).
121. Fox, *supra* note 37, at 77.
122. *See id.*
123. 15 U.S.C.§ 6a.
124. *See* 8 SECTION OF ANTITRUST LAW, AMERICAN BAR ASSOCIATION, VERTICAL RESTRICTIONS UPON BUYERS LIMITING PURCHASES OF GOODS FROM OTHERS. (1982) [hereinafter VERTICAL RESTRICTIONS]; Butler, Lane & Phillips, *The Futility of Antitrust Attacks on Tie-In Sales: An Economic and Legal Analysis*, 36 HASTINGS L. J. 173 (1984); *see also* Industria Siciliana Asfalti S.p.A v. Exxon Research & Eng'g Co., 1977-1 Trade Cas. (CCH) ¶ 61,256 (S.D.N.Y 1977). In *Industria Siciliana* an Italian oil refiner claimed it was the victim of an illegal tying agreement and was allowed to invoke the Sherman Act even though the only material injury was in Italy. *Id.* at 70,783-84. *Industria Siciliana* was overruled by the ETCA because no direct, substantial, and reasonably foreseeable effect was shown on the export trade of a United States person. 15 U.S.C. § 6a.

that the buyer will either purchase another product, or agrees that he will not purchase that product from any other supplier.[125] In the domestic market, tying arrangements may be per se illegal under the Sherman Act,[126] and have been challenged under section 3 of the Clayton Act.[127] The Supreme Court has invalidated tying arrangements on the grounds that such arrangements extend a seller's monopoly power over the tied product into the tied product market,[128] thereby possibly foreclosing competition in that market.[129]

3. Licensing Agreements

When United States firms license industrial property rights to foreign persons, such agreements are within the scope of the Sherman Act only to the extent that they harm domestic markets or the export opportunities of other United States firms in a direct, substantial and reasonably foreseeable manner.[130] A licensing agreement is an arrangement in which

125. Northern Pacific Ry. Co. v. United States, 356 U.S. 1, 5-6 (1958).

126. VERTICAL RESTRICTIONS, *supra* note 124, at 1; *see also* ANTITRUST LAW DEVELOPMENTS, *supra* note 1, at 77-89 (elements of a per se violation).

127. *See* Butler, Lane, & Phillips *supra* note 124, at 174; *see, e.g.*, Forner Enters., Inc. v. United States Steel Corp., 394 U.S. 495 (1969); Northern Pacific Ry. Co. v. United States, 356 U.S. 1 (1958).

Generally, Sherman Act violations result when there are two distinct, and separate products and the seller conditions the sale of the first product on the purchase of the second one. The seller must have considerable market power in the tied product market, and the arrangement must effect a substantial volume of commerce. *See* Butler, Lane & Phillips, *supra* note 124, at 175-76; ANTITRUST LAW DEVELOPMENTS, *supra* note 1, at 75-93. A Sherman or Clayton Act violation will generally be found when; 1) the seller has two distinct tied products, 2) there is an agreement to sell one product or service conditioned on the purchase of another, 3) the seller either has considerable market power and the tying arrangement affects a substantial volume of commerce. ANTITRUST LAW DEVELOPMENTS, *supra* note 1, at 77.

128. *See* Northern Pacific Ry. Co. v. United States, 356 U.S. 1, 5-6 (1958). *Northern Pacific* involved a railroad's "preferred routing" provisions, which required buyers and lessees of Northern Pacific's land holdings to commit themselves to shipping on Northern Pacific's railroad line, even though other carriers may have had less expensive rates. The Supreme Court found the Sherman Act applicable if the arrangement imposed an appreciable restraint on free competition in the tied product market, and affected a "not insubstantial" amount of the tied product's commerce. *Id.* at 6; *see also* International Salt Co. v. United States, 332 U.S. 392 (1947).

129. Butler, Lane & Phillips, *supra* note 124, at 177; *see also* International Salt Co. v. United States, 332 U.S. 392, 398 (1947).

130. 15 U.S.C. § 6a; *see also* Eurim-Pharm GmbH v. Pfizer, 1984-2 Trade Cas. (CCH) ¶ 66,208 (S.D.N.Y. 1984). In this case, the court granted a motion to dismiss for lack of subject matter jurisdiction and failure to state a claim in which relief can be

the holder of an industrial property right receives a royalty from a licensee,[131] and, in exchange, the licensee is allowed to benefit from the right.[132] License agreements may violate United States antitrust laws. The grant of a license is not only dependent on the payment of a license fee, but may also be dependent on other obligations to the licensor.[133]

United States courts have outlawed reciprocal licensing arrangements which incorporated territorial restrictions that allocated world markets.[134] Such agreements would probably still be considered illegal if domestic competition would be affected by allocating the United States to one firm exclusively.[135] A territorial restriction imposed on a foreign licensee banning sales to third markets would not be challenged unless there were an effect on United States commerce.[136]

4. Mergers with Foreign Firms

The merger of a United States firm with a foreign firm[137] is the absorption of a previously separate firm into the com-

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granted. *Id.* ¶ 66,208 Pfizer tied geographic market allocation schemes to the grant of licenses for an anti-depressant. *Id.* ¶¶ 66,814. The court in applying the ETCA amendments to the Sherman Act, found that the plaintiff failed to allege in its complaint that the defendant's conduct had an effect on United States trade or commerce. *Id.* ¶¶ 66,814-15.

131. *See* J. DAVIDOW, *supra* note 110, at A-17; ANTITRUST LAW DEVELOPMENTS, *supra* note 1, at 499.

132. J. DAVIDOW, *supra* note 110, at A-18.

133. *Id.* "American courts have outlawed schemes in which reciprocal patent, know-how, or trademark licenses with territorial restrictions were employed as key features of a broad scheme to allocate world markets." *Id.* at A-18, *citing* United States v. Bayer Co., 135 F.Supp. 65 (S.D.N.Y. 1955); United States v. Imperial Chemical Indus., Ltd., 100 F.Supp. 504 (S.D.N.Y. 1951); United States v. Timken Roller Bearing Co., 83 F.Supp. 284 (N.D. Ohio 1949), *aff'd as modified*, 341 U.S. 593 (1951); United States v. General Elec. Co., 82 F.Supp. 753 (D.N.J. 1949), *modified*, 115 F.Supp. 835 (D.N.J. 1953); United States v. General Elec. Co., 80 F.Supp. 989 (S.D.N.Y. 1948); United States v. National Lead Co., 63 F.Supp. 513 (S.D.N.Y. 1945), *aff'd*, 332 U.S. 319 (1947).

134. United States v. Bayer Co., 135 F.Supp. 65 (S.D.N.Y. 1955); United States v. Timken Roller Bearing Co., 83 F.Supp. 284 (N.D.Ohio 1949), *aff'd as modified*, 341 U.S. 593 (1951); United States v. National Lead Co., 63 F.Supp. 513 (S.D.N.Y. 1945), *aff'd*, 332 U.S. 319 (1947).

135. *See* 15 U.S.C. § 6a.

136. *Id.*

137. *See* Jackson, *Application of U.S. Antitrust Law to International Investment: Joint Ventures, Mergers and Acquisitions*, 5 N.C.J. INT'L L. & COM. REG. 141 (1980); Halverson, *supra* note 81.

mon ownership and control of another firm.[138] In the domestic market, the merger of firms that are competitors in the same product line is a horizontal restriction of trade[139] and may be seen as an alternative to cartelization.[140] In the international market, an acquisition may be viewed as a vertical restriction when a United States firm acquires a customer or supplier in the foreign market.[141]

A United States firm may merge with a foreign firm in order to penetrate foreign markets.[142] Ordinarily, section 7 of the Clayton Antitrust Act[143] would not prevent a United States firm from merging with a foreign firm when the potential adverse effects on competition resulting from such a merger would occur outside the United States.[144] An acquisition could violate the Sherman Act if the acquisition of the foreign firm forecloses access to the market to other United States firms, and access to the foreclosed market is necessary to support a sufficient number of viable firms in the United States.[145]

III. *MARKET DEFINITIONS RELEVANT FOR DETERMINING ILLEGAL FORECLOSURE EFFECTS*

Defining markets is neither a jurisdictional prerequisite nor a significant statutory issue;[146] rather it provides a basis for determining if an illegal foreclosure effect exists.[147] A "market," in economic terms is a firm or a unified group of firms

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138. L. Sullivan, *supra* note 4, § 193 (1977); *see also* ANTITRUST LAW DEVELOPMENTS, *supra* note 1, at 147-214.

139. *See* L. SULLIVAN, *supra* note 4, § 192 (1977).

140. *Id.*

> Horizontal merger is, in a sense, an alternative to cartelization, though (involving as it does a fuller integration) it may stem from very different motives and may have effects (including some social value) which cartelization cannot achieve.

Id.

141. *See* ANTITRUST LAW DEVELOPMENTS, *supra* note 1, at 174-78.

142. *See* 1984 MERGER GUIDELINES, *supra* note 107.

143. 15 U.S.C. § 18; *see also supra* note 1.

144. *See* Baker, *Market Definition in Transnational Joint Ventures, Mergers and Monopolization*, in 1984 FORDHAM CORP. L. INST. 115 (B. Hawk ed. 1985).

145. *See* Fox, *supra* note 37, at 77-79.

146. *See* L. SULLIVAN, *supra* note 4, § 12.

147. *See id.*; *see also* ANTITRUST LAW DEVELOPMENTS, *supra* note 1, at 149; 1 J. ATWOOD & K. BREWSTER, *supra* note 59, § 7.23.

having market power in dealing with a particular group of buyers.[148] Delineation of the relevant product and geographic markets is necessary to determine the extent to which competition has been foreclosed from the export market.[149] The likelihood of an illegal foreclosure effect must be judged in relation to the market affected.[150] Therefore, the problem of defining an export market must be resolved by looking to the objectives of the antitrust laws, and not to statutes.[151] In the domestic market, it is "unreasonable per se to foreclose competitors from any substantial market."[152] The goal of the ETCA was to increase efficiencies in export practices.[153] Therefore, the substantiality of the foreclosure in an export market should be measured against the full range of export opportunities available to these rivals in both the product and geographic markets.

In defining relevant markets,[154] the three elements that

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148. *See* Landes & Posner, *Market Power in Antitrust Cases*, 94 HARV. L. REV. 937 (1981). In the domestic market, if demand were held constant, and either prices were raised, or the volume of the product were decreased within the defined area, then supply from alternative sources would never be sufficient to restore the former price or volume. L. SULLIVAN, *supra* note 4, § 12. Market power can also be defined as the ability to raise price by restricting output. *See* 2 P. AREEDA & D. TURNER, *supra* note 15, at § 501. The significance of market power depends not only on its degree but also on its durability. In a perfectly competitive market with easy access to production, if firms are making excess profits in the market, then additional manufacturers will enter the industry and expand output until price equals long-run marginal costs of production. *Id.* Therefore, substantial market power can persist only if there are significant barriers to entry. *Id.* "A simple economic meaning of the term 'market power' is the ability to raise price above marginal cost." Landes & Posner, *supra*, at 939. "Under perfect competition price equals marginal cost, so if a firm's price is above its marginal cost, the implication is that the firm does not face perfect competition i.e. that it has at least some market power." *Id.*

149. *See* 1 ATWOOD & BREWSTER, *supra* note 59, at § 7.23.

150. Tampa Elec. Co., v. Nashville Coal Co., 365 U.S. 320, 327 (1961).

151. The objectives of the antitrust laws are to maintain free and unfettered competition. *See supra* notes 26-56 and accompanying text.

152. International Salt Co. v. United States, 332 U.S. 392, 396 (1947).

153. *See supra* notes 18-31 and accompanying text.

154. The 1984 Department of Justice Merger Guidelines define a market as:

> [A] product or group of products and a geographic area in which it is sold such that a hypothetical profit-maximizing firm, not subject to price regulation, that was the only present and future seller of those products in that area would impose a small but significant and nontransitory increase in price above prevailing or likely future levels.

1984 MERGER GUIDELINES, *supra* note 107, at 26,827.

In the domestic market, the relevant geographic market is the narrowest market that is wide enough so that products from other areas, or from different producers in need to be determined are the geographic,[155] product,[156] and production dimensions.[157] When determining illegal foreclosure effects in export markets the market should be defined from the exporters' perspective[158] because Congress intended to protect rival exporters' in the ETCA.[159] Although buyer protection is the main goal of the antitrust laws,[160] the courts have also sought to protect sellers from the anticompetitive effect of both vertical and horizontal arrangements in export trade.[161] In export trade, however, protection of sellers is an

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that same area, cannot compete with those included in the other markets. L. SULLIVAN, *supra* note 4, § 12. For example, the relevant geographic market is the smallest area in which the costs to outside firms to transport the product into the area prevent them from being able to sell at as low a price as firms within the area. *See id.*

In the export market, however, the relevant geographic market includes not only the area in question, but all other areas to which an exporter can export without confronting detrimental effects that can have negative impacts on United States consumers. *See* 15 U.S.C. § 6a; Note, *Defining International Geographic Markets in American Antitrust Suits*, 33 STAN. L. REV. 1069 (1981); *infra* notes 196-202 and accompanying text. The relevant product market includes not only the product in question but all other products that the exporter can switch to without incurring any detrimental effects that can have negative impacts on United States consumers. *See* 1 J. ATWOOD & K. BREWSTER, *supra* note 59, at §§ 7.23-7.24.

155. *See infra* notes 181-202 and accompanying text.

156. *See infra* notes 163-80 and accompanying text. In the domestic market definition, the product dimension encompasses all the products that are close enough substitutes to be included in the same market. 2 P. AREEDA & D. TURNER, *supra* note 15, § 517. For the purposes of this Note "product" refers to both products and services. Sometimes the relevant product being exported is a service, *e.g.*, an engineering joint venture; ANTITRUST GUIDE, *supra* note 69, at Case C.

157. 2 P. AREEDA & D. TURNER, *supra* note 15, § 517. The production dimension defines which products can be manufactured with the same production facilities. *Id*; *see also id.* at § 526. Producer substitutes are products that, while not close substitutes for each other in the consumer markets, can be produced interchangeably from the same production facilities. "Substitutes in supply exist when producers of other products are able to enter into the production of the product by modifying existing facilities or constructing new facilities within a relatively short period." CERTIFICATE GUIDELINES, *supra* note 37, at 1795.

158. *See* 15 U.S.C. §§ 6a, 4013. The ETCA confines Sherman Act violations to those situations where other United States exporters experience negative impacts. *Id.*

159. *Id.*

160. *See supra* note 15; *see also* R. POSNER, ANTITRUST LAW: AN ECONOMIC PERSPECTIVE (1976); Karp, *supra* note 14 at 163-66.

161. *See* Harris & Jorde, *supra* note 14, at 16-17; United States v. Topco Assocs., 405 U.S. 596, 610 (1972).

> [T]he freedom guaranteed each and every business, no matter how small, is the freedom to compete—to assert with vigor, imagination, devotion, and ingenuity whatever economic muscle it can muster. Implicit in such freedom is the notion that it cannot be foreclosed with respect to one sector of

important consideration. The ETCA specifically states that a foreclosure effect is not subject to the Sherman Act unless it substantially affects the export trade of a United States person with a foreign nation.[162]

A. *Product Markets*

Foreclosure may be defined as the inability of an exporter to sell his products in a particular geographic area because another exporter has precluded the opportunities to sell in that area.[163] In defining export trade markets, delineation of the relevant product market provides the basis for defining the relevant geographic market.[164] The product market should be defined from the exporter's perspective, becoming broader as the number of substitutes in production and alternative markets increase.[165] For the purpose of Title III certification[166] the United States government will analyze the relevant product market by first considering each product for which certification is sought as a separate market.[167] The market may then be broadened to the extent that close substitutes exist in demand or supply which might limit the exercise of market power by a firm or group of firms.[168]

In economic terms, the domestic product market is defined by the the cross-elasticity of demand[169] between the

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> the economy because certain private citizens or groups believe that such foreclosure might promote greater competition in a more important sector of the economy.

Id.; *see also* Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959) (Sherman Act prohibited manufacturer's and retailers' boycott of a small retail store).

162. 15 U.S.C. § 6a(1)(B).

163. *See* 2 P. AREEDA & D. TURNER, *supra* note 15, § 527a.

164. *See* Harris & Jorde, *supra* note 14, at 46-47; *see, e.g.*, Pacific Coast Agricultural Export Ass'n v. Sunkist Growers, 526 F.2d 1196, 1203 (9th Cir. 1975), *cert. denied*, 425 U.S. 959 (1976); E-H Int'l, Inc. v. Autek Sys. Corp., 1982-83 Trade Cas. (CCH) ¶¶ 62,026, 70,713 (N.D. Ca 1982), *aff'd*, 698 F.2d 1229 (9th Cir. 1983); Dominicus Americana Bohio v. Gulf & Western Indus., Inc., 473 F.Supp. 680, 688 (S.D.N.Y. 1979). In all these cases the analysis of the geographic markets follows the analysis of the region where the consumer purchases the products at issue.

165. *See* CERTIFICATE GUIDELINES, *supra* note 37, at 1794-95; *see also* Harris & Jorde, *supra* note 14, at 46-47.

166. *See supra* notes 26-56 and accompanying text.

167. *See* CERTIFICATE GUIDELINES, *supra* note 37, at 1794.

168. *See id.* at 1795.

169. Elasticity is the relationship between the magnitude of quantity changes in purchases per unit of time to small changes in price. *See* Landes & Posner, *supra* note

product itself and its substitutes.[170] However, because cross-elasticity defines the consumer's willingness to switch to other products as the price of the product in question increases, this definition defines the markets from the consumer's perspective.[171] Therefore, in the export product market definition, the relevance of a foreclosure effect depends on the existence of alternative markets, and the ability of exporters to switch to other products if no such alternative markets exist.[172] If ex-

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148, at 940 n.8. Demand is elastic when a small price change results in a relatively larger change in the volume of purchases. *See* P. AREEDA, *supra* note 1, ¶ 114 n.28. For example, small reductions in prices lead to large increases in purchases, while small price increases lead to large decreases in sales. *See id.* Demand is inelastic when a small price change results in an even relatively smaller change in total purchases. *See id.* When demand is elastic, reductions in price lead to increases in total revenue. *See id.* When demand is inelastic, reductions in prices lead to reductions in total revenue. *See id.* For example, an elasticity of demand of -2 indicates that if price rose (or fell) by one percent, quantity demanded would fall (or rise) by two percent. Landes & Posner, *supra*, at 940 n.8. The negative sign, which is often dropped for simplicity, indicates that price and quantity move in opposite directions. *Id.*

Cross-elasticity of demand is the effect of the change in the price of a product has on the sales of substitute or complementary products. *See* United States v. E.I. Du Pont & Co.; 351 U.S. 377, 400 (1956). The Court in Du Pont held that the cross-elasticity of demand of cellophane to other flexible packaging materials prevented Du Pont from possessing monopoly control over price. *Id.* If the price of aluminum foil was to stay constant, and the price of cellophane wrap increased, then the sales of aluminum foil would increase as consumers switch to it. Complementary products are items that are typically used together. When the sales of one product fall in response to the price increase of a complementary product this is known as negative cross-elasticity of demand. For example, sales of tennis racquets would fall if the price of tennis balls were increased. Cross-elasticity is positive when products are substitutes for each other. *See* Landes & Posner, *supra* note 148, at 960 n.39.

170. United States v. Tracinda Inv. Co., 477 F. Supp. 1093, 1103 (C.D. CA 1979).

171. *See supra* note 169.

172. *See generally*, Areeda, *supra* note 117, at 570-72. Professor Areeda discusses the production dimension aspect when defining the market from the producer's perspective. *Id.* Government agencies and courts have examined production flexibility as an important factor in product market determination. The Justice Department's 1982 Merger Guidelines recognize that "production substitution may allow firms that do not currently produce the relevant product to respond effectively to an increase in the price of that product." U.S. DEPT. OF JUSTICE, MERGER GUIDELINES, 47 Fed. Reg. 28,493 (June 30, 1982). *See generally*, Beatrice Foods Co., 3 Trade Reg. Rep. (CCH) ¶ 22,035 (FTC 1983) (concurring opinion of Commissioner Douglas). Sometimes products are considered to be in the same product market if firms can readily switch their production capabilities from one product to another. *See, e.g.*, Brown Shoe Co. Inc., v. United States, 370 U.S. 294, 325 n.42 (1962) (cross-elasticity of production facilities may also be important); Heublein, Inc., 96 F.T.C. 385, 576 (1980)(there is also some supply-side interchangeability of productive facilities); Coca-Cola Bottling

porters can switch without impacting negatively on United States consumers,[173] these products should be included in the same export product market. If negative impacts would be felt by United States consumers because of a switch in production, then these products should be excluded from the relevant product market definition.[174] In the domestic market, when two firms offer products which buyers consider perfect substitutes, those products are considered to be in the same market.[175] Export markets should include these substitutes only when the switching costs to exporters does not result in negative impacts on the United States consumers.[176]

When viewing the product market from the exporters' perspective, the production dimension is of primary importance when the exporter is also the manufacturer.[177] If a producer can readily switch production to other products, the product market should be defined to include these substitute products.[178] If the costs of switching production to a substitute product would force the producer to suffer a loss that

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Co., 93 F.T.C. 110, 204-05 (1979) (supply-side flexibility is also an important factor); RSR Corp., 88 F.T.C. 800, 876-77 (1976), *aff'd*, 602 F.2d 1317 (9th Cir. 1979), *cert. denied*, 445 U.S. 927 (1980); Budd Co., 86 F.T.C. 477, 585 (1972) (firms occupying common "supply space" are in the same product market).

173. *See supra* note 15. In considering what constitutes a negative impact on United States consumers, it is important to consider the potential effects on the domestic product market that could occur if the producer was to switch to another product. If the exporter switched production to another product and United States consumers experienced either: 1) a shortage of the formerly produced product, or 2) an increase in the price of the discontinued product, this would constitute a negative impact on American consumers. The concern with the effects of export trade practices on American consumers is related to the theory that a primary concern of the antitrust laws is the protection of consumers' interests. *Id.*

174. *See id.*

175. Karp, *supra* note 4, at 224; *see also* United States v. E.I. Du Pont de Nemours and Co., 351 U.S. 377 (1956). In this case, the defendant produced approximately seventy-five percent of all cellophane sold in the United States. *Id.* at 379. Cellophane made up less than twenty percent of the total supply of flexible wrapping materials sold in the United States. *Id.* The Court compared the various types of flexible wrapping materials and found that if the price of cellophane was increased, consumers switched to other flexible wraps. *Id.* at 395-400. Therefore, the Court defined the market to include both cellophane and these substitutes. *Id.*

176. *See supra* notes 15 and 173 (consumer protection is a primary concern of United States antitrust law).

177. *See generally* CERTIFICATE GUIDELINES *supra* note 37 at 332-34. When determining whether or not to certify a joint export arrangement, the Department of Commerce will consider the ease of entry into the production dimension. *Id.*

178. *See supra* note 175.

could have negative impacts on United States consumers, then the market should be defined narrowly.[179] When the exporter is merely an export intermediary, and not a manufacturer, the product market should be defined broadly. In this case, the production dimension is irrelevant, because the intermediaries are not the manufacturers but merely exporters. In this type of situation, it is easier for an export intermediary to switch to a different product than it is for a manufacturer to switch to a different product. Furthermore, the possibility of there being negative effects on United States consumers is diminished.[180]

B. *Geographic Markets*

Once the relevant product market is defined, the next step in delineating export markets for the purpose of determining when foreclosure of export markets has occurred is to define the relevant geographic markets from the perspective of competitor exporters involved in the trade of that relevant product.[181] Geographic markets must be determined so that a geographic boundary can be established "that roughly separates firms that are important factors in the competitive analysis from those that are not."[182]

1. Defining Geographic Markets from the Exporters' Perspective

The economic definition for geographic markets is "the area within which price tends towards uniformity, allowing for differences in transportation costs."[183] However, a legal definition which has been frequently used by courts in the United States, is the "area of effective competition in the known line

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179. *See supra* notes 15 and 173.

180. *But see* Pacific Coast Agricultural Export Ass'n v. Sunkist Growers, Inc., 526 F.2d 1196 (9th Cir. 1975), *cert. denied*, 425 U.S. 959 (1976). Pacific Coast Agricultural Export Association was an export intermediary engaged in the export of oranges to Hong Kong. *Id.* at 1200. Sunkist Growers was an agricultural cooperative of citrus fruit growers who effectively foreclosed Pacific Coast from the Hong Kong export market. *Id.* at 1200-01. The court found that the antitrust laws were violated. *Id.* at 1202-05. This case was decided, however, before the ETCA was enacted, and there was no discussion of the production dimension, nor other potential geographic export markets other than Hong Kong.

181. *See infra* notes 183-202 and accompanying text.

182. CERTIFICATE GUIDELINES, *supra* note 37, at 1795; *see also* the discussion on potential markets, *infra* notes 196-202 and accompanying text.

183. Baker, *supra* note 144, at 120.

of commerce . . . in which the seller operates and to which the purchaser can practically turn for supplies."[184] In defining geographic export markets, courts should look to the geographic area where exporters' profits tend toward uniformity.[185] A geographic comparison of transportation, tariff, and non-tariff barriers should be made to determine actual profits.[186] The geographic export market may be restricted to the extent that transportation, tariff and non-tariff barrier costs may reduce the exporters' profits to zero.[187] When the exporters' profits in two separate geographic areas are equal,[188] this strongly indicates that they are in the same geographic export market.[189]

Under the economic definition of the term geographic market, "[w]hen prices and price movements in two territories are closely correlated, a single market definition is strongly indicated."[190] However, as long as there are profits to be made, exporters have often sold at a lower local price and absorb market barrier costs.[191] While price may be equal in two areas,

184. Tampa Electric Co. v. Nashville Coal Co., 365 U.S. 320, 327 (1961); United States v. Tracinda Investment Co., 477 F.Supp. 1093, 1105 (C.D. CA 1979).

185. *See infra* notes 186-96 and accompanying text.

186. CERTIFICATE GUIDELINES, *supra* note 57, at 1795. A good or service may sometimes bring a higher price in one area than another, but there may be higher transportation costs to the area were the price is greater as well. If barrier costs are the same, and if the exporter's profits in both areas are equal, then these two areas should be included in the same market. *Id.*

187. *Id.* Transportation costs, tariffs and non-tariff barriers are "market barriers." *See* 2 P. AREEDA & D. TURNER, *supra* note 15, § 523. Market barriers limit the ability of firms to sell in a particular area. *Id.*

> [T]he significance of transporation costs as an indication of separate markets depends entirely on their relation to prices in the areas concerned, and on the presence or absence of cross-shipments. Transporation costs between two areas, say A and B, may be either roughly equal to or substantially greater than the difference between the prices in A and B. One-way or two-way cross-shipments may be non-existent, episodic or persistent.

Id.

188. Profits are defined in this Note as sales price minus transportation costs minus barrier cost.

189. *Cf.* 2 P. AREEDA & D. TURNER, *supra* note 15, § 523(b): "Minneapolis sellers, because of transport cost, would net only $.90 on sales in Chicago, [which is] $.20 less than the $1.10 they can obtain in Minneapolis. Under virtually any assumption, the Chicago price would have to rise substantially to induce them to sell there." *Id.*

This example demonstrates that exporters will view two areas as separate markets based on their profit expectations. *See id.*

190. 2 P. AREEDA & D. TURNER, *supra* note 15, § 522(a).

191. *Cf.* 2 P. AREEDA & D. TURNER, *supra* note 15, § 523(c)(2) ("Producers may

the exporters' profit margin in one area is lower.[192] If this occurs, the two areas should not be included in the same market.[193]

Price is not a good indicator of market differentiation in the export market definition because price defines markets from the buyers' perspective, and not the sellers' perspective.[194] Therefore, the profits of exporters should be analyzed. If the exporters' profits are equal, it indicates that the geographic areas should be included in the same market because this would define the market from the exporters' perspective.[195] If net profits to the exporters differ between the geographic areas, then those areas are in separate markets.

2. Potential Markets

The relevant geographic export market includes both actual and potential purchasers of the exporters' product.[196] If

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persistently 'export' goods to another area notwithstanding that transport costs exceed any price difference between the two areas.").

192. For example, Areas A and B are two separate geographic markets with approximately the same number of buyers for product X. Price for product X in the two areas is the same, but the transportation costs to area B are higher for firm Y. Even though price is equal, firm Y's profits are not.

193. When there are no cross-area sales, then market barrier costs exceed any price differential between the two areas, and the areas are in two separate markets. *See* 2 P. AREEDA & D. TURNER, *supra* note 15, § 522(a). But even if exporters earn less on export sales than on their local sales, exporters may still enter the export market because profits can still be made. *See id.* This is the case when producers persistently export goods although transportation costs exceed any price difference. *Id.*

194. *See supra* note 169 (discussion on elasticity of demand and cross elasticity of demand). As prices rise consumers either stop buying the product or switch to other products. *Id.*

195. *See supra* notes 183-89 and accompanying text; Harris & Jorde, *supra* note 14, at 51.

196. *See id.* at 1081; *see also* Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320 (1961) (Supreme Court used the potential market analysis to determine geographic markets). *See generally* Note, *supra* note 154; Landes & Posner, *supra* note 148, at 967. Factors taken into consideration in determining the feasibility of potential markets should include: a) tariff and non-tariff barriers, b) consumer preferences, c) transportation costs, d) the "time element," i.e. whether the time period (which inherently assumes the cost element) necessary to develop these new markets makes the project economically unfeasible in the short-run without damage to the firm that would lead to negative effects on United States consumers.

The plaintiff may also introduce evidence that the market in dispute is the only truly relevant market. Evidence indicating that the native population of this geographic market is the only consumer of the product in question favors this analysis. Export conduct should be closely scrutinized for domestic anticompetitive effects competitor exporters are foreclosed from the geographic market at issue, then the courts should look to other potential markets to which the exporter can export. Foreclosure should be measured against the full range of export opportunities available to the export competitors. If it is possible to switch to these markets without United States consumers experiencing any long-term negative effects, these potential markets should be included in the analysis because a too narrow view of the market would increase the risk of finding an antitrust violation by the courts.[197] As a result, many export practices could be deterred, thereby defeating the purposes of the ETCA.[198] When determining if there has been an illegal foreclosure in an export market, the alternative geographic markets should be defined as expansively as possible but narrowly enough to protect export opportunities.[199]

At any given time, however, the market at issue may be the only market available to a particular group of exporters, or it may offer cost and profit advantages that make it superior to all other markets.[200] In this case, there is a high risk of finding illegal effects foreclosure by the courts because the market is by definition narrow. If a market is an essential exporting facility that is necessary to support a viable number of United States firms,[201] and if foreclosure to rival exporters could have serious negative anticompetitive impacts within the United States, then this market should be treated separately with no analysis of potential markets.[202]

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when the relevant markets are concentrated and the participants in the proposed markets have market power. Margulies, *supra* note 8, at 293.

197. *See* Note, *supra* note 154, at 1078-79.

> But a firm with market power is prohibited from engaging in certain business practices, even though those practices would be permissible in an atomistic industry. By reducing the size of export markets, courts make it increasingly likely that each firm will have market power in some areas in which they sell, and will be barred from otherwise legitimate export practices.

Id.

198. *Id.*

199. *Id.*

200. 1 J. ATWOOD & K. BREWSTER, *supra* note 59, § 7.26.

201. *See supra* note 75 and accompanying text.

202. *See* 1 J. ATWOOD & K. BREWSTER, *supra* note 59, § 7.24. When alternative markets exist, however, national markets should not be determinative. *Id.* Note, *supra* note 7, at 1327. Foreclosure of a single national market to an exporter may not result in higher prices for United States buyers and only have a minimum effect on

CONCLUSION

When delineating markets to determine illegal foreclosure effects, the product and geographic markets should be defined as broadly as possible.[203] The purpose of the ETCA is to encourage United States exports by clarifying the risks of potential antitrust violations in export trade activities.[204] Restrictive market delineation practices could thwart this goal.

In evaluating whether export conduct will substantially restrain the export trade of a competitor, the focus should be on the effect of such conduct within the United States and the business justification for the conduct. A balancing approach should be used to determine if the anticompetitive effects outweigh the positive impacts of the restrictive export practices. The anticompetitive effects are relevant only insofar as they occur within the United States. Negative effects outside the United States do not pose antitrust risks. Once it is determined that anticompetitive effects are present within the United States, both the actual and potential markets should be viewed from the exporters' perspective.

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other United States exporters. 1 J. ATWOOD & K. BREWSTER, *supra* note 59, § 7.24. If the national market in question represents only a single minor portion of United States trade of that product, no antitrust violations should be found.

203. *See supra* notes 146-202 and accompanying text.

204. *See supra* notes 26-56 and accompanying text.

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