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Exports, Banking and Antitrust: The Export Trading Company Act—A Modest Tool for Export Promotion

George E. Garvey *

I. INTRODUCTION

There is an almost universally held perception that expanded export trade is essential to a robust United States economy. President Carter, for example, stated in a report to Congress that export expansion is critical to the health of our economy.¹ Huge balance of payments deficits in recent years,² the increasingly successful and visible penetration of United States markets by foreign producers, and substantial unemployment in basic industries have all fuelled this concern. These conditions have led naturally to a two-pronged response by the public and members of Congress: first, the call for greater protection against foreign competition;³ and second, a substantial effort to establish policies that will pro-

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mote United States export activities.\textsuperscript{4}

The likelihood that any benefits will flow from "protectionist" policies is remote. The imposition by the United States of tariffs, quotas and other non-tariff barriers, such as domestic content laws, will invite retaliation from our trading partners. It also will jeopardize the healthy movement of recent decades toward international free trade by institutions such as the Organization for Economic Cooperation and Development (OECD)\textsuperscript{5} and the General Agreement on Tariffs and Trade (GATT).\textsuperscript{6} Furthermore, gains in production or employment experienced in one industry are likely to be offset by losses elsewhere.\textsuperscript{7}

Export expansion is, therefore, a safer response to the needs of the United States economy. Fortunately, legislation intended to promote exports has been more successful to date than protectionist measures. This article discusses The Export Trading Company Act ("the Act"),\textsuperscript{8} which is intended to:

assist our domestic companies in finding their way through the thicket of regulations that may bar the door [to export trading]. In effect, this is a positive, aggressive approach to the problem of nontariff barriers, one that steers clear of protectionist legislation which carries the danger of retaliation and a full-scale trade war.\textsuperscript{9}

The Export Trading Company Act represents the merger, with modifications, of several bills intended to promote United States export trade.\textsuperscript{10} It contains four distinct sections. Title I establishes an export

\textsuperscript{5} See FULDA & SCHWARTZ, REGULATION OF INTERNATIONAL TRADE AND INVESTMENT 103-04 (1970).
\textsuperscript{6} See JACKSON, INTERNATIONAL ECONOMIC RELATIONS (1977); LOWENFELD, PUBLIC CONTROLS ON INTERNATIONAL TRADE 1979).
\textsuperscript{10} The legislation consists of four Titles: Title I is the Export Trading Company Act of 1982, 15 U.S.C. § 4001-03 (1982); Title II is the Bank Export Services Act (codified in scattered sections of 12 U.S.C.) [hereinafter cited as BES Act]; Title III does not contain a short title but earlier versions of this title were called the Export Trade Association Act, 15 U.S.C. §§ 4011-21 (1982) [hereinafter cited as ETA Act]; and Title IV is the Foreign Trade Antitrust Improvements Act of 1982, 15
promotion office in the Department of Commerce. Title II permits bank holding companies, and related Edge Act or agreement corporations, to invest in and extend credit to export trading companies. It also authorizes the Export-Import Bank of the United States to guarantee loans extended to export trading companies. The third title establishes a government review and certification procedure to provide export associations with limited antitrust immunity. Finally, title IV of the Act clarifies the jurisdictional reach of the Sherman Act and of the "unfair methods of competition" clause of section 5 of the Federal Trade Commission Act.

The antitrust provisions of the Act are responsive to the perception that United States antitrust laws have been a needless barrier to aggressive export activities by American firms. They are also based on a belief that the existing antitrust exemption for export companies, the Webb-Pomerene Act, is too uncertain to remove the fear of Sherman Act exposure for concerted export activities.

The Export Trading Company Act is built on faith in two institutions: the federal government and banks. The government, primarily


11 ETC Act, supra note 8, § 104.
13 Id. § 206.
through the Commerce Department and Federal Reserve Board, is expected to promote the creation and utilization of export trading companies. The Commerce Department, with the concurrence of the Justice Department, also will offer exporters safe passage, within limits, through the shoals of the antitrust laws. Finally, bank holding companies and related institutions are predicted to bring new capital, experience and contacts to export promoting activities.\textsuperscript{19}

After discussing briefly some of the statute’s economic implications and limitations, this article will analyze the more significant provisions of the Act. The Act only recently has been implemented so there is insufficient experience or empirical basis for critiquing the performance of the enforcement agencies.\textsuperscript{20} It is not premature, however, to suggest that all administrative and enforcement policies should foster a limited role for government in the operation of export markets. Therefore, regulators empowered to exempt firms from potential antitrust liability should recognize the dual problems inherent in their regulatory activities: They must not impede the efficient organization of an industry as dictated by competitive market forces, and they must not sanction combinations that have the power to limit world-wide production and exact supercompetitive profits from foreign and domestic consumers. Both extremes would necessarily limit production and impede the efficient allocation of resources. In short, those implementing the Act should foster organizations that create otherwise unattainable efficiencies but do not acquire excessive monopoly power.

II. Economic Assumptions and Goals

The major significance of title I of the Act is found in the findings of fact and statement of purpose, which demonstrate the principal Congressional assumptions and expectations underlying this legislation.\textsuperscript{21} Those


\textsuperscript{20} The Department of Commerce has issued interim regulations, 48 Fed. Reg. 10600 (1983) and guidelines, 48 Fed. Reg. 15937 (1983). The experience under the Act to date has been recently summarized by Donald Zarin, formerly with the Office of General Counsel, U.S. Dep’t of Commerce. Mr. Zarin notes that neither banks nor non-bank trading firms have yet demonstrated substantial interest in the Act’s provisions. He suggests that some applicants for certificates of review have not required antitrust protection and are perhaps seeking government approval as a public relations device. Zarin believes, however, that the potential benefits of the law will become clearer over time and that participation by banks and others will increase substantially. Former Commerce Dep’t Official Foresees Rising Interest In ETCs, 46 ANTITRUST & TRADE REG. REP. (BNA) No. 1750, at 204 (Feb. 2, 1984).

\textsuperscript{21} (a) The Congress finds that—

(1) United States exports are responsible for creating and maintaining one out of every nine
factors which bear most directly on the substantive provisions of the law may be summarized as follows:

1. there are currently insufficient firms providing export-related services to meet the needs of thousands of small- and medium-sized potential exporters, particularly service organizations;\(^2\)

2. those firms that do exist generally have been unable to achieve sufficient size to capture available scale economies and lack needed financial leverage;\(^3\)

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\(^2\) Id. §§ 102(a)(2), (4), (6), (7), (9); 15 U.S.C. §§ 4001(a)(2), (4), (6), (7), (9).

\(^3\) Id. §§ 102(a)(6), (7); 15 U.S.C. §§ 4001(a)(6), (7). The finding of fact in subsection (5) that export trading companies are needed to further promote agricultural exports is dubious. The grain trade of the world is dominated by several well developed and substantial grain trading companies, including Cargill, Inc. and Continental Grain Company. D. MORGAN, MERCHANTS OF GRAIN (1979). The belief that new trading companies can have an appreciable impact on agricultural exports, at least in the near future, also ignores the bleak market conditions facing the international agricultural community. See Shellenbarger, Shock for Growers, Falling Grain Exports Bruise the Farm Belt; Damage Could Spread, Wall St. J., Feb. 1, 1982, at 1, col. 6.
3. promotion by the federal government and equity participation by banks will produce sufficiently large export trading companies to resolve these problems.²⁴

These assumptions demonstrate limited faith in the ability of a market economy to adapt to changing conditions. They also represent a surprising commitment to government intervention at a time when there is a general emphasis on deregulation.²⁵

The National Association of Export Companies estimates that there are about 2,000 export trading companies serving United States manufacturers and service organizations.²⁶ Although many of these companies are relatively small, they generally have experienced rapid growth in recent years.²⁷ There are also several giant trading companies currently serving United States exporters. Cargill and Continental Grain, both United States companies, are among the largest grain trading companies in the world,²⁸ and Philipp Brothers is a major international marketer of raw materials.²⁹ Furthermore, Japanese trading companies have become significant participants in the United States export market.³⁰ In 1980, for example, Mitsui & Co. (U.S.A.) exports from the United States totaled $3.8 billion and Mitsubishi International's United States exports amounted to $3 billion.³¹ Finally, some major United States corporations, including Sears and General Electric, have established or announced their intention to create trading companies.³²

The number, diversity and growth, both individually and collectively, of exporting principals and intermediaries is persuasive evidence

²⁴ ETC Act §§ 102(a)(10), (b); 15 U.S.C. §§ 4001(a)(10),(6). It is noteworthy that a major focus of the legislation is on antitrust reform although the findings of fact never refer to the antitrust laws, except, perhaps, cryptically in finding (8): “the development of export trading companies in the United States has been hampered by business attitudes and by Government regulations.”


²⁷ S. 144 Hearings, supra note 1, at 396 (statement of National Association of Export Companies, Inc.). Many existing firms are known as export management companies. Since they fit the statutory definition of export trading companies, this article will not distinguish between the two. The Association's members have grown seven-fold in the last decade.

²⁸ D. MORGAN, MERCHANTS OF GRAIN (1979).

²⁹ Inside Philipp Bros., A $9 Billion Supertrader, BUS. WK., Sept. 3, 1979, at 108.


³¹ Id.

that the market has been working satisfactorily. The private enterprise system has been generating needed export services; the idea that government will do it better is questionable.

The assumption that large trading companies necessarily will achieve desirable efficiencies, as well as the apparent belief that entrepreneurs will not recognize available economies without government intervention, is also dubious. The equation of size and efficiency fails to account for the diversity and complexity of markets generally, and markets for exported goods and services in particular.

An elaborate analysis of the scale economies of trading companies is beyond the scope of this article, but several factors suggest that larger firms need not enjoy advantages over smaller ones. Initially, it is probably impossible to reach any conclusion about the optimal size of trading firms because of their diversity. A trading company may be an exporting adjunct of a manufacturer or group of manufacturers;\(^3\) it may acquire the goods of others to export;\(^3\)\(^4\) or it may provide any of several export related services, including the provision or facilitation of financing, insurance or transportation.\(^3\)\(^5\)

One commentator has stated that:

> [i]n its perfect form such an entity would be a "one-stop shop" that would buy a product from a manufacturer and assume the risk of selling it, including identifying a market, concluding the sale, and arranging for financing, transportation, custom, and insurance. A more limited approach would be an entity which, while not taking title to the manufacturer's goods, would handle all aspects of the transaction, utilizing its expertise both here and abroad through foreign offices or foreign agents.\(^3\)\(^6\)

In contrast, the president of an existing international trading company views such firms primarily as financiers of trade activities,\(^3\)\(^7\) while others view them as vehicles for combination by domestic service or manufacturing competitors for competing abroad.\(^3\)\(^8\)

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33 The Senate bill, S. 734, 97th Cong., 1st Sess. (1981), required eligible export trading companies to provide some services to "unaffiliated" exporters. S. REP. NO. 27, supra note 1, at 8. This requirement was abandoned by the Conference Committee and trading companies need not provide services to unaffiliated firms. CONFERENCE REPORT ON S. 734, H. REP. NO. 924, 98th CONG. REC. H8341, H8346 (daily ed., Oct. 1, 1982) [hereinafter cited as CONFERENCE REPORT].

34 See S. 144 HEARINGS, supra note 1, at 213 (testimony of John M. Bowles).

35 S. REP. NO. 27, supra note 1, at 5.

36 Reinsch, supra note 1, at 48.

37 S. 144 HEARINGS, supra note 1, at 214 (testimony of John M. Bowles).

38 Id. at 219 (testimony of Peter Gutman), 284-292 (statement of Milton Schulman). Title III of S.734, as enacted by the Senate, would have amended the Webb-Pomerene Act, 15 U.S.C. §§ 61-66 (1982), and distinguished trading companies from trade associations. The Conference Committee adopted a procedure that does not alter the Webb-Pomerene Act and does not explicitly refer to trade associations. In fact, the definition of "export trade association" was deleted by the conferees. CONFERENCE REPORT, supra note 33, at H8346.
The various potential forms of trading companies make any generalization about scale economies unreasonable. The economies of a trading company engaged in manufacturing, for example, will depend largely on the efficiencies attainable through increases in the scale of the relevant manufacturing process. On the other hand, the available scale economies of a trading company offering limited, specialized services may bear no relationship to other trading company formats.

F.M. Scherer, a prominent industrial organization expert, notes that there are frequently distinct advantages enjoyed by firms of various sizes in the same industry: "Each such size-correlated advantage may be exploited by entities in the favored size-class, and it is commonplace for entities of quite diverse sizes to coexist and survive profitably, each serving some subset of the market to which its special attributes are best adapted." The inherently diverse nature of trading companies suggests that they would develop naturally along a broad spectrum of sizes, each company filling a specific niche in the market for export services.

Nobel prize-winning economist George Stigler has written that the best way to determine the optimum size or sizes of firms in a particular industry is to observe the performance of firms over time and identify the "survivors." The survivor technique proceeds to solve the problem of determining the optimum firm size as follows: Classify the firms in an industry by size, and calculate the share of industry output coming from each class over time. If the share of a given class falls, it is relatively inefficient, and in general is more inefficient the more rapidly the share falls. An efficient size of firm, on this argument, is one that meets any and all problems the entrepreneur actually faces: strained labor relations, rapid innovation, government regulation, unstable foreign markets, and what not.

Applying the survivor technique to export trading companies, it again appears that there is a fairly wide range of firm sizes that can efficiently serve the needs of exporters. As noted earlier, there are about 2,000 small- or medium-sized firms plus several giant trading companies. This does not suggest that there never would be advantages available to large trading companies. Trading companies seldom will be primarily engaged in manufacturing, and, therefore, the economies associated with

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40 Stigler, supra note 39.
41 Id. at 73. See McGee, supra note 39, at 80-83.
42 See supra text accompanying notes 27-31.
the increased scale of productive capacity frequently will not be applicable. Those firms purchasing for resale, however, may obtain some procurement economies from large size, and capital-raising and managerial scale economies also could be applicable in the context of traditional trade intermediaries.

In short, the implicit assumption that large trading companies will be more efficient than small, more specialized firms ignores the complexity of this issue. Moreover, the legislation creates the danger that a federal bureaucracy charged with promoting export trading companies, routing potential customers to such entities, and granting limited protection from the antitrust laws will assume that it must foster large firms. The Commerce Department and Federal Reserve Board therefore must insure that its efforts to foster the development of significant sized trading firms will not interfere with efficient small firms able to compete effectively for this commerce.

Proponents of the Act have claimed that the legislation will generate new jobs for American workers. This belief is based primarily on a study conducted by Chase Econometrics which concluded that “[B]y 1985, the impact of these companies would be sufficient to increase current dollar Gross National Product by between $27 billion and $55 billion without causing significant additional inflation. Employment would be increased by 320,000 to 640,000 workers.”

The Chase study, however, assumed a constant exchange rate and that assumption distorts the conclusions. Increases in export sales will strengthen the dollar vis-a-vis other currencies and that in turn will stimulate imports and lessen the demand for United States exports. There-

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43 Scherer, supra note 39, at 42-43.
44 Id. at 51.
45 Id. at 41-51. Scherer questions the existence of managerial economies and the social utility of procurement and capital-raising efficiencies. Contra McGee, supra note 39, at 77-80.
49 The Federal Reserve Board has an explicit mandate to foster small bank participation. Id. § 202(3).
52 Id. at 15.
53 REPORTS BY THE PRESIDENT, supra note 1, at III-3 to III-7.
fore, the gains in export commerce generated by the success of a trading company may be met by losses elsewhere in the domestic economy. A major study of competitiveness of United States industry, for example, notes that "an improvement in the international competitive performance of one industry, because of its effect on the exchange rates, may contribute to a deterioration in the international competitiveness of other industries."\(^{54}\)

The study conducted by Chase recognizes that changes in the exchange rate will affect the nature of the benefits to the United States economy. Rather than simply increasing exports and employment in those industries successfully exporting, the success of trading companies will stimulate imports at lower costs to United States consumers and will dampen inflation.\(^{55}\) The projected increases in exports and employment are, therefore, in part a surrogate for the benefits of cheaper imports.\(^{56}\)

The Congressional assumptions regarding scale economies and increased employment demonstrate the legislature’s tendency to minimize difficult issues. The United States’ performance in the international marketplace is affected by numerous factors. As already noted, the exchange rate—with the dollar maintaining a consistently strong position—has a dramatic impact on the ability of Americans to export.\(^{57}\) Other obvious and significant factors include the wages and productivity of United States workers, the ability of United States management, the strength of the economies of other nations, and the trade philosophies of United States foreign trading partners.\(^{58}\)

This does not of course mean that the Export Trading Company Act will not have desirable effects on United States export performance. Its impact, however, will be felt at the margin and likely will develop gradually. Furthermore, any number of external factors could dissipate the gains that trading companies are expected to achieve.

\(^{54}\) Id. at III-4.

\(^{55}\) CHASE STUDY, supra note 46, at 15.

\(^{56}\) Id.


III. STATUTORY PROVISIONS

A. Office of Export Trade

The only substantive provision of title I of the Export Trading Company Act establishes an "Office of Export Trade" in the Commerce Department.\(^5^9\) This office shall promote the establishment and use of export trading companies.\(^6^0\)

The efficacy of a new federal export promotion office likely will be minimal. There are numerous federal agencies presently charged with the promotion or facilitation of export trading, including the Departments of Commerce and Agriculture, the Small Business Administration, and the Export-Import Bank.\(^6^1\) In fact, the Secretary of Commerce testified at Senate hearings that there was no need for a new agency within his Department.\(^6^2\)

Since the new office's promotional duties essentially duplicate existing federal programs, its value will depend primarily on the manner in which it implements the certification procedure established by title III of the Act.

B. Bank Export Services Act

Title II of the legislation, the "Bank Export Services Act," allows bank holding companies, bankers' banks\(^6^3\) and Edge Act Corporations\(^6^4\) to invest in and extend credit to export trading companies. The Senate bill would have authorized more substantial bank participation and established more specific restrictions.\(^6^5\) The House, however, limited participation to institutions regulated under the Bank Holding Company

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\(^{59}\) "The Secretary of Commerce shall establish within the Department of Commerce an office to promote and encourage to the greatest extent feasible the formation of export trade associations and export trading companies. Such office shall provide information and advice to interested persons and shall provide a referral service to facilitate contact between producers of exportable goods and services and firms offering export trade services." ETC Act § 104, 15 U.S.C. § 4003 (1982).

\(^{60}\) Id. See S. REP. No. 27, supra note 1, at 9.


\(^{62}\) S. 144 Hearing, supra note 1, at 41 (testimony of Malcolm Baldridge, Sec. of Commerce).

\(^{63}\) "Bankers banks" are owned by banks and transact business solely with banks. Abbott, supra note 26, at 41.


\(^{65}\) S. 734, 97th Cong., 1st Sess. § 105 (1981); See Reisch, supra note 10, at 79-91; S. REP. No. 27, supra note 1, at 11-13.
The Export Trading Company Act
5:818(1983)

Act and the Conferees adopted the House version. Because the Act is an amendment to the Bank Holding Company Act, it was not necessary to include all of the restrictions contained in the Senate bill.

The Act represents a compromise between policies that traditionally have divorced banks from commercial activities and those that would eliminate most restraints on bank participation in export activities. It allows bank holding companies to invest not more than five percent of their consolidated capital and surplus in the shares of export trading companies. It also authorizes bank holding companies with equity investments in an export trading company to lend up to ten percent of their combined capital and surplus to export trading companies.

An investment, however, generally may not be made until sixty days after the Federal Reserve Board has received written notice of the holding company's intent to invest in an export trading company. The Board may disapprove a proposed investment if:

(I) such disapproval is necessary to prevent unsafe or unsound banking practices, undue concentration of resources, decreased or unfair competition, or conflicts of interest;

(II) the Board finds that such investment would affect the financial or managerial resources of a bank holding company to an extent which is likely to have a materially adverse effect on the safety and soundness of any subsidiary bank of such bank holding company, or

(III) the bank holding company fails to furnish the information required under clause (iii).

67 CONFERENCE REPORT, supra note 33, at H8346.
68 Id.
69 "U.S. banks have been excluded from most commercial activities, including direct participation in export trade for more than a century. Among the reasons given for maintaining the traditional distinctions are: (1) that banks should focus on loans and deposits and can better exercise independent judgment on whether or not to make a loan if they are prohibited from holding a stake in the management of actual or potential borrowers; (2) that banks could be exposed to unfamiliar and excessive risks in commercial trading and the holding of inventories; (3) that the bank regulatory agencies lack the capacity to evaluate the commercial risks banks would encounter in owning export trading companies; (4) that bank capital is low and should be reserved for support of bank loans; and (5) that bank-owned export trading companies or companies dealing with them may have preferential access to bank credit." S. REP. NO. 27, supra note 1, at 11.
70 See, e.g., "The doctrines of the free interplay of market forces and fair competition, however, suggest that all investors be allowed to own trading companies if they so choose." BARRETT & DAPARMA, THE U.S. EXPORT TRADING COMPANY LEGISLATION—A TIP OF THE EXPORT EXPANSION ICEBERG, at 10 (Mar., 1982) (prepared for the National Foreign Trade Council).
71 For convenience this article will refer to all banking institutions covered by the Act as bank holding companies.
To foster effective bank participation, the Act requires the Board of Governors to adopt regulatory policies that will (1) allow the establishment of trading companies with sufficient power to compete internationally; (2) assure American firms constant access to export services; (3) foster participation by regional and small banks; and, (4) stimulate the creation of joint ventures with non-banking firms.\textsuperscript{76}

An export trading company with bank participation may not engage in securities transactions, except to the extent that bank holding companies are allowed to do so, nor engage "in agricultural production activities or in manufacturing."\textsuperscript{77} A holding company extending credit to a trading company in which it has invested may not take any unusual risks, and must extend credit under the same terms to other similarly situated export companies.\textsuperscript{78}

Finally, the Act authorizes the Export-Import Bank of the United States to guarantee loans extended to export trading companies,\textsuperscript{79} and allows banks to trade more freely in "bankers acceptances.\textsuperscript{80}

Some banking institutions were extremely supportive of efforts to enact this legislation.\textsuperscript{81} One trade journal reported that some banks were actually so anxious to participate that they planned to form trading companies before the Federal Reserve Board could publish regulations implementing title II.\textsuperscript{82} Subsequent events, however, have shown that the initial enthusiasm has given way to a more cautious attitude. Some of the nation's largest banks have indicated that they will participate in trading companies,\textsuperscript{83} but the response has not been overwhelming.\textsuperscript{84}

Several factors may help to explain the banks' caution. First, their trading company activities will be regulated and the banks do not yet know how supportive the Federal Reserve Board will be.\textsuperscript{85} Second, the market for export trade does not exist in a competitive vacuum. Bankers will have to compete with some of the most aggressive and successful

\begin{itemize}
\item \textsuperscript{76} \textit{Id.}
\item \textsuperscript{78} 12 U.S.C. § 1843(c)(14)(B)(iii) (1982).
\item \textsuperscript{79} 12 U.S.C. § 635a-4 (1982).
\item \textsuperscript{80} 12 U.S.C. § 372 (1982). See Abbott, \textit{supra} note 26, at 41, where the author defines bankers' acceptances as "IOUs that run for less than six months and are used in export financing." See also Verkuil, \textit{Bank Solvency and Guaranty Letters of Credit}, 25 \textit{STAN. L. REV.} 716 (1973).
\item \textsuperscript{81} S. 144 Hearings, \textit{supra} note 1, at 187-212. (statements of J. Hallam Dawson, President, Bankers' Association for Foreign Trade and Douglas R. Stucky on behalf of The American Bankers Association).
\item \textsuperscript{82} Wash. Tariff & Trade Letter, Vol. 2, No. 47, 1 (Nov. 29, 1982).
\item \textsuperscript{83} Bank America, for example, has announced that it plans to form an export trading subsidiary. Wall St. J., Mar. 4, 1983, at 11, col. 1.
\item \textsuperscript{84} \textit{Banks Shun Export Trading Companies for Now, J. OF COM.}, Jan. 10, 1983, at 24.
\item \textsuperscript{85} \textit{Id.}; Abbott, \textit{supra} note 26, at 40.
\end{itemize}
firms in the world, including Japanese trading companies. Banking institutions also may have problems adjusting to the highly entrepreneurial nature of export trading. Bankers, conservative by nature and regulated by a risk averse agency, likely will approach the risk-taking world of international traders with caution.

Because foreign export trading companies are generally highly leveraged, there was some expectation that bank participants would extend substantial credit to firms in which they have some equity interest. The Act, however, prohibits banks from extending unreasonable or discriminatory credit to any trading firm. All credit decisions therefore would have to be prudent and any gains in available financing would result from increased knowledge about the risks and opportunities of export trading that banks may gain from close participation in trading activities.

Banks will not commit capital, either through investments in equity or extensions of credit, to ventures that are too risky for other sources of capital, but they will provide an infrastructure that may stimulate the growth of trading companies. The Senate Banking Committee has stated:

banking organizations have two resources which are essential to establishing a viable export trading company. First, through their retail banking operations, banking organizations are able to reach out to large numbers of small- and medium-sized companies who may manufacture exportable products. Second, through their international branches and foreign correspondent banking relationships, banking organizations are in an excellent position to identify foreign markets and customers.

This Article cannot deal at length with the role of banks in the development of export firms. Some major financial institutions likely will play significant roles in the growth of major United States trade intermediaries. They can provide an in-place international structure as well as substantial financial and related experience.

The immediate response to the Act, however, demonstrates that bank participation holds no particular magic that will expand dramatically the United States share of the international market. There are no large pools of “cheap” or high-risk money suddenly available for trading company activities. Success will be determined by competitive market forces, and only those trading companies, with skilled management and

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87 S. 144 Hearings, supra note 1, at 215 (testimony of John M. Boles, President, Boles & Co., Inc.).
89 S. REP. No. 27, supra note 1, at 6; see S. 144 Hearings, supra note 1, at 193 (statement of J. Hallam Dawson, President, Bankers' Association for Foreign Trade).
efficient organizations, with or without bank participants, will survive in the long-run.

C. Antitrust Provisions

Two titles of the Export Trading Company Act have impact on the international application and enforcement of United States antitrust laws: title IV, the "Foreign Trade Antitrust Improvements Act,"\(^9\) amends the Sherman\(^9\) and Federal Trade Commission Acts;\(^9\) title III\(^9\) provides limited antitrust immunity for activities reviewed and certified by the Commerce Department, with the concurrence of the Attorney General.\(^9\)

I. Antitrust Improvements Act

In 1980, near the close of the 96th Congress, the Senate passed an Export Trading Company Act bill.\(^9\) That legislation died in the House of Representatives in part because the members of the Monopolies Subcommittee of the Committee on the Judiciary believed the bill raised serious antitrust issues that could not be considered adequately during the remainder of that Congress.\(^9\)

Early in the 97th Congress, Congressman Peter Rodino, Chairman of the Judiciary Committee, introduced the Foreign Trade Antitrust Improvements Act.\(^9\) To the extent that the antitrust laws presented a needless barrier to desirable export promotion practices, the sponsors of the bill believed that this problem should be addressed directly, without new or expanded exemptions or regulatory apparatus.\(^9\) They therefore proposed amending the Sherman Act, which prohibits monopolization and combinations in restraint of trade,\(^9\) and section 7 of the Clayton

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\(^9\) Antitrust Improvements Act, §§ 401-403.
Act, which proscribes, *inter alia*, joint ventures that may lessen competition or tend to monopoly.

The proposed Sherman Act amendment would have limited the international reach of the statute. Export activities would have been subject to Sherman Act scrutiny only if they directly and substantially affected the commerce of the United States or if they foreclosed a domestic competitor from a foreign market. The amendment was intended to eliminate the chilling perception that collective activities impacting solely on foreign competitors or consumers in foreign markets fall within the proscriptions of the Act. The proposed amendment was consistent with the holdings of most relevant judicial decisions and essentially would codify existing enforcement policy. The amendment nevertheless was believed to be desirable in light of the body of case law and scholarly authority favoring a broader application of the Sherman Act.

As finally enacted, the legislation limits the jurisdictional reach of the Sherman Act to conduct involving non-import foreign commerce that has a "direct, substantial and reasonably foreseeable effect" on United States imports or on the inter- or intra-state commerce of the United States, and which also is a substantive violation of the Act. Generally speaking, this amendment frees United States business to engage in concerted export, or other wholly foreign business activities, without fear of antitrust reprisal if the domestic effects are incidental and insubstantial. The requirement that the conduct also violate the Act eliminates any implication that the "effects" criterion establishes a substantive standard: that is, the fact that there is a direct, substantial and reasonably foreseeable effect does not mean, without more, that the Sherman Act has been violated.

The Sherman Act also continues to prohibit joint conduct that has a direct, substantial and reasonably foreseeable anticompetitive effect on

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102 H.R. 2326, supra note 97, § 2.
105 H.R. 2326 Hearings, supra note 98, at 37-38 (statement of David Goldsweig), and at 107-08 (statement of Martin F. Connor on behalf of the Business Roundtable); Garvey, supra note 10, at 6-18.
107 See H.R. 2326 Hearings, supra note 98, at 110 (statement of Martin F. Connor).
the export trade of an exporter doing business in the United States.108 But if liability is based on the impact on an individual, as opposed to commerce in general, only the injured exporter may recover.109 When a general anticompetitive effect on commerce has been experienced, however, all injured parties, foreign and domestic, will have a cause of action.110

An identical change was made to that portion of section 5 of the Federal Trade Commission Act prohibiting unfair methods of competition.111 Generally, section 5 proscribes all conduct that tends toward a violation of the other antitrust laws.112 The FTC Act amendment, however, prevents section 5 from inhibiting activities that the Sherman Act amendment places beyond its reach.

As introduced, the Improvements Act removed all joint export ventures from scrutiny under section 7 of the Clayton Act.113 Like the Federal Trade Commission Act, section 7 embodies an "incipiency" standard, i.e., it prohibits conduct that is likely to lessen competition or tend toward monopoly.114 The change would have subjected export joint ventures to the amended Sherman Act provisions rather than this "incipiency" standard. The amendment, however, was deleted by the House and Senate conferees and export joint ventures remain subject to the Clayton Act restrictions.115

The primary test under the amended statutes will surely be "substantially." If an enforcement agency or court finds concerted foreign conduct to have a substantial anticompetitive effect on United States commerce, either quantitatively or qualitatively, it likely will perceive of the effect as both direct and foreseeable.116 On the other hand, behavior having relatively little domestic impact will probably be permitted unless there is evidence that the adverse effects in the United States were a primary purpose of the actors.

109 Id.
110 Id.
113 H.R. 2326, supra note 97, § 3.
115 Fugate, supra note 2, at 702-03.
116 See, e.g., Int'l Trade Admin., Guidelines for the Issuance of Export Trade Certificates of Review, 48 Fed. Reg. 15,937, 15,939 (1983) [hereinafter cited as Guidelines] where the Commerce Department guidelines state that "conduct will be certified unless it has a substantial anticompetitive impact in the domestic market or on U.S. export competitors."
2. Certificate of Review

Title III establishes a "certificate of review" that grants limited anti-trust immunity to recipients of the certificate. Applicants may be certified to engage in export trade and related activities if their conduct 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 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.\footnote{117}

A certificate of review protects its holders from antitrust actions by federal and state authorities for activities identified in the document while it remains in effect.\footnote{118} Any person injured by certified activities that are not in compliance with the above standards for certification may sue under this statute for injunctive relief and actual damages including interest and the costs of suit.\footnote{119} The Attorney General also may seek an injunction to prevent "conduct threatening clear and irreparable harm to the national interest."\footnote{120}

Two provisions of the Act are intended to discourage frivolous suits against certified trading companies. There is a rebuttable presumption that certified activities are in compliance with the standards,\footnote{121} and successful defendants will recover the costs of defending the litigation.\footnote{122}

3. Implementation

There is a direct relationship between the provisions of title III and title IV. The House and Senate conferees stated their intent that the standards for certification "encompass the full range of the antitrust laws."\footnote{123} Therefore, the Commerce Department may not issue a certificate authorizing any person to violate the antitrust laws. Essentially, three questions will have to be answered by the certifying agencies: Is

\begin{itemize}
\item \footnote{117}{ETA Act, supra note 8, § 303(a), 15 U.S.C. § 4013(a)(1982).
\item \footnote{118}{Id. § 306(a), 15 U.S.C. § 4016(a)(1982).
\item \footnote{119}{Id. § 306(b)(1), 15 U.S.C. § 4016(b)(1)(1982).
\item \footnote{120}{Id. § 306(b)(5), 15 U.S.C. § 4016(b)(5)(1982).
\item \footnote{121}{Id. § 306(b)(3), 15 U.S.C. § 4016(b)(3)(1982).
\item \footnote{122}{Id. § 306(b)(4), 15 U.S.C. § 4016(b)(4)(1982).
\item \footnote{123}{CONFERENCE REPORT, supra note 33, at 26.}
the certificate being sought for export trade and related activities and methods of operation? Is the proposed conduct likely to have a direct, substantial and reasonably foreseeable effect on United States domestic commerce or competing exporters? And, if so, is it likely to violate the antitrust laws?

Horizontal agreements—those between competitors—involving prices, markets or production almost invariably violate one or more of the antitrust laws. The sole issue in such cases therefore will be the probable effect on domestic commerce. The Commerce Department guidelines indicate a sensitivity to this issue. They note that the agency will guard against agreements that facilitate domestic collusion and also will scrutinize closely agreements between firms in highly concentrated industries.126

Vertical agreements—those between persons at different levels of production and/or distribution—on the other hand, may require an analysis to determine if the proposed conduct is unreasonable, as well as an assessment of the probable domestic impact. The requirement that certified conduct not operate as a “substantial restraint of the export trade of any competitors of the applicant” adopts the “exclusionary” strain of antitrust policy embodied in vertical restraints frequently involving boycotts and tying arrangements.129

4. Limitations and Pitfalls

The Act provides a private remedy for unfair methods of competition against domestic competitors for export trade in the goods or services of the applicant. This provision expands the potential liability of certified companies because there is no private remedy for violations of the “unfair methods of competition” prohibition of section 5 of the Federal Trade Commission Act.131 This potential liability may present a serious problem for trading companies because section 5 embodies a nebulous standard that prohibits, among other things, activities that tend toward a violation of the Sherman Act or the Clayton Act. The Com-

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126 Guidelines, supra note 116, at 15,939.
132 FTC v. Sperry & Hutchinson Co., 405 U.S. 233, 244-45 (1972); FTC v. Brown Shoe Co., 384
The Export Trading Company Act
5:818(1983)

...merce Department has attempted to mitigate this problem by stating in its guidelines that "judicial decisions interpreting section 5 of the Federal Trade Commission Act, while illustrative, have only limited precedential significance." The fact remains, however, that Congress intended the Act's standards to embody the "full range of the antitrust laws" and this provision may invite substantial private litigation.

There are also several practical disadvantages to seeking certification. First, there is the problem of delay. The determination regarding certification must be made within ninety days but cannot be made sooner than thirty days after an application is published in the Federal Register. International trade, however, is a dynamic venture and opportunities must often be taken immediately or lost. Therefore, exporters may have to forego the safety of certification to seize an opportunity. One hopes that the existence of an immunization process will not result in needless timidity, denying the United States of opportunities to expand export trade.

Those seeking certification also must disclose potentially sensitive information. The Act provides for confidentiality and exempts disclosed information from the Freedom of Information Act, but the protection is limited. For example, the prohibition against disclosure relates only to confidential or privileged information if disclosure would harm the applicant. Furthermore, the Secretary of Commerce still may order disclosure of this information if it is necessary to determine whether the certificate should be issued. Finally, all information submitted, which may include market share, production, and pricing data, will be transmitted to the Department of Justice. In particular situations these factors could cause potential exporters to avoid the certification procedure and abandon a desirable export opportunity. Assuming, however, that

133 Guidelines, supra note 116, at 15,939.
134 CONFERENCE REPORT, supra note 122.
135 See Fugate, supra note 2, at 703.
137 Garvey, supra note 10, at 27; Inside Philipp Bros., A $9 Billion Supertrader, BUS. WK., Sept. 3, 1979, at 108.
the Commerce Department will be extremely sensitive to the needs of business applicants, it is unlikely that the potential for disclosure will have much of a chilling effect on salutary joint export activities.

Certification also subjects trading companies to continuing oversight and regulation by the federal bureaucracy. Certified companies must file annual reports and promptly report all material changes in their activities or methods of operation. In addition, the Commerce Department or Attorney General may revoke or amend the certificate whenever either becomes aware that the activities of the certified company no longer comply with the standards for certification. The costs of regulation unfortunately will impact most dramatically on those potential exporters that are the primary intended beneficiaries of the Act: small- and medium-sized firms. As with the problems of disclosure, enlightened regulatory polices may minimize this potential dilemma for smaller firms, but cannot eliminate it.

The Antitrust Improvements Act as introduced would have allowed exporters to make an independent judgment regarding the domestic impact of their conduct and to proceed, if appropriate, without seeking a certificate of review. The failure to amend section 7 of the Clayton Act, however, may make certification necessary for joint ventures whose members are competitors or potential competitors. The incipient standard of section 7 reaches mergers, including joint ventures, which tend toward monopoly by increasing market concentrations. It can apply to a joint venture formed to engage in foreign commerce and, because its substantive standards are substantially less rigid than those of the amended Sherman Act, prudent members of a joint export venture may feel compelled to seek a certificate of review. There are costs to

145 Garvey, supra note 10, at 22.
149 An export venture may also seek protection from the application of section 7 by complying with the requirements of the Webb-Pomerene Act. Fugate, supra note 2, at 703.
seeking certification, however, and it is unfortunate that joint venturers may feel compelled to apply even when their proposed conduct is desirable and clearly within the contemplation of the Act.

The Commerce Department's guidelines introduce a potentially serious impediment to effective implementation of the new law. It states that the Act's standards embody "the substantive law of antitrust as modified by the Webb-Pomerene Act (emphasis added)." Further, the guidelines cite the Minnesota Mining case, apparently as an interpretive precedent for the trading company act. Few things could jeopardize more seriously the efficacy of the legislation than the adoption of Webb-Pomerene precedents and policies.

The Webb-Pomerene Act, like the Export Trading Company Act, was intended to promote exporting by small- and medium-sized United States firms. It has stimulated little export trade in recent years, however, and on the whole has not benefited small firms. The Federal Trade Commission, for example, has found that Webb-Pomerene Associations are primarily made up of large producers of homogeneous products. The National Commission for the Review of Antitrust Laws and Procedures similarly concluded in 1979 that "the common feature of export associations today is not their performance or efficiency or cost-reducing functions, but rather the pursuit of traditional cartel-related activities."

Webb-Pomerene judicial precedents are few and they have generally tended to limit that Act's exemption. It is particularly disturbing that the Department of Commerce would cite Minnesota Mining as a controlling precedent. That decision has been criticized for its broad dicta regarding the nature of the domestic impact needed to find foreign

150 Guidelines, supra note 116, at 15,939.
152 Guidelines, supra note 116 at 15,939 n.12.
153 FED. TRADE COMM'N, ECONOMIC REPORT ON WEBB-POMERENE ASSOCIATIONS: A 50-YEAR REVIEW 4 (1967) [hereinafter cited as FTC 50-YEAR REVIEW].
154 NATIONAL COMM'N FOR THE REVIEW OF ANTITRUST LAWS AND PROCEDURES, REPORTS TO THE PRESIDENT AND THE ATTORNEY GENERAL 298 (1979) [hereinafter cited as NCRALP REPORT].
155 FTC 50-YEAR REVIEW, supra note 153, at 69.
158 See Fugate, supra note 2, at 679-86.
joint activities illegal. Alleged uncertainty about the scope of the Webb-Pomerene exemption was, in fact, a primary motivating factor behind the Export Trading Company Act. That same uncertainty should not be read immediately into the new law.

The federal agencies administering the Trading Company Act therefore should avoid analogies to the Webb-Pomerene Act. That law has generated confusion and proven itself to be of little practical consequence. In addition, Congress has chosen to use a new vehicle for export promotion while leaving the Webb-Pomerene Act as it is. Most important, however, Webb-Pomerene Associations frequently have been more concerned with traditional cartel activities than promoting efficiency and exports. If the Export Trading Company Act is to promote the goals of its creators—more effective United States competition for export trade—trading companies and federal enforcement agencies must be committed to efficiency-promoting combinations that will expand trade, not profit maximizing cartels that limit production and trade.

The existence of foreign antitrust laws also creates barriers to some concerted trading company activities. The guidelines state that “applicants should be aware that other nations have competition laws with which they must comply. The certificate does not confer immunity from foreign competition laws.”

A thorough analysis of foreign competition laws is beyond the scope of this article. The European Community (EC), however, as well as several member nations, have competition policies that are in many respects analogous to the United States antitrust laws. These policies generally will apply to the concerted activities of United States firms if they have the proscribed effect within the EC or in the particular nation.

There are two areas of particular concern to United States firms forming combinations to export to Europe. First, traditional cartel activities—limiting production and raising prices—may subject them to foreign enforcement action. In 1981, for example, the European

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160 S. REP. NO. 27, supra note 1, at 7.
162 See supra text accompanying note 145.
163 Guideline, supra note 116, at 15,938.
164 See B. HAWK, supra note 148, at 411-27.
165 Id. at 455-59. The West German Act against Restraints of Competition specifically states, “This Act shall apply to all restraints of competition which have effect in the area in which this Act applies, even if they result from acts done outside such area.” Section 98(2), reprinted in 5 World Law of Competition, W. Ger GAI - 67 (Von Kalinowski, ed., 1979).
Commission objected to the activities of several non-Common Market firms, including members of United States Webb-Pomerene Associations, that resulted in fixed prices for the sale of pulp in the EC. After consultation with United States officials, EC officials noted that they would proceed against foreign export associations having substantial anti-competitive effects in the Community regardless of the legal status of the combination in other nations. Similar activities by United States firms relating to the sale of goods in West Germany are likely to violate the competition laws of that nation, as well as those of the EC.

The European sensitivity to certain types of vertical agreements also presents a potentially significant problem for United States trading companies. Professor Hawk, for example, notes that vertical territorial restrictions are almost per se illegal under European Commission and Court of Justice precedents. United States antitrust policy, however, subjects such non-price restraints to a rule of reason analysis.

The Commerce Department guidelines also indicate that resale price maintenance is a method of operation that may be certified, if Trading Company Act standards are satisfied. This practice, however, is specifically prohibited in several nations, including France, Luxembourg, the United Kingdom, and Germany, and may violate EC rules as well. Once again, the European resolve in this area may be stronger, at least at the moment, than that of the United States.

To summarize, the antitrust provisions of titles III and IV of the Export Trading Company Act provide opportunities for United States firms to reduce their risk of antitrust exposure when engaging in export-related activities. There are, however, costs associated with this protection and limits to the extent that the law can or does provide immunity against liability. Title IV basically codifies existing antitrust enforcement policy, and title III's certification procedure does not permit the Commerce Department to authorize antitrust violations. The certificate may issue only if the Department finds that the standards which Congress intends to be co-extensive with the antitrust laws are met. Finally, the Act

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167 Id.
at 109-10.
168 Id. at 587.
172 Resale price maintenance is still per se illegal under U.S. law, Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911), but the rule has come under attack by antitrust enforcers lately. See 44 Antitrust & Trade Reg. Rep. (BNA) No. 1096, at 18 (Jan. 6, 1983).
does not have any impact on the application of foreign competition laws and policies.

IV. CONCLUSION

The Export Trading Company Act is a reasonable but limited response to some of the problems that United States producers face as they adjust to a market that is increasingly dependent on international trade. The Act represents some lessening of the United States government's resolve to foster freer international markets, but it avoids more strident protectionist measures. United States producers, however, should not have great expectations that this legislation will increase immediately or dramatically export opportunities.

The Act, and the agencies administering it, should foster a greater awareness of the potential that foreign markets offer domestic firms not presently exporting. Efficient trading companies may provide information, convenience and some risk-sharing qualities not currently available to small firms. Ultimately, however, the ability of the United States to provide high-quality products and services at competitive prices will dictate the United States role in international trade. In addition, the volume of international trade will depend to a great extent on factors beyond the control of trading companies, such as the health of foreign economies, the exchange rate, and the impact of foreign trade barriers.

At this germinal stage it is important that the several administrative bodies responsible for administering the law recognize the primacy of market forces—not as a matter of policy, but as fact. Combinations and activities promoting efficiency will have long-term salutary effects on United States export performance. Those that result in limited production, but higher profits for their members, will reduce exports and misallocate United States resources. Moreover, a trading company engaged in traditional cartel activities will have a strong, perhaps irresistible, tendency to destroy effective competitors through predatory conduct whenever possible.

The Commerce Department, as well as the Federal Reserve Board, therefore should discount some of the generalizations that have accompanied this legislation. "Big" trading companies, for example, may not be better than smaller ones, and policies favoring larger firms may impede the most efficient organization of an industry. The best policies under these circumstances will be those that interfere least with the natural development of markets while insuring that private firms do not acquire monopolistic power.

Firms seeking to join or form trading companies also should appre-
ciate the need for sound counseling. A certificate of review is not a li-
cense to violate the antitrust laws and an improvidently granted
certificate does not eliminate the potential for suit. Furthermore, the
competition laws of foreign nations must be considered and their require-
ments satisfied. Since domestic and foreign competition policies are con-
cerned largely with the existence of a position of dominance, the larger a
trading company or its members are, the greater their exposure will be.

To conclude, the Export Trading Company Act will help expand
United States exports if the federal bureaucracy contains its zeal and the
business community avoids short-term avarice. The establishment of effi-
cient trade intermediaries will, over time, integrate the United States
more fully into the international marketplace and their presence will pro-
mote trade. Any expectation, however, that this legislation will produce
immediate and substantial gains in United States performance is unjusti-
fied and any attempts to achieve spectacular results could be counter-
productive. Trading firms must complement, not displace, the one factor
that will bring about long-term benefits: an efficient, productive domestic
economy.