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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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¹ REPORTS BY THE PRESIDENT, 96TH CONG. 2D SESS., EXPORT PROMOTION, EXPORT DISINCENTIVES, AND U.S. COMPETITIVENESS 1 (Comm. Print 1980) [hereinafter cited as REPORTS BY THE PRESIDENT]. See also *Export Trading Company Act of 1981: Hearings on S. 144 Before the Subcomm. on Int'l Finance and Monetary Policy of the Comm. on Banking, Housing and Urban Affairs*, 97th Cong., 1st Sess. (1981) (testimony of Malcolm Baldrige, Secretary of Commerce) [hereinafter cited as *S. 144 Hearings*]; S. REP. NO. 27, 97th Cong., 1st Sess. 4-7 (1981) [hereinafter cited as S. REP. NO. 27]; Malabre, *Trade is Playing Fast-Growing Role in Economic Picture of the U.S.*, Wall St. J., Nov. 13, 1980, at 56, col. 1.

² See Fugate, *The Export Trade Exception to the Antitrust Laws: The Old Webb-Pomerene Act and the New Export Trading Company Act*, 15 VAND. J. TRANSNAT'L L. 673, 675 (1982).

³ See, e.g., H.R. 1234, 98th Cong., 1st Sess. (1983) ("Domestic Content" legislation); see also *Protectionist Feelings Against Japan Increase in the U.S. and Europe*, Wall St. J., Jan. 14, 1983, at 1, col. 6.

mote United States export activities.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)⁵ and the General Agreement on Tariffs and Trade (GATT).⁶ Furthermore, gains in production or employment experienced in one industry are likely to be offset by losses elsewhere.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”),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.⁹

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

⁴ See, e.g., REPORTS BY THE PRESIDENT, *supra* note 1; S. 734, 97th Cong., 1st Sess. (1981); S. 144, 97th Cong., 1st Sess. (1981); H.R. 5235, 97th Cong., 1st Sess. (1981); H.R. 1799, 97th Cong., 1st Sess. (1981); H.R. 1648, 97th Cong., 1st Sess. (1981); S.864, 96th Cong. 1st Sess. (1979).

⁵ See FULDA & SCHWARTZ, REGULATION OF INTERNATIONAL TRADE AND INVESTMENT 103-04 (1970).

⁶ See JACKSON, INTERNATIONAL ECONOMIC RELATIONS (1977); LOWENFELD, PUBLIC CONTROLS ON INTERNATIONAL TRADE 11-41 (1979).

⁷ Dunn, *Save an Auto Worker's Job, Put Another American Out of Work*, *Wash. Post*, Oct. 28, 1982, at A23, col. 1; Rowen, . . . *And Other Protectionist Pitfalls*, *Wash. Post*, Oct. 28, 1982, at A23, col. 2.

⁸ The Export Trading Company Act, Pub. L. No. 97-290, 96 Stat. 1233 (1982) (codified at 15 U.S.C. § 4001 (1982)). [hereinafter cited as ETC Act] On October 1, 1982, the United States' House of Representative and Senate agreed to the Report of the Committee of Conference on the Export Trading Company Act of 1982. President Reagan signed the legislation on October 8. The legislation consists of four Titles, with Title I actually being the Export Trading Company Act of 1982. The legislation, however, is generally identified by this name and reference in this article to the Export Trading Company Act will be to the entire statute unless otherwise designated.

⁹ 128 CONG. REC. E2333 (daily ed. May 19, 1982) (statement of Rep. Don Bonker).

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.¹¹ Title II permits bank holding companies, and related Edge Act or agreement corporations, to invest in and extend credit to export trading companies.¹² It also authorizes the Export-Import Bank of the United States to guarantee loans extended to export trading companies.¹³ The third title establishes a government review and certification procedure to provide export associations with limited antitrust immunity.¹⁴ 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.¹⁵

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.¹⁶ They are also based on a belief that the existing antitrust exemption for export companies, the Webb-Pomerene Act,¹⁷ is too uncertain to remove the fear of Sherman Act exposure for concerted export activities.¹⁸

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

U.S.C. §§ 6(a), 45(a)(3) (1982) [hereinafter cited as Antitrust Improvements Act]. For a general background on the legislation and legislative efforts preceding adoption of the Export Trading Company Act, see Cole, *Establishing America Trading Companies*, 2 NW. J. INT'L L. & BUS. 277 (1980); Garvey, *The Foreign Trade Antitrust Improvements Act of 1981*, 14 LAW & POL'Y INT'L BUS. 1 (1982); Murphy, *The Export Trade Association Act of 1981—A Brief Analysis*, 4 HASTINGS INT'L & COMP. L. REV. 399 (1981); Reinsch, *The Export Trading Company Act of 1981*, 14 LAW & POL'Y INT'L BUS. 47 (1982).

¹¹ ETC Act, *supra* note 8, § 104.

¹² BES Act § 203 (codified in scattered sections of 12 U.S.C. (1982)).

¹³ *Id.* § 206.

¹⁴ ETA Act, 15 U.S.C. §§ 4011-21 (1982).

¹⁵ Antitrust Improvement Act, 15 U.S.C. §§ 6(a), 45(a)(3) (1982).

¹⁶ See M. Dawson, *Lessons From the Past: A Comparative Study of National Export Expansion Programs 1963-1980* (undated study published by the Landegger Program in Int'l Bus. Diplomacy at Georgetown Univ. School of Foreign Serv.); *Hearings on H.R. 2326, H.R. 1648, and H.R. 2459 Before the Subcomm. on Monopolies and Commercial Law of the House Comm. on the Judiciary*, 97th Cong., 1st Sess. (1981) [hereinafter cited as *House Hearings*] (statement of Martin F. Connor on behalf of The Business Roundtable); Dempsey, *The Whole World is the Market—Implications for U.S. Antitrust Policy*, in ANTITRUST AND U.S. INTERNATIONAL COMPETITIVENESS, INT'L ECONOMIC AFFAIRS DEP'T., NAT'L. ASS'N. MFRS., (Sept. 1981) [hereinafter cited as U.S. INTERNATIONAL COMPETITIVENESS]; Stevenson, *U.S. Antitrust Policy and International Economic Realities*, in U.S. INTERNATIONAL COMPETITIVENESS, *supra*. But see *House Hearings*, *supra* (statement of James A. Rahl, Owen L. Coon Professor of Law, Northwestern University); Ongman, *Is Somebody Crying "Wolf"? An Assessment of Whether Antitrust Impedes Export Trade*, 1 N.W. J. INT'L L. & BUS. 163 (1979); Shenefield, *Antitrust and U.S. Exports—Myth Over Reality*, in U.S. INTERNATIONAL COMPETITIVENESS, *supra*.

¹⁷ Webb-Pomerene Act, 15 U.S.C. §§ 61-66 (1982).

¹⁸ Fugate, *supra* note 2, at 674; Hirschhorn, *A Shot in the Arm for American Exports*, 69 A.B.A. J. 746 (1983).

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.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.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.²¹ Those

¹⁹ See, e.g., S. REP. NO. 27, *supra* note 1, at 10-16; Cole, *Establishing American Trading Companies*, 2 N.W. J. INT'L L. & BUS. 277, 289-90 (1980).

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).

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;²²
2. those firms that do exist generally have been unable to achieve sufficient size to capture available scale economies and lack needed financial leverage;²³

manufacturing jobs in the United States and for generating one out of every seven dollars of total United States goods produced;

(2) the rapidly growing service-related industries are vital to the well-being of the United States economy inasmuch as they create jobs for seven out of every ten Americans, provide 65 percent of the Nation's gross national product, and offer the greatest potential for significantly increased industrial trade involving finished products;

(3) trade deficits contribute to the decline of the dollar on international currency markets and have an inflationary impact on the United States economy;

(4) tens of thousands of small- and medium-sized United States businesses produce exportable goods or services but do not engage in exporting;

(5) although the United States is the world's leading agricultural exporting nation, many farm products are not marketed as widely and effectively abroad as they could be through export trading companies;

(6) export trade services in the United States are fragmented into a multitude of separate functions, and United States exporters;

(7) the United States needs well-developed export trade intermediaries which can achieve economics of scale and acquire expertise enabling them to export goods and services profitably, at low per unit cost to producers;

(8) the development of export trading companies in the United States has been hampered by business attitudes and by Government regulations;

(9) those activities of State and local governmental authorities which initiate, facilitate, or expand exports of goods and services can be an important source for expansion of total United States exports, as well as for experimentation in the development of innovative export programs keyed to local, State, and regional economic needs;

(10) if United States trading companies are to be successful in promoting United States exports and in competing with foreign trading companies, they should be able to draw on the resources, expertise and knowledge of the United States banking system, both in the United States and abroad; and

(11) the Department of Commerce is responsible for the development and promotion of United States exports, and especially for facilitating the export of finished products by United States manufacturers.

(b) It is the purpose of this Act to increase United States exports of products and services by encouraging more efficient provision of export trade services to United States producers and suppliers, in particular by establishing an office within the Department of Commerce to promote the formation of export trade associations and export trading companies, by permitting bank holding companies, bankers' banks, and Edge Act corporations and agreement corporations that are subsidiaries of bank holding companies to invest in export trading companies, by reducing restrictions on trade financing provided by financial institutions, and by modifying the application of the antitrust laws to certain export trade.

ETC Act § 102; 15 U.S.C. § 4001 (1982).

²² *Id.* §§ 102(a)(2), (4), (6), (7), (9); 15 U.S.C. §§ 4001(a)(2),(4),(6),(7),(9).

²³ *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."

²⁵ See REPORT TO THE PRESIDENT AND THE ATTORNEY GENERAL OF THE NATIONAL COMMISSION FOR THE REVIEW OF ANTITRUST LAWS 177-313 (1979); S. BREYER, REGULATION AND ITS REFORM (1982); D. BOIS & P. VERKUIL, PUBLIC CONTROL OF BUSINESS 955-76 (1977); L. WEISS, *Introduction: The Regulatory Reform Movement*, in CASE STUDIES IN REGULATION REVOLUTION AND REFORM I (L. Weiss & M. Klass, eds. 1981); Lippman, *GOP Panel Urges Congress to Sweep Regulations Out*, Wash. Post, Jan. 18, 1983, at C6, col. 5.

²⁶ Abbott, *Missing the Boat on Export Trading Companies*, AM. ENTERPRISE INST. J. ON GOV. & Soc. 39, 43 (Nov./Dec. 1982).

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.

³⁰ Lachica, *Unlikely American Exporter: Japan*, Wall St. J., Nov. 11, 1981, at 31, col. 2.

³¹ *Id.*

³² Abbott, *supra* note 26, at 40-41; G.E. *Sets Up Firm to Spur Exports of It and Others*, Wall St. J., Mar. 9, 1982, at 10, col. 3.

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;³³ it may acquire the goods of others to export;³⁴ or it may provide any of several export related services, including the provision or facilitation of financing, insurance or transportation.³⁵ 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.³⁶

In contrast, the president of an existing international trading company views such firms primarily as financiers of trade activities,³⁷ while others view them as vehicles for combination by domestic service or manufacturing competitors for competing abroad.³⁸

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, 128 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 10, at 48.

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

³⁸ *Id.* at 219 (testimony of Peter Guttman), 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."³⁹ 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."⁴⁰

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.⁴¹

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.⁴²

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

³⁹ F.M. SCHERER, *Economies of Scale and Industrial Concentration*, in INDUSTRIAL CONCENTRATION: THE NEW LEARNING 18 (1974) [hereinafter cited as SCHERER]. See F.M. SCHERER, *INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE* 81-118 (1980); G. STIGLER, *THE ORGANIZATION OF INDUSTRY* (1968); J. MCGEE, *Efficiency and Economies of Size*, in INDUSTRIAL CONCENTRATION: THE NEW LEARNING (1974).

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,⁴³ and capital-raising⁴⁴ and managerial⁴⁵ 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,⁴⁶ routing potential customers to such entities,⁴⁷ and granting limited protection from the antitrust laws⁴⁸ 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.⁴⁹

Proponents of the Act have claimed that the legislation will generate new jobs for American workers.⁵⁰ 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."⁵¹

The Chase study, however, assumed a constant exchange rate and that assumption distorts the conclusions.⁵² 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.⁵³ There-

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.

⁴⁶ ETC Act, §§ 104, 202.

⁴⁷ *Id.* § 104, 15 U.S.C. § 4003 (1982).

⁴⁸ *Id.* § 306, 15 U.S.C. § 4016 (1982).

⁴⁹ The Federal Reserve Board has an explicit mandate to foster small bank participation. *Id.* § 202(3).

⁵⁰ *See, e.g.*, 128 CONG. REC. E2333 (daily ed. May 19, 1982) (statement of Rep. Don Bonker, citing Secretary of Commerce Baldrige); 128 CONG. REC. H8460 (daily ed. Oct. 1, 1982) (statement of Rep. John La Falce); Taylor, *Law to Encourage Joint Export Ventures Is Expected to Be Signed by Reagan Today*, Wall St. J., Oct. 8, 1982, at 12, col. 2 (citing Sen. John Heinz).

⁵¹ CHASE ECONOMETRICS/INTERACTIVE DATA CORPORATION, *THE MACROECONOMIC IMPACT OF AUTHORIZING U.S. EXPORT TRADING COMPANIES 1* (1981) [hereinafter cited as CHASE STUDY].

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 effect 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.*

⁵⁷ See Pine, *Dollar’s Strength in Face of Rate Decline Challenges Firms that Vie With Imports*, Wall St. J., Oct. 15, 1982, at 56, col. 1; Leger, *U.S. Competitiveness Hurt by Dollar Rise, By Swelling Wages Over Salaries Abroad*, Wall St. J., Oct. 18, 1982, at 38, col. 1.

⁵⁸ See ANDERSON, U.S. AND FOREIGN PRODUCTIVITY AND COMPETITIVENESS, FEDERAL RESERVE BANK OF CLEVELAND, ECONOMIC COMMENTARY 1 (1981); Pugel, *Foreign Trade and U.S. Market Performance*, 29 J. INDUS. ECON. 119 (1980); *U.S. Exports Decline As Foreign Economies Slide Into Recession*, Wall St. J., Oct. 30, 1980, at 1, col. 6; Silk, *Why the U.S. Fell Behind*, N.Y. Times, Oct. 10, 1980, at D2, col. 1.

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.⁵⁹ This office shall promote the establishment and use of export trading companies.⁶⁰

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.⁶¹ In fact, the Secretary of Commerce testified at Senate hearings that there was no need for a new agency within his Department.⁶²

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' banks⁶³ and Edge Act Corporations⁶⁴ 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.⁶⁵ The House, however, limited participation to institutions regulated under the Bank Holding Company

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.

⁶¹ Many of the federal export expansion programs are identified and described in the following publications: DELOITTE, HASKINS & SELLS, EXPORTING, SMALL AND GROWING BUSINESSES (1981); INT'L TRADE ADMIN., U.S. DEP'T COMMERCE, REVIEW OF EXECUTIVE BRANCH EXPORT PROMOTION FUNCTIONS AND POTENTIAL EXPORT DISINCENTIVES (1980); INDUSTRY AND TRADE ADMIN., U.S. DEP'T. OF COMMERCE, A BASIC GUIDE TO EXPORTING (1979); SMALL BUSINESS ADMIN., EXPORT MARKETING FOR SMALLER FIRMS (4th Ed. 1979).

⁶² S. 144 Hearing, *supra* note 1, at 41 (testimony of Malcolm Baldrige, Sec. of Commerce).

⁶³ "Bankers banks" are owned by banks and transact business solely with banks. Abbott, *supra* note 26, at 41.

⁶⁴ 12 U.S.C. §§ 611-32 (1976 & Supp. IV 1981). Edge Act corporations engage in international or foreign banking and related financial operations.

⁶⁵ S. 734, 97th Cong., 1st Sess. § 105 (1981); See Reinsch, *supra* note 10, at 79-91; S. REP. NO. 27, *supra* note 1, at 11-13.

Act⁶⁶ and the Conferees adopted the House version.⁶⁷ 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.⁶⁸

The Act represents a compromise between policies that traditionally have divorced banks from commercial activities⁶⁹ and those that would eliminate most restraints on bank participation in export activities.⁷⁰ It allows bank holding companies⁷¹ to invest not more than five percent of their consolidated capital and surplus in the shares of export trading companies.⁷² 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.⁷³

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.⁷⁴ 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).⁷⁵

⁶⁶ 12 U.S.C. 1843 (1976 & Supp. IV 1981).

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 [sic] 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.

⁷² BES Act § 203(3), 12 U.S.C. § 1843(c)(14).

⁷³ 12 U.S.C. § 1843(c)(14)(B)(i)(1982).

⁷⁴ 12 U.S.C. § 1843(c)(14)(A)(i)(1982).

⁷⁵ 12 U.S.C. § 1843(c)(14)(A)(iv) (1982).

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.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."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.⁷⁸

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

Some banking institutions were extremely supportive of efforts to enact this legislation.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.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,⁸³ but the response has not been overwhelming.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.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

⁷⁶ *Id.*

⁷⁷ 12 U.S.C. § 1843(c)(14)(C)(i)-(ii) (1982).

⁷⁸ 12 U.S.C. § 1843(c)(14)(B)(iii) (1982).

⁷⁹ 12 U.S.C. § 635a-4 (1982).

⁸⁰ 12 U.S.C. § 372 (1982). See Abbott, *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, *Bank Solvency and Guaranty Letters of Credit*, 25 STAN. L. REV. 716 (1973).

⁸¹ S. 144 Hearings, *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).

⁸² Wash. Tariff & Trade Letter, Vol. 2, No. 47, 1 (Nov. 29, 1982).

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.

⁸⁴ *Banks Shun Export Trading Companies for Now*, J. OF COM., Jan. 10, 1983, at 24.

⁸⁵ *Id.*; Abbott, *supra* note 26, at 40.

firms in the world, including Japanese trading companies. Banking institutions also may have problems adjusting to the highly entrepreneurial nature of export trading.⁸⁶ 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.⁸⁷ The Act, however, prohibits banks from extending unreasonable or discriminatory credit to any trading firm.⁸⁸ 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.⁸⁹

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

⁸⁶ See Marcuss & Grushkin, *New Export Act Offers New Opportunities, Conflicts*, LEGAL TIMES, Mar. 21, 1983, at 25.

⁸⁷ S. 144 Hearings, *supra* note 1, at 215 (testimony of John M. Boles, President, Boles & Co., Inc.).

⁸⁸ BES Act, § 203 (3), 12 U.S.C. 1843 (c)(14)(A)(iii), (B)(iii) (1982).

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,"⁹⁰ amends the Sherman⁹¹ and Federal Trade Commission Acts;⁹² title III⁹³ provides limited antitrust immunity for activities reviewed and certified by the Commerce Department, with the concurrence of the Attorney General.⁹⁴

1. *Antitrust Improvements Act*

In 1980, near the close of the 96th Congress, the Senate passed an Export Trading Company Act bill.⁹⁵ 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.⁹⁶

Early in the 97th Congress, Congressman Peter Rodino, Chairman of the Judiciary Committee, introduced the Foreign Trade Antitrust Improvements Act.⁹⁷ 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.⁹⁸ They therefore proposed amending the Sherman Act, which prohibits monopolization and combinations in restraint of trade,⁹⁹ and section 7 of the Clayton

⁹⁰ Antitrust Improvements Act, §§ 401-403.

⁹¹ 15 U.S.C. §§ 1-7 (1982).

⁹² 15 U.S.C. §§ 41-46, 47-58 (1982).

⁹³ ETA Act §§ 301-312; 15 U.S.C. §§ 4011-21 (1982).

⁹⁴ ETA Act § 303; 15 U.S.C. § 4013 (1982).

⁹⁵ S. 2718, 96th Cong. 2d Sess. (1980), was passed by the Senate on September 3, 1980. 126 CONG. REC. S11,924-25 (daily ed. Sept. 3, 1980).

⁹⁶ Reinsch, *supra* note 10, at 69-72. The House Banking Committee also prevented S. 2718 from proceeding to the House floor for consideration. *Id.*

⁹⁷ H.R. 2326, 97th Cong., 1st Sess. (1981) [hereinafter cited as H.R. 2326].

⁹⁸ Remarks of Rep. Peter W. Rodino, Jr., International Trade Seminar "How to Export," 5-7 (Toms River, N.J. Oct. 2, 1981). See *Foreign Trade Antitrust Improvements Act: Hearings before the Subcomm. on Monopolies and Comm. Law of the Senate Comm. on the Judiciary on H.R. 2326*, 97th Cong., 1st Sess. 2 (1981) (statement of Peter W. Rodino, Jr., Chairman, House Comm. on the Judiciary) [hereinafter cited as *H.R. 2326 Hearings*].

⁹⁹ 15 U.S.C. §§ 1-2 (1982).

Act,¹⁰⁰ which proscribes, *inter alia*, joint ventures that may lessen competition or tend to monopoly.¹⁰¹

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.¹⁰² 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.¹⁰³ The proposed amendment was consistent with the holdings of most relevant judicial decisions and essentially would codify existing enforcement policy.¹⁰⁴ 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.¹⁰⁵

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.¹⁰⁶ 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.¹⁰⁷

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

¹⁰⁰ 15 U.S.C. § 18 (1982).

¹⁰¹ *Citizens Publishing Co. v. United States*, 394 U.S. 131 (1969); *United States v. Penn-Olin Chem. Co.*, 378 U.S. 158 (1964).

¹⁰² H.R. 2326, *supra* note 97, § 2.

¹⁰³ 127 CONG. REC. H779 (daily ed. Mar. 4, 1981) (remarks of Rep. Rodino and Rep. McClory regarding H.R.2326).

¹⁰⁴ ABA Section of Antitrust Law, RESOLUTIONS AND REP. TO ACCOMPANY RESOLUTIONS CONCERNING LEGIS. PROPOSALS TO PROMOTE EXPORT TRADING (Oct. 26, 1981), reprinted in *H.R.2326 Hearings*, *supra* note 98, at 224-235. *But see* Rahl, *Reforming American Antitrust in Foreign Commerce*, 81 MICH. L. REV. 1130, 1137 (1983).

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.

¹⁰⁶ Antitrust Improvements Act, §§ 402, 403, 15 U.S.C. §§ 6(a), 45(a)(3) (1982).

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 "substantiality." 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.

¹⁰⁸ Antitrust Improvements Act, § 402, 15 U.S.C. § 6(a)(1982).

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ Antitrust Improvements Act, § 403, 15 U.S.C. § 45(a)(3)(1982).

¹¹² *Fashion Originators' Guild v. FTC*, 312 U.S. 457, 463-67 (1941).

¹¹³ H.R. 2326, *supra* note 97, § 3.

¹¹⁴ *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321 (1963); *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962).

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.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.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.¹¹⁹ The Attorney General also may seek an injunction to prevent “conduct threatening clear and irreparable harm to the national interest.”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,¹²¹ and successful defendants will recover the costs of defending the litigation.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.”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

¹¹⁷ ETA Act, *supra* note 8, § 303(a), 15 U.S.C. § 4013(a)(1982).

¹¹⁸ *Id.* § 306(a), 15 U.S.C. § 4016(a)(1982).

¹¹⁹ *Id.* § 306(b)(1), 15 U.S.C. § 4016(b)(1)(1982).

¹²⁰ *Id.* § 306(b)(5), 15 U.S.C. § 4016(b)(5)(1982).

¹²¹ *Id.* § 306(b)(3), 15 U.S.C. § 4016(b)(3)(1982).

¹²² *Id.* § 306(b)(4), 15 U.S.C. § 4016(b)(4)(1982).

¹²³ CONFERENCE REPORT, *supra* note 33, at 26.

the certificate being sought for export trade and related activities and methods of operation?¹²⁴ 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.¹²⁵ 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,¹²⁷ 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”¹²⁸ 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.¹³⁰ 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.¹³² The Com-

¹²⁴ See Guidelines, *supra* note 116, at 15,938-39.

¹²⁵ See, e.g., *United States v. Topco Assoc., Inc.*, 405 U.S. 596 (1972); *United States v. Sealy, Inc.*, 388 U.S. 350 (1967).

¹²⁶ Guidelines, *supra* note 116, at 15,939.

¹²⁷ See, e.g., *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 44 (1977).

¹²⁸ ETA Act § 303(a)(1), 15 U.S.C. § 4013(a)(1)(1982).

¹²⁹ See, e.g., *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959); *Northern Pac. Ry. Co. v. United States*, 356 U.S. 1 (1958).

¹³⁰ ETA Act § 303(a)(3), 15 U.S.C. § 4013(a)(3)(1982).

¹³¹ 15 U.S.C. § 45 (1982).

¹³² *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 244-45 (1972); *FTC v. Brown Shoe Co.*, 384

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."¹³³ The fact remains, however, that Congress intended the Act's standards to embody the "full range of the antitrust laws"¹³⁴ and this provision may invite substantial private litigation.¹³⁵

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.¹³⁶ International trade, however, is a dynamic venture and opportunities must often be taken immediately or lost.¹³⁷ 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.¹³⁸

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.¹³⁹ For example, the prohibition against disclosure relates only to confidential or privileged information if disclosure would *harm* the applicant.¹⁴⁰ Furthermore, the Secretary of Commerce still may order disclosure of this information if it is necessary to determine whether the certificate should be issued.¹⁴¹ Finally, all information submitted, which may include market share, production, and pricing data, will be transmitted to the Department of Justice.¹⁴² In particular situations these factors could cause potential exporters to avoid the certification procedure and abandon a desirable export opportunity. Assuming, however, that

U.S. 316 (1966). See P. AREEDA, *ANTITRUST ANALYSIS, PROBLEMS, TEXT, CASES* ¶ 158 (a) (3d ed. 1981).

¹³³ Guidelines, *supra* note 116, at 15,939.

¹³⁴ CONFERENCE REPORT, *supra* note 122.

¹³⁵ See Fugate, *supra* note 2, at 703.

¹³⁶ ETA Act § 303(b), 15 U.S.C. § 4013(b)(1982).

¹³⁷ Garvey, *supra* note 10, at 27; *Inside Philipp Bros., A \$9 Billion Supertrader*, BUS. WK., Sept. 3, 1979, at 108.

¹³⁸ The Webb-Pomerene Act, 15 U.S.C. §§ 61-66 (1982), has been interpreted to carry an implication that export activities are fully subject to the U.S. antitrust laws unless the Webb procedures are utilized. *Pfizer, Inc. v. India*, 434 U.S. 308, 320 (1978); J. ATWOOD & K. BREWSTER, 2 *ANTI-TRUST AND AMERICAN BUSINESS ABROAD* 351-52 (2d ed. 1981).

¹³⁹ ETA Act, § 309, 15 U.S.C. § 4019 (1982).

¹⁴⁰ *Id.* § 309(b)(1), 15 U.S.C. § 4019(b)(1) (1982).

¹⁴¹ *Id.* § 309(b)(2)(D), 15 U.S.C. § 4019(b)(2)(D)(1982).

¹⁴² *Id.* § 302(b)(2), 15 U.S.C. § 4012(b)(2)(1982).

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.¹⁴³ 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.¹⁴⁴ 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.¹⁴⁵ 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,¹⁴⁶ 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.¹⁴⁷ It can apply to a joint venture formed to engage in foreign commerce¹⁴⁸ 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.¹⁴⁹ There are costs to

¹⁴³ *Id.* §§ 304(a)(1), 308, 15 U.S.C. §§ 4014(a)(1), 4018 (1982).

¹⁴⁴ *Id.* § 304(b)(1), 15 U.S.C. § 4014(b)(1)(1982).

¹⁴⁵ Garvey, *supra* note 10, at 22.

¹⁴⁶ 15 U.S.C. § 18 (1982).

¹⁴⁷ See *United States v. Penn-Olin Chem. Co.*, 378 U.S. 158 (1964); *Yamaha Motor Co. v. F.T.C.*, 657 F.2d 971 (8th Cir. 1981); *BOC Int'l Ltd. v. F.T.C.*, 557 F.2d 24 (2d Cir. 1977); *United States v. Jos. Schlitz Brewing Co.*, 253 F. Supp. 129 (N.D. Cal. 1966).

¹⁴⁸ Donovan, *Legality of Acquisitions and Mergers Involving American and Foreign Corporations Under the United States Antitrust Laws*, 40 S. CAL. L. REV. 38, 107-12 (1967); Graham, Hermann & Marcus, *Section 7 of the Clayton Act and Mergers Involving Foreign Interests*, 23 STAN. L. REV. 205, 221-27 (1971). See J. ATWOOD & K. BREWSTER, *supra* note 138, at 78-118; B. HAWK, *UNITED STATES, COMMON MARKET AND INTERNATIONAL ANTITRUST: A COMPARATIVE GUIDE* 241-306 (1979); Atwood, *International Joint Ventures and the U.S. Antitrust Laws*, 10 AKRON L. REV. 609 (1977); Joelson & Griffin, *Multinational Joint Ventures and the U.S. Antitrust Laws*, 15 VA. J. INT'L L. 487 (1975).

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)."¹⁵⁰ Further, the guidelines cite the *Minnesota Mining*¹⁵¹ case, apparently as an interpretive precedent for the trading company act.¹⁵² 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.¹⁵³ It has stimulated little export trade in recent years, however, and on the whole has not benefited small firms.¹⁵⁴ The Federal Trade Commission, for example, has found that Webb-Pomerene Associations are primarily made up of large producers of homogeneous products.¹⁵⁵ 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."¹⁵⁶

Webb-Pomerene judicial precedents are few¹⁵⁷ and they have generally tended to limit that Act's exemption.¹⁵⁸ 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.

¹⁵¹ *United States v. Minnesota Mining & Mfg. Co.*, 92 F. Supp. 947 (D. Mass. 1950).

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.

¹⁵⁶ NCRALP REPORT, *supra* note 154, at 297. *But see* McDermid, *The Antitrust Commission and the Webb-Pomerene Act: A Critical Assessment*, 37 WASH. & LEE L. REV. 105, 111 (1980).

¹⁵⁷ *United States v. Concentrated Phosphate Export Ass'n*, 393 U.S. 199 (1968); *United States v. Minnesota Mining & Mfg. Corp.*, 92 F. Supp. 947 (D. Mass. 1950); *United States v. United States Alkali Export Ass'n*, 58 F. Supp. 785 (S.D.N.Y. 1944), *aff'd*, 325 U.S. 196 (1945).

¹⁵⁸ *See* Fugate, *supra* note 2, at 679-86.

joint activities illegal.¹⁵⁹ Alleged uncertainty about the scope of the Webb-Pomerene exemption was, in fact, a primary motivating factor behind the Export Trading Company Act.¹⁶⁰ 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.¹⁶¹ Most important, however, Webb-Pomerene Associations frequently have been more concerned with traditional cartel activities than promoting efficiency and exports.¹⁶² 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.”¹⁶³

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.¹⁶⁴ 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.¹⁶⁵

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

¹⁵⁹ Joelson & Griffin, *Multinational Joint Ventures and the U.S. Antitrust Laws*, 15 VA. J. INT'L L. 487, 511-12 (1975).

¹⁶⁰ S. REP. NO. 27, *supra* note 1, at 7.

¹⁶¹ Fugate, *supra* note 2, at 702; *see also* NATIONAL ASSOCIATION OF MANUFACTURERS, The Green Memo: The Export Trading Company Act of 1982, P.L. 97-290, at 11 (Nov. 3, 1982).

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.¹⁶⁶ 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.¹⁶⁷ 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.¹⁶⁸

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.¹⁶⁹ United States antitrust policy, however, subjects such non-price restraints to a rule of reason analysis.¹⁷⁰

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.¹⁷¹ This practice, however, is specifically prohibited in several nations, including France, Luxembourg, the United Kingdom, and Germany, and may violate EC rules as well.¹⁷² Once again, the European resolve in this area may be stronger, at least at the moment, than that of the United States.¹⁷³

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

¹⁶⁶ B. HAWK, *supra* note 148, 1983 Supp., at 39.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at 109-10.

¹⁶⁹ *Id.* at 587.

¹⁷⁰ *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977).

¹⁷¹ Guidelines, *supra* note 116, at 15,938-39.

¹⁷² E. STEIN, P. HAY, & M. WAELBROECK, *EUROPEAN COMMUNITY LAW AND INSTITUTIONS IN PERSPECTIVE*, 810-11 (1976). See B. HAWK, *supra* note 147, at 625-28, and 1983 Supp., at 242.

¹⁷³ 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 license 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 requirements satisfied. Since domestic and foreign competition policies are concerned 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 efficient trade intermediaries will, over time, integrate the United States more fully into the international marketplace and their presence will promote trade. Any expectation, however, that this legislation will produce immediate and substantial gains in United States performance is unjustified and any attempts to achieve spectacular results could be counterproductive. Trading firms must complement, not displace, the one factor that will bring about long-term benefits: an efficient, productive domestic economy.