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Suzanne H. Clawson

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# THE EXPORT TRADING COMPANY ACT OF 1982: EXPORT TRADE COMES OF AGE IN THE UNITED STATES

## I. INTRODUCTION

Over the past ten years, the United States' share of world markets has declined from 21.3 percent to 17.4 percent.<sup>1</sup> Imports of manufactured goods increased nearly four times as rapidly as exports during this period.<sup>2</sup> In contrast with the substantial trade surpluses generally experienced by the United States since World War II, each of the past five years has brought significant trade deficits, amounting to a cumulative total of at least \$103 billion.<sup>3</sup> Although escalating energy prices are largely responsible for the deficit,<sup>4</sup> many other nations faced with similar energy problems have been able to offset their energy bills better than the United States because of superior international competitiveness.<sup>5</sup> For example, while America's manufactured goods trade stayed in rough balance from 1970 to 1979, Japan and West Germany had surpluses of \$70 billion and \$60 billion, respectively, by 1979.<sup>6</sup>

Exports are vital to the continued well-being of the United

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1. SENATE COMM. ON BANKING, HOUSING, AND URBAN AFFAIRS, EXPORT TRADING COMPANIES, TRADE ASSOCIATIONS, AND TRADE SERVICES, S. REP. NO. 27, 97th Cong., 1st Sess. 4 (1981).

2. *Id.*

3. *The Export Trading Company Act of 1981: Hearings on S. 144 Before the Subcomm. on International Finance and Monetary Policy of the Senate Comm. on Banking, Housing, and Urban Affairs*, 97th Cong., 1st Sess. 99 (1981)(statement of William E. Brock, United States Trade Representative)[hereinafter cited as *1981 Hearings on S. 144*]. The aggregate deficit has been as high as \$140 billion. S. REP. NO. 27, 97th Cong., 1st Sess. 4 (1981).

4. *Formation and Operation of Export Trading Companies: Hearings on H.R. 7230 Before the Subcomm. on Trade of the House Comm. on Ways and Means*, 96th Cong., 2d Sess. 4 (1980)(statement of Reubin O'D. Askew, United States Trade Representative)[hereinafter cited as *1980 Hearings on H.R. 7230*]; see also *1981 Hearings on S. 144*, *supra* note 3, at 99 (statement of William E. Brock).

5. S. REP. NO. 27, 97th Cong., 1st Sess. 4 (1981).

6. *Id.*

States economy.<sup>7</sup> A thriving export program is essential to the long-range stability of our external accounts and the dollar.<sup>8</sup> Exports stimulate productivity and can help reduce domestic prices through economies of scale. They also provide one of the most logical methods of paying for imported products.<sup>9</sup>

Exporting in the United States has traditionally been viable for only large manufacturing firms. Of some 250,000 manufacturing firms in the United States, only ten percent export.<sup>10</sup> Fewer than one percent of these firms account for eighty percent of our exports. Although estimates by the Department of Commerce reveal that as many as 20,000 small and medium-sized United States manufacturing firms and agricultural producers offer goods and services which could compete successfully in the world market, their small size and inexperience in foreign markets make the initial costs and risks involved in creating an overseas market prohibitive.<sup>11</sup>

Extensive knowledge of foreign markets is necessary to the development of international trade. A company wishing to engage in export trade must be familiar with foreign market conditions, economies, cultures, laws, government regulations, and a host of other topics. The company must also have the manpower and facilities required to develop contracts and communication networks in foreign countries.<sup>12</sup> Access to substantial financing is also crucial.

Companies interested in exporting must be aware that international trade involves serious risks before, during, and after shipment. Before shipment, the manufacturer risks cancellation

7. Ambassador Brock testified that inhibition of exports leads to depreciation of the dollar, which contributes to domestic inflation; and "large deficits contribute to the perception of American weakness throughout the world." 1981 *Hearings on S. 144, supra* note 3, at 99.

8. 1980 *Hearings on H.R. 7230, supra* note 4, at 5 (statement of Reubin O'D. Askew).

9. *Id.*

10. S. REP. NO. 27, 97th Cong., 1st Sess. 5 (1980).

11. *Id.*

12. UNITED STATES DEPARTMENT OF COMMERCE, A STUDY TO DETERMINE THE FEASIBILITY OF THE EXPORT TRADING COMPANY CONCEPT AS A VIABLE VEHICLE FOR EXPANSION OF UNITED STATES EXPORTS 114 (1977), *reprinted in* EXPORT TRADING COMPANIES AND TRADE ASSOCIATIONS: HEARINGS ON S. 864, S. 1499, S. 1633 AND S. 1744 BEFORE THE SUB-COMM. ON INT'L FINANCE OF THE SENATE COMM. ON BANKING, HOUSING, AND URBAN AFFAIRS, 96th Cong., 1st Sess. 413, 437-50 (1979) [hereinafter cited as DEPARTMENT OF COMMERCE STUDY].

of the order and insolvency of the importer. Further, on-shore risks such as acts of nature, sprinkler leakage, explosion, and subsidence of docks and structure may cause property loss and damage. During shipment, risks arise from perils of the sea, fire or explosion, collision and sinking, and piracy. After shipment risks include the importer refusing acceptance, default on payment incident to warranty issues or commercial difficulties, and importer insolvency.<sup>13</sup> All of these risks present a nightmare for the small or medium-sized business unfamiliar with export trade.

Although certain existing enterprises do offer export services to United States producers—freight forwarders, brokers, shippers, export management companies, trade lawyers, and foreign purchasing firms—none provide the comprehensive services required by a potential exporter.<sup>14</sup> In contrast, large general trading companies in Europe and Japan perform the full range of functions necessary to export trade: finding a market, financing the deal, transporting the goods, and providing after-the-sale service.<sup>15</sup> These general trading companies make it possible for small and medium-sized firms to successfully trade on world markets.<sup>16</sup>

The United States Congress has recently enacted legislation that may alleviate many of the difficulties experienced by companies attempting to enter the export market. The Export Trading Company Act of 1982<sup>17</sup> seeks to encourage and promote the growth of export trading by small and medium-sized firms in the United States through the development of export trading companies.<sup>18</sup> The Act establishes the trading company concept,<sup>19</sup> creates extensive financing possibilities,<sup>20</sup> and grants limited antitrust exemption to general trading companies.<sup>21</sup> This Note discusses the history of the trading company, the reasons for its

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13. *Id.* at 515.

14. S. REP. NO. 27, 97th Cong., 1st Sess. 5 (1980).

15. *Id.*

16. *Id.*

17. On October 1, 1982, Congress passed The Export Trading Company Act of 1982, Pub. L. No. 97-290, 96 Stat. 1233 (1982). President Reagan signed the Act into law on October 8, 1982) [hereinafter cited as Export Trading Company Act].

18. Export Trading Company Act at § 102(b).

19. *Id.* at Title I.

20. *Id.* at Title II.

21. *Id.* at Title III.

absence in the United States, and the provisions of the Export Trading Company Act of 1982.

## II. HISTORY OF THE TRADING COMPANY

### A. *Europe*

The trading company concept is not new. Trading companies, in one form or another, have served an integral function in European trade since the eleventh century.<sup>22</sup> During the Middle Ages, oriental products came to be highly valued through Europe, but the cost of trading over such long distances was extremely high and involved much time and a high degree of risk. The routes were long and dangerous, and frequently goods were passed from hand-to-hand along a complicated chain of distribution, with each middleman taking a portion to compensate him for his services.<sup>23</sup>

In the fifteenth century, European merchants began to search for a less expensive way of obtaining oriental products. Impetus was added to this quest in the sixteenth and seventeenth centuries by the growing belief, primarily fostered by the predominance of sixteenth century Spain, that possession of gold and silver was an indication of national prosperity.<sup>24</sup> Since neither of these metals was available in any quantity in Europe, European powers began to seek colonies which had them. Thus developed the theory of "bullionism," which was at the heart of seventeenth and eighteenth century mercantilist policies and which was intimately linked with the European trading company concept.<sup>25</sup>

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22. Venetian families carried on a thriving trade with Asia in the eleventh century. Shortly thereafter, the joint-stock venture concept emerged, which called for purchase of goods from one party and transportation to distant parts of the world for sale. Venice came to exist solely for the purpose of trade. J. WILLIAMSON, *Maritime Expansion, 1448-1558*, 16-18 (1972).

23. See H. MORSE, *THE CHRONICLES OF THE EAST INDIA COMPANY TRADING TO CHINA 1635-1834*, 1-2 (1966). For insight into the operations of English, Dutch, and Portuguese joint-stock companies (trading companies), see R. DAVIS, *OVERSEAS TRADE 1500-1700* (1973); MORSE, *supra*; R. WESTERFIELD, *MIDDLEMEN IN ENGLISH BUSINESS* (1915); J. WILLIAMSON, *MARITIME ENTERPRISE 1448-1558* (1972).

24. J. MUNRO, *WOOL, CLOTH, AND GOLD: THE STRUGGLE FOR BULLION IN ANGLO-BURGUNDIAN TRADE, 1340-1478*, 11 (1972) [hereinafter cited as MUNRO]. See also VINER, *STUDIES IN THE THEORY OF INTERNATIONAL TRADE* 1-45 (1937).

25. MUNRO, *supra* note 24, at 11.

The theory of bullionism-mercantilism eventually expanded to encompass the notion of a "favorable trade balance" which could be obtained by increasing exports and limiting imports.<sup>26</sup> Therefore, colonies that did have gold or silver were still important if they yielded raw materials not otherwise available in Europe, since this reduced European dependence on imports and provided markets for the manufactured goods of the mother country.

The predecessors of general trading companies, joint-stock companies, were formed to colonize these lands rich in natural resources and to create trade with the colonies.<sup>27</sup> Joint-stock companies made it possible for groups of investors to pool their capital and limit risks, as no individual or even the monarchy could. The success of the joint-stock company and the opportunities created by imperialistic expansion in the nineteenth century led to the development of the modern European trading company. These companies continue to have strong regional, rather than product, orientations, particularly when the region includes one of the relatively undeveloped countries of the old Empire.<sup>28</sup>

### *B. Japan*

Japanese trading companies grew out of a threat to Japan's national survival. Fearing that European conquest of Japan was imminent, a small group of men overthrew the decaying feudal system and instituted the Meiji Restoration.<sup>29</sup> Their primary goal was to build military strength to protect Japan. Industrialization was perceived as necessary to implement this goal, and exporting was necessary to industrialization. Through exporting, Japan was to pay for the manufacturing of modern weapons and machines.

In an effort to develop key industries, government indus-

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26. *Id.* at 12. The mercantilist "balance of trade" theorem states that a country without mines can only increase its bullion supply by having an excess of exports over imports. *Id.*

27. R. DAVIS, *ENGLISH OVERSEAS TRADE 1500-1700*, 43 (1973); L. LEVI, *THE HISTORY OF BRITISH COMMERCE AND OF THE ECONOMIC PROGRESS OF THE BRITISH NATION 1763-1878*, 337-46 (1971).

28. E. HOBSBAWM, *INDUSTRY AND EMPIRE*, 48-54 (1978).

29. M. YOSHINO, *JAPAN'S MULTINATIONAL ENTERPRISES*, 3-6 (1976).

tries were sold to a small group of businessmen and heavy subsidies were provided to partially pay for improvements. The family-owned companies of these businessmen evolved into large diversified companies, collectively and individually called *zaibatsu*, which were under the control of a family-owned holding company. The *zaibatsu* ultimately moved into banking, ship-building, mining, trading, and other industries. By the end of World War I, each *zaibatsu* had some portion of the major industries of the day under its control.

These giants were, however, broken up into specialized firms as required by the antitrust policies of the Allied Forces after World War II, and small and medium-sized firms competed thereafter for the small amount of foreign trade.<sup>30</sup> The older medium-sized companies, *senmonshosha*, which had previously specialized in certain products, expanded and diversified, and eventually merged, and developed into the *sogoshosha* of today. The two major *zaibatsu*, Mitsui and Mitsubishi, also regrouped to form *sogoshosha*.<sup>31</sup>

### III. JAPANESE *Sogoshosha*

The *sogoshosha*<sup>32</sup> of Japan<sup>33</sup> have been proposed as a model

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30. Y. TSURUMI, *SOGOSHOSHA: ENGINES OF EXPORT-BASED GROWTH*, 17-22 (1980) [hereinafter cited as TSURUMI].

31. *Id.* at 20, 22.

32. Of approximately 8,000 trading companies in Japan, many of which specialize in particular industries or products, only nine are large enough and general enough to be called *sogoshosha*. In order of sales volume, the nine are Mitsubishi, Mitsui, C. Itoh & Co., Marubeni, Sumitomo, Nissho-Iwai, Toyo Menka Kaisha (Tomen), Kanematsu-Gosho, and Nichimen. JAPAN EXTERNAL TRADE ORGANIZATION (JETRO), *THE ROLE OF TRADING COMPANIES IN INTERNATIONAL COMMERCE*, 21 (1980).

33. Korea has also had substantial success in developing trading companies. *Export Trading Companies: Hearings and Markup Before the Subcomm. on Int'l Economic Policy and Trade of the House Comm. on Foreign Affairs*, 96th Cong., 2d Sess. 29 (1980) (statement of Richard Hoefs, Director, International Tax Policy, Arthur Andersen & Co.) [hereinafter cited as 1980 *Hearings and Markup*]; TSURUMI, *supra* note 30, at 67. The Korean model is similar to the Japanese *sogoshosha*. The Korean government introduced the general trading company system in 1975. By 1978, approximately 31% of the total exports from the nation were handled by general trading companies. 1980 *Hearings and Markup*, *supra*, at 29 (statement of Richard Hoefs). The new system is designed to induce small exporters to form general trading companies; separate manufacturers from direct export operations; assist general trading companies in specializing in international marketing; provide financial support and administrative benefits; and relax rigid regulations. *Id.* at 32 (Letter to Max Stucker, Arthur Andersen & Co. from Ahn, Kwon & Co., CPAs).

for United States export trading companies.<sup>34</sup> They are large general trading companies that serve as channels to connect supply and demand.<sup>35</sup> Their role is not passive in this regard, however, for they also actively participate in creating long-term demand and supply.<sup>36</sup> Because *sogoshosha* handle large quantities of diverse products and services,<sup>37</sup> are engaged in extensive

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Brazil is also developing general trading companies to facilitate export growth. The Brazilian government has given considerable support to these efforts, and exports have expanded dramatically as a result. TSURUMI, *supra* note 30, at 60-67.

34. *Export Trading Companies and Trade Associations: Hearings on S. 864, S. 1499, S. 1633, and S. 1744 Before the Subcomm. on International Finance of the Senate Comm. on Banking, Housing, and Urban Affairs*, 96th Cong., 1st Sess. 55 (1979) (statement of Frederick W. Huszagh, Executive Director, Dean Rusk Center, University of Georgia) [hereinafter cited as 1979 *Hearings on S. 864*]; see *Financial Institutions and Export Trading Companies: Hearings on S. 2718 Before the Senate Comm. on Banking, Housing and Urban Affairs*, 96th Cong., 2d Sess. 21 (1980) (statement of Senator Stevenson) [hereinafter cited as 1980 *Hearings on S. 2718*].

35. A. YOUNG, *THE SOGO SHOSHA: JAPAN'S MULTINATIONAL TRADING COMPANIES*, 3 (1979) [hereinafter cited as YOUNG].

36. *Id.*

37. As an example of the diverse nature of the business of the *sogoshosha*, Young provides a list of business ventures of Mitsubishi from its semiannual financial statement for the fiscal half-year ending March 31, 1974:

1. Purchase, sale, export and import of the following:
  - a. coal, petroleum, gas, other fuels and manufactured products of above;
  - b. iron, nonferrous metals, manufactured products of above, ores and minerals;
  - c. machinery and equipment (including gauge and medical equipment), locomotives, ships, airplanes, and parts of above;
  - d. food, liquor and other beverages, fat resin, tobacco, salt, and other agricultural, marine, forestry, livestock and natural products and finished products of above;
  - e. fertilizer, feed, and raw materials of above;
  - f. textile products and raw materials;
  - g. lumber, wood products, cement, glass and other kiln products;
  - h. chemical products, cosmetics and pharmaceuticals (drugs, poisons and explosives, etc.); and
  - i. rubber, leather, pulp, paper, manufactured products of above, and sundry goods.
2. The development, prospecting, production, manufacturing, processing, growing, and subcontracting of each of the items above.
3. Repair and installation, subcontracting, leasing and management of machinery, equipment, locomotives, ships, airplanes, and parts.
4. Construction business.
5. Purchase, sales, leasing and management of real estate.
6. Purchase and sales of antiques.
7. Warehousing.
8. Land transportation, maritime transportation, and air transportation.



global marketing, and command enormous resources, they are often erroneously looked upon as manufacturing conglomerates. This impression is false; *sogoshosha* are trading conglomerates. Although *sogoshosha* own a global network of subsidiaries and large joint ventures that are involved in such diverse activities as manufacturing, construction, resource prospecting and development, financing, leasing, and subcontracting, each of these concerns is owned and run for the primary purpose of facilitating trade and creating new business opportunities.<sup>38</sup>

*Sogoshosha* act as intermediaries between large manufacturers and small producers and wholesalers. They supply large manufacturers with raw materials from overseas and parts from small or medium-sized domestic producers. Intermediate pro-

9. Agency, brokerage, and wholesale of each of the items above.

10. Agency for liability insurance and for automobile insurance based on the automobile liability insurance law.

11. All and every business related to each of the items above.

YOUNG, *supra* note 35, at 4-5.

*Sogoshosha* are involved in multiple types of trade, including:

1. One dimensional trade—single or multiproduct sales to single customers. One dimensional trade may involve such complex transactions as the export of an entire manufacturing plant, ranging from equipment, technology, and consulting, to construction and after-the-sale service.

2. Two dimensional trade—purchase of one product from a foreign source and sale of another to that source, *i.e.*, purchase of grain from and sale of grain to the United States.

3. Barter trade—exchange of goods for goods, without currency.

4. Switch trade—imports from one foreign country are paid for in the currency of another foreign country.

5. Multidimensional trade—trade between two foreign countries handled by Japanese firms without the direct involvement of Japan as a supplier or market. For example, exporting Brazilian gas to the United States or selling American manufactured machinery to Indonesia. A particularly intriguing example of multi-dimensional trade arose from the following scenario:

A Brazilian textile manufacturer requested that a *sogoshosha* supply it with polyester fibers. The *sogoshosha* approached a major American chemical company, which was willing to supply the fibers if it could get ethylene glycol, a necessary ingredient. The *sogoshosha* found a French firm that was willing to supply the ethylene glycol if it could get benzene. Benzene was procured by the *sogoshosha* from firms in Holland and the United States. The French firm supplied ethylene glycol, and the American firm produced the fibers. This transaction involved five different trading company offices in four countries and was completed within a week. It is illustrative of the unique ability of the *sogoshosha* to match producers and suppliers.

YOUNG, *supra* note 35, at 9-11.

38. *Id.* at 12.

ducer goods from these large manufacturers are distributed to small and medium-sized producers. Finished products are then distributed to wholesalers for further distribution to retailers.<sup>39</sup>

The advantages of trading through *sogoshosha* are extensive, ranging from access to market information to financing for the transaction. Because the primary business of *sogoshosha* is trading, they have been able to concentrate their efforts on building expertise and resources traditionally unavailable to many small and medium-sized manufacturers, producers, and wholesalers because of time and financial constraints.<sup>40</sup>

#### IV. ADVANTAGES OF THE *Sogoshosha*

##### A. *Knowledge of Domestic and International Markets*

Small and medium-sized concerns have generally restrained their trading to known territories because of ignorance of existing market conditions and fear of risks.<sup>41</sup> The *sogoshosha*, however, have access to global information on market conditions and have the ability to synthesize this knowledge and transform it into business opportunities for their clients. Through extensive communications networks, which include offices in all the major cities of the world, the *sogoshosha* are able to accumulate information concerning business opportunities, clients, distribution contacts, trading procedures, and finances.<sup>42</sup> Furthermore, the information services of the *sogoshosha* extend beyond the immediate realm of supplying business and economic information to supplying global political and legal data, sociocultural environment analysis, demographic data, and other world and national trend information that is likely to affect the Japanese economy.<sup>43</sup> These informational services are the keystone to the success of the *sogoshosha*.

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39. *Id.*

40. *Id.*

41. 1980 *Hearings on H.R. 7230*, *supra* note 4, at 5 (statement of Reubin O'D. Askew).

42. See YOUNG, *supra* note 35, at 60-62; TSURUMI, *supra* note 30, at 11-12.

43. YOUNG, *supra* note 35, at 62. The *sogoshosha* officials stationed in New York in early 1977 even exerted considerable effort to ascertain information about former President Carter's energy policy before it was announced in April 1977, so they could pass it on to their automobile and oil industry clients whose situations could be vastly affected by it. *Id.*

### B. *Financial Services*

One of the greatest difficulties encountered by small firms attempting to break into the international marketplace is lack of financing. The *sogoshosha* help to alleviate this difficulty by acting as intermediaries between large commercial banks and customers and suppliers in Japan.<sup>44</sup> The *sogoshosha* borrow heavily from large banks and in turn make smaller loans to their clients. Through this process, the *sogoshosha* are able to offer more favorable interest rates and make loans more accessible to their clients. *Sogoshosha* not only make loans, they also extend credit, guarantee loans, and provide venture capital.<sup>45</sup>

### C. *Risk Reduction*

Because of the time and cost of administration and the high degree of risk involved, banks prefer not to lend money or extend credit to thousands of small and medium-sized manufacturing firms. The *sogoshosha*, however, have daily contact with these firms and are in a better position to assess and evaluate realistically the risks of dealing with them.<sup>46</sup>

Risks are particularly high in international trading. Problems arise because of differences in language, customs, economic and political systems and policies, unfamiliar antitrust regulations and import-export controls, the floating of major world currencies, sudden shifts in prices, and exposure to customers of widely varied reputations and credit standings. The *sogoshosha* are able to assess and minimize many of these risks by extensive knowledge of world markets and cultures.<sup>47</sup>

### D. *Economies of Scale and Cost Reduction*

Accumulation and processing of knowledge of market condi-

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44. *Id.* at 70; TSURUMI, *supra* note 30, at 14.

45. YOUNG, *supra* note 35, at 70; TSURUMI, *supra* note 30, at 14.

46. YOUNG, *supra* note 35, at 62-64.

47. *Id.* In some areas, risk assessment may not be enough. Concerning antitrust regulations, a *sogoshosha*, by the very nature and extent of its activity, runs a high risk of violation. No attempt to create a *sogoshosha*-type entity in the United States would be feasible without some alteration of antitrust regulations.

tions depends upon dynamic and static economies of scale.<sup>48</sup> The worldwide network of market contacts of *sogoshosha* produces static economies of scale.<sup>49</sup> After the initial investment in establishing the contact network, the cost of processing the information is marginal to the *sogoshosha* and their clients. Small and medium-sized firms may link with these informational services for a small fee, and even large firms often use the *sogoshosha*'s information in cultivating uncertain markets not covered by their own communication networks.<sup>50</sup> Dynamic economies of scale result from the ability of *sogoshosha* to synthesize into business opportunities the political, economic, social and climatic occurrences in domestic and international markets.<sup>51</sup>

The static and dynamic economies of scale of the *sogoshosha* are especially effective in reducing shipping costs. Dealings in diverse commodities on numerous markets make it possible for *sogoshosha* to pool goods of different clients for shipping, or to make guarantees of return freight to shippers and thereby reduce cost.<sup>52</sup>

### *E. Internal Market*

An internal market is created by *sogoshosha* through dealing with a large variety of goods and services for clients in Japan. This internal market makes bartering for goods and services possible among *sogoshosha*.<sup>53</sup>

### *F. Human Resources*

Manpower is critical to the smooth functioning of the *sogoshosha*.<sup>54</sup> Immense efforts are devoted to hiring and training personnel, and only the top graduates of the best universities are considered for positions in the *sogoshosha*.<sup>55</sup> A premium is placed upon intelligence, diligence, alertness, creativity, organi-

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48. YOUNG, *supra* note 35, at 66; TSURUMI, *supra* note 30, at 12-13.

49. TSURUMI, *supra* note 30, at 12.

50. *Id.*

51. *Id.*

52. *Id.* at 13.

53. *Id.* at 13-14.

54. *Id.* at 31-38.

55. *Id.* at 31.

zational capabilities, foreign language skills, and human relations skills.<sup>56</sup> A position in a *sogoshosha* is regarded as a lifelong commitment. New recruits are subjected to extensive training and a long apprenticeship. The hours are long, advancement within the *sogoshosha* is slow, and competition is encouraged. Each employee, however, is given a sense of being a part of the long-range program of the firm. Shared goals and responsibilities are the foundation for development and implementation of strategic decisions.<sup>57</sup>

Although the Japanese *sogoshosha* provided an excellent example of the general trading company in action, the model could not be followed identically in the United States for several reasons. These reasons include American manufacturing practices, legal and banking regulations, and, most importantly, the fundamental social and cultural differences between the United States and Japan.<sup>58</sup>

#### V. ABSENCE OF EXPORT TRADING COMPANIES IN THE UNITED STATES

If export trading companies are the best alternative for American producers, why have the marketplace and American entrepreneurship not produced similar companies? The answer lies in the peculiar makeup of United States law, economy, and culture. These elements, compounded by restrictions in foreign markets, have deterred the viability of the trading company concept in the United States.

Cultural hostility to exporting may present the most difficult problem to overcome because it cannot be simply legislated away. It involves deeply indoctrinated concept about who Americans are, what we stand for, and how we see our position in the world. Such dogma takes generations to unlearn. A primary diffi-

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56. *Id.* at 32.

57. *Id.* at 34-35.

58. Japanese notions of company style, institutionalized business entertainment, the interplay of revealed position and true intention, and the relationship between persons who stand as elders and those who defer to them, notions clearly beyond the realm of American conception, are of modern and crucial importance. These doctrines may be a factor in the success of *sogoshosha* organization. See C. YANAGA, *BIG BUSINESS IN JAPANESE POLITICS*, 129 (1968).

culty is the domestic focus of most United States citizens.<sup>59</sup> Vast resources and a large market have historically kept Americans largely self-sufficient; consequently, there has been a pronounced lack of interest in foreign culture. Our lack of knowledge of foreign cultures and foreign languages puts our country at a severe disadvantage in foreign markets.<sup>60</sup> A problem also arises from the protectionist attitude of labor.<sup>61</sup> To function well as an internationally interdependent economy, it is necessary to admit that certain industries function better outside the United States. Labor, however, prefers to protect these noncompetitive jobs, rather than realize the benefit of export expansion, including the creation of jobs.<sup>62</sup>

Compounding these prohibitive factors has been the problem of the inaccessibility of many foreign markets because of their isolation and high tariff and nontariff barriers to imports.<sup>63</sup> The reduction in trade barriers following the Multilateral Trade Agreements are, however, opening these international markets to foreign producers.<sup>64</sup> Unfortunately for United States producers, the experience of foreign competitors in aggressive exporting places them in a better position to take advantage of these new market opportunities.<sup>65</sup>

The major domestic legal and economic disincentives to the development of export trading companies have been antitrust prohibitions and strict regulations which prevent bank ownership or control of export trading companies. These disincentives, combined with America's cultural differences and foreign tariff and nontariff barriers, help to explain the absence of export

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59. 1980 *Hearings and Markup*, *supra* note 33, at 26 (statement of Ambassador Michael A. Samuels).

60. *Id.*

61. *Id.*

62. *Id.*

63. *Export Trading Company Legislation: Hearing Before the Subcomm. on Financial Institutions Supervision, Regulation and Insurance of the House Comm. on Banking, Finance and Urban Affairs*, 96th Cong., 2d Sess. 78 (1980).

At least one commentator argues that international cartels are the major inhibitors of United States trade in international markets. Foreign antitrust provisions, which substantially limit various activities, may be more onerous to United States exporters than American antitrust laws. State owned companies also give certain countries an advantage in world markets. *Id.* (letter to the Committee from Professor James A. Rahl, Northwestern University School of Law).

64. S. REP. NO. 27, 97th Cong., 1st Sess. 5-6 (1981).

65. *Id.*

trading companies in the United States.

## VI. THE WEBB-POMERENE ACT<sup>66</sup>

As early as 1916, Congress recognized the advisability of creating an exemption from antitrust regulation for export associations.<sup>67</sup> Senator Atlee Pomerene asserted that, because merchants and manufacturers in foreign countries are allowed to combine for the purpose of foreign trade, American merchants and manufacturers must be afforded the advantages of combination to enable them to compete in international markets.<sup>68</sup> The Federal Trade Commission also reported that small businesses were particularly disadvantaged in international trade and that they would clearly benefit from the opportunity to combine and work together on exporting.<sup>69</sup> Legislation proposed to meet these needs thus had the following three purposes: “(1) To promote and increase the export trade of the United States; (2) To encourage and expand the exports of small business; and (3) To provide a means of effective competition with foreign cartels or combinations in export markets.”<sup>70</sup>

The Webb-Pomerene Act defines export trade as “solely trade or commerce in goods, wares, or merchandise exported

66. 15 U.S.C. §§ 61-65 (1976).

67. *Hearings on Antitrust Legislation Before the House Comm. on the Judiciary*, 63rd Cong., 2nd Sess., 433 (1914); *Hearings on the Investigation of Concentration of Economic Powers Before the Temporary National Economic Comm.*, 76th Cong., 3d Sess., 1313 (1940); *Hearings to Promote Export Trade Before the House Comm. on the Judiciary*, 64th Cong., 1st Sess. 38-39 (1916); F.T.C. REPORT ON COOPERATION IN AMERICAN EXPORT TRADE, Vol. 1, at 3 (1916).

68. 55 CONG. REC. 7515 (1917).

69. F.T.C. REPORT, *supra* note 67, Vol. 1, at 200. Congressman Edwin Y. Webb emphasized the importance to small businesses of being allowed to combine on export trading ventures:

In order to build up an export trade it is necessary to have the most expert representatives in the foreign trade fields to introduce and thoroughly advertise our American goods. This involves a large expenditure of money before the trade can be established. A number of our larger enterprises are able to do this alone, and for this reason the proposed law would not greatly benefit these large enterprises, but our smaller manufacturers and merchants would be prohibited from undertaking such an enterprise because of the tremendous costs it would involve.

55 CONG. REC. 3564 (June 13, 1917).

70. *Hearings Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary*, 90th Cong., 1st Sess., 132-33 (1967).

. . . from the United States . . . to a foreign nation.”<sup>71</sup> The definition does not include acts in the course of “production, manufacture or selling for consumption or for resale within the United States . . . of such goods, wares, or merchandise.”<sup>72</sup> An association is defined as a corporation or combination of two or more persons, partnerships or corporations, entered into for the sole purpose of engaging in export trade.<sup>73</sup> The Act provides that the activities and agreements of these associations are exempt from the Sherman Act<sup>74</sup> as long as they do not restrain trade within the United States, restrain the export-trade of any domestic competitor of the association, artificially or intentionally influence prices within the United States of commodities of the class exported by the association, or substantially deplete United States competition or trade.<sup>75</sup> The test for legality is thus two-tiered: direct restraints on trade are prohibited, except as among members of the association; indirect restraints are prohibited if they have a substantial effect on domestic trade or competition. The activities of Webb-Pomerene associations are overseen by the Federal Trade Commission.<sup>76</sup>

Much confusion has arisen over interpretation and application of the Act. In a landmark case, *United States v. Minnesota Mining and Manufacturing Co.*,<sup>77</sup> a Massachusetts federal district court found that American manufacturers who controlled four-fifths of the export trade in coated abrasives, agreed to prices, and set quotas for exports were engaging in activities that were “normal features” of a Webb-Pomerene association. Since there was no showing of direct restraint on trade, the activities were upheld. In *Florida Hardrock Phosphate Association*,<sup>78</sup> the

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71. 15 U.S.C. § 61 (1976).

72. *Id.*

73. *Id.*

74. 15 U.S.C. §§ 1-7 (1976).

75. S. 144, 97th Cong., 1st Sess. (1981).

76. 15 U.S.C. § 65 (1976). The Commission has the power to: (1) investigate alleged violation; (2) recommend readjustment of an association's business to comply with the law; and (3) refer its findings to the Attorney General should an association fail to comply with the Commission's recommendations. The Commission's powers do not extend to making orders, imposing any prohibitions or restrictions, or making binding adjudications. These powers are vested in the Department of Justice. See *United States v. U.S. Alkali Export Ass'n*, 325 U.S. 196 (1945).

77. 92 F. Supp. 947 (D. Mass. 1945).

78. 40 F.T.C. 843 (1947).



Federal Trade Commission similarly upheld an agreement by association members not to export independently because such exporting reduced competition only among members.<sup>79</sup> The court noted, however, that an agreement among members not to sell to competing exporters would be a direct restraint on nonmembers and thus illegal.<sup>80</sup>

The Webb-Pomerene association has not been particularly successful.<sup>81</sup> Although the associations accounted for about nineteen percent of total United States exports between 1930 and 1935, by 1979 the percentage had dropped to two percent.<sup>82</sup> A number of factors have contributed to this decline, the most important of which is the uncertainty of the Sherman Act exemption. There has been much confusion over what activities constitute "substantial restraint" on domestic trade.<sup>83</sup>

Webb-Pomerene associations have also been restricted by lack of membership discipline and insufficient market domination to exert foreign market price control.<sup>84</sup> Furthermore, the primary interest of members has traditionally been focused on domestic markets to the exclusion of foreign markets.<sup>85</sup> An unwillingness exists among manufacturers to blend the individual image they have developed with that of their competitors in a common association image.<sup>86</sup> The exclusion from qualifying for exemption of United States service industries has also been a major problem with the Act.<sup>87</sup> Finally, Webb-Pomerene associations have been perceived by the business community as the objects of thinly veiled hostility by the Department of Justice and the Federal Trade Commission.<sup>88</sup>

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79. *Id.*

80. *Id.*

81. 1979 *Hearings on S. 864*, *supra* note 34, at 600-02.

82. *Export Trading Company Act of 1980: Hearings on S. 2379 and S. 864 Before the Subcomm. on International Finance of the Senate Comm. on Banking, Housing and Urban Affairs*, 96th Cong., 2d Sess. 3 (1980)(statement of Herbert A. Gardner).

83. *Small Business Participation in U.S. Exports: Hearings Before the Senate Select. Comm. on Small Business*, 96th Cong., 1st Sess. 188 (1979)(statement of James H. Mack, Public Affairs Director of the Machine Tool Builders Association).

84. DEPARTMENT OF COMMERCE STUDY, *supra* note 12, at 600-02.

85. *Id.*

86. *Id.* at 602.

87. *Id.* at 497.

88. *Id.*

## VII. THE EXPORT MANAGEMENT COMPANY

The export management company (EMC) is currently one of the major export trading vehicles used by small and medium-sized businesses in the United States.<sup>89</sup> The EMC is a specialized trading company (somewhat similar to the Japanese *senmonshosha*) with a product-oriented, as opposed to market-oriented, export focus.<sup>90</sup> Its role generally consists of marketing a product with which it is familiar in markets where it has contacts and savvy. It does not cater to the international market by responding to worldwide demand.<sup>91</sup> The direction of the trade of an EMC is generally one dimensional; it only exports, rather than exporting and importing or engaging in multi-dimensional trade among several countries.<sup>92</sup> Its interest is limited to selling a product.

There are two major types of EMC's: Export Commission Representatives or "agents" and Export Distributors.<sup>93</sup> The Export Commission Representative (ECR) functions essentially as the export sales department for a manufacturer.<sup>94</sup> It assumes all the responsibilities of export management except the credit risk. Although the ECR may operate in the name of the manufacturer, it is not actually an agent of the manufacturer and has no legal right to bind the manufacturer. Similarly, the manufacturer is not liable for the actions of the ECR. The ECR's sales are usually subject to approval by the manufacturer and it is paid for its work through commissions on sales overseas.<sup>95</sup>

An export distributor is more independent in its function than an ECR.<sup>96</sup> The export distributor actually takes title to the goods and resells the product overseas at its own risk for a higher price.<sup>97</sup> The export distributor is like any other domestic customer to the manufacturer.

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89. *Id.* at 520.

90. *Id.* at 522; See generally C. ALEXANDRIDES AND G. MOSCHIS, EXPORT MARKETING MANAGEMENT 73-76 (1977)[hereinafter cited as ALEXANDRIDES AND MOSCHIS].

91. DEPARTMENT OF COMMERCE STUDY, *supra* note 12, at 526.

92. *Id.*

93. *Id.* at 522.

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

The services offered by an EMC are more typical of those offered by the export division of a manufacturer than of the total marketing services which an export trading company would offer. These services include: marketing and sales strategy, customer contact abroad, establishment of pricing policies, arranging documentation and insurance, responsibility for delivery of goods, and arranging for overseas servicing of goods.<sup>98</sup> Notably, most of the services of the EMC center around making arrangements with the firms which offer such services—they perform few of the actual services themselves.<sup>99</sup> The EMC will usually handle limited product lines, generally concentrating on fewer than ten lines each, and markets these products in a limited geographical area.<sup>100</sup>

The EMC is generally small and operates through United States sales offices using a network of distributors.<sup>101</sup> It has low capitalization and a small amount of available external financing. Most do not desire to expand by opening overseas sales offices because of high overhead, insufficient capital, narrowness of product lines, instability of sales, and lack of manpower.<sup>102</sup> It is also unlikely that an EMC will integrate into complementary businesses, such as overseas warehousing.

The EMC is used by most manufacturers as a first step in developing foreign markets.<sup>103</sup> The relationship is generally shortlived because once the manufacturer has been introduced to a foreign market, has gained some experience, and has observed sales volume increase in specific markets, it generally phases out the EMC and begins direct exporting.<sup>104</sup> Because the EMC is not an aggressive new market seeker for the manufacturer, it serves little purpose once the manufacturer is established in the target market.

Although export management companies might provide a basis for the development of export trading companies, this appears unlikely. The primary problem lies in the reluctance of the

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98 *Id.* at 533; ALEXANDRIDES AND MOSCHIS, *supra* note 90, at 73-74.

99. DEPARTMENT OF COMMERCE STUDY, *supra* note 12, at 532.

100. *Id.* at 534.

101. *Id.* at 538.

102. *Id.*

103. *Id.* at 535.

104. *Id.*

EMC to diversify in either product line or geographical area.<sup>105</sup> This problem is compounded by undercapitalization and unwillingness to provide a wide range of market planning and strategy functions.<sup>106</sup>

### VIII. THE EXPORT TRADING COMPANY ACT OF 1982<sup>107</sup>

The Export Trading Company Act of 1982 attempts to mitigate the difficulties small and medium-sized businesses have in establishing themselves in world markets by encouraging the development of export trading companies to facilitate export of the products of these firms<sup>108</sup> and by clarifying the impact of the Webb-Pomerene Act on exporting.<sup>109</sup> The Act is divided into four titles. Title I, the "Export Trading Company Act of 1982,"<sup>110</sup> provides for the establishment and promotion of export trading companies. Title II, the "Bank Export Services Act,"<sup>111</sup> authorizes bank holding company ownership and control of export trading companies and allows guaranteed loans to export trading companies. Title III provides a limited antitrust exemption through issuance of certificates of review for export trading companies. Title IV, the "Foreign Trade Antitrust Improvements Act of 1982,"<sup>112</sup> amends the Sherman Act<sup>113</sup> and Section 5(a) of the Federal Trade Commission Act<sup>114</sup> to emphasize that these provisions do not apply to export trade in the absence of a "direct, substantial, and reasonably foreseeable effect" on domestic or import commerce, or commerce opportunities.<sup>115</sup>

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105. *Id.* at 544-45.

106. *Id.*

107. See Export Trading Company Act, *supra* note 17.

108. *Id.* at § 102(b).

109. *Id.* at Title III. The Export Trading Company Act of 1982 does not actually affect the Webb-Pomerene Act. United States companies can continue to register with the Federal Trade Commission as Webb-Pomerene associations. The Webb-Pomerene Act may become the lesser attractive alternative because it does not provide the assurances of certificates of review or protection against private treble damage suits, or cover the export of services or licensing.

110. Export Trading Company Act, *supra* note 17, at § 101.

111. *Id.* at § 201.

112. *Id.* at § 401.

113. 15 U.S.C. §§ 1-7 (1976).

114. 15 U.S.C. 45(a)(1976).

115. Export Trading Company Act, *supra* note 17, at §§ 402, 403.

A. *Title I*

Title I is primarily devoted to definitions. The export trading company is defined as a person, partnership, or association organized and operated principally for the purposes of exporting goods and services produced in the United States and facilitating the export of goods and services produced in the United States by unaffiliated persons by providing one or more export trade services.<sup>116</sup> The definition is intended to include most existing firms which offer trade services to unaffiliated United States producers while doing some exporting at their own risk.<sup>117</sup> The phrase “organized and operated principally for the purposes of”<sup>118</sup> raises the presumption that, although export trading companies will occasionally find it necessary to engage in importing, barter, third-party trade, and related activities, a significant portion of the company’s business is to be directed to United States exports as defined by the Act.<sup>119</sup>

Export trade is defined as trade or commerce in goods or services produced in the United States and exported from the United States to any foreign nation.<sup>120</sup> The inclusion of services and export trade services is especially important to the Act and distinguishes it from the Webb-Pomerene Act.<sup>121</sup> The definition of services is expansive and includes technical, professional, repair, and construction services.<sup>122</sup> Export trade services is defined to include a wide variety of trade-related services, from consulting, marketing, and research to documentation, warehousing, and financing.<sup>123</sup>

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116. *Id.* at § 103(a)(4).

117. S. REP. NO. 27, 97TH CONG., 1ST SESS. 8 (1981).

118. Export Trading Company Act, *supra* note 17, at § 103(a)(4).

119. CONFERENCE REPORT ON S. 734, EXPORT TRADING COMPANY ACT OF 1981, H.R. REP. NO. 97-924, 97TH CONG. H8347 (1982) [hereinafter cited as REPORT ON S. 734].

120. Export Trading Company Act, *supra* note 17, at § 103(a)(1).

121. *Id.* at § 103(a)(1),(2),(3).

122. Section 103(a)(2) defines “services” to include “accounting, amusement, architectural, automatic data processing, business, communications, construction franchising and licensing, consulting, engineering, financial, insurance, legal, management, repair, tourism, training, and transportation services.”

123. Section 103(a)(3) defines “export trade services” to include “consulting, international market research, advertising, marketing, insurance, product research and design, legal assistance, transportation, including trade documentation and freight forwarding, communication and processing of foreign orders to and for exporters and foreign purchasers, warehousing, foreign exchange, financing, and taking title to goods, when

The Act directs the Secretary of Commerce to promote and encourage formation of export trading companies by providing information to interested parties and by facilitating manufacturer-exporter contacts.<sup>124</sup> This directive is merely an extension of the role of the Department of Commerce, which is already charged with the duty of assisting companies interested in learning to export. Rather than attempting to educate companies about how to begin exporting, it will be more effective for the Commerce Department to put the companies in contact with export trading companies. The Commerce Department will also make a concerted effort to help trading companies locate and contact American producers who could benefit from their services.

## B. Title II

### 1. Banking Provisions

If export trading companies are to succeed, large amounts of capital will be necessary. The most logical source of such capital would be domestic banks which have international offices, experience in trade financing, business contacts abroad, and international marketing knowledge.<sup>125</sup> The tradition in the United States, however, has been separation of banking and commerce.

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provided in order to facilitate the export of goods or services produced in the United States."

124. Export Trading Company Act, *supra* note 17, at § 104. The International Trade Administration, a division of the United States Department of Commerce, has already established a clearing house for United States suppliers and export trading companies. "Contact Facilitation" fosters the development of relationships between suppliers and export trading companies. The mechanics of the operation are quite simple. For a nominal fee, an export trading company or other firm offering export services such as banks or export management companies, and United States firms interested in contacting or being contacted by providers, can register with the District Office of the Department of Commerce by giving a brief description of the company, the person to contact, and what products the company represents or wishes to export. This information is entered into a computer in Washington, D.C., and the computer matches the company to interested parties. Searches can be made on the basis of the type of service provided or sought, location, area of foreign market interest, and Standard Industrial Classification codes for each product. The data base is updated with regard to continuing interest and status after a registrant's information has been registered for more than one year. UNITED STATES DEP'T OF COMMERCE, INTERNATIONAL TRADE ADMINISTRATION, CONTACT FACILITATION SERVICE FOR EXPORT TRADING COMPANIES (January 1983).

125. S. REP. NO. 27, 97th Cong., 1st Sess. 10 (1981).

Regulations that ensure this separation have prohibited bank involvement in trading companies.<sup>126</sup> These regulations have been promulgated to ensure the soundness of banks and to guard against the risk of bank failure by keeping banks disinterested in the affairs of customers.

Title II of the Export Trading Company Act recognizes the importance of bank participation in exporting and relaxes prohibitory regulations, allowing conditional ownership of up to one hundred percent of an export trading company by bank holding companies,<sup>127</sup> Edge Act corporations,<sup>128</sup> or Agreement Act corporations<sup>129</sup> that are subsidiaries of bank holding companies or bankers' banks.<sup>130</sup> The bank holding company rather than the bank was chosen as the structure within which bank affiliated export trading companies would operate. Congress believed that the bank holding company structure could adequately minimize any risk to the bank or banks within the holding company and ensure adequate separation of the bank's export activities from its deposit taking functions.<sup>131</sup> Because the bank holding company structure was chosen, this portion of the legislation is constructed as an amendment to the Bank Holding Company Act of 1956,<sup>132</sup> and existing restraints on bank holding companies auto-

126. *Id.* at 11.

127. Export Trading Company Act, *supra* note 17, at § 202. A bank holding company is a holding company which owns at least 25 percent of any bank subsidiary and which is registered with the Federal Reserve Board (FRB) under the Bank Holding Act (12 U.S.C. § 1843(c)(1976)). Bank holding company activities other than banking must be closely related to banking, such as credit cards or leasing. UNITED STATES DEP'T OF COMMERCE, INTERNATIONAL TRADE ADMINISTRATION, SUMMARY OF EXPORT TRADING COMPANY (ETC) LEGISLATION, 1 n.1 (November 15, 1982) [hereinafter cited as SUMMARY].

128. Export Trading Company Act, *supra* note 17, at §§ 202, 203(3)(E). "An Edge Act corporation is a corporation chartered, supervised and examined by the FRB for the purpose of engaging in foreign or international banking or other foreign or international financial operations. They engage in certain limited deposit taking functions in the United States." *Id.* at n.2

129. *Id.* at § 203(3)(E). "An Agreement Act corporation is a federally or state chartered corporation that has entered into an agreement or undertaking with the Federal Reserve Board under which it will not exercise any power that is impermissible for an Edge Act corporation." *Id.*

130. *Id.* at § 202. "A bankers' bank is a bank whose only clients are other banks. Small banks form bankers' banks to offer a variety of services they could not independently offer. Inclusion of bankers' banks should encourage regional and small banks to invest in ETCs." *Id.* at 3.

131. REPORT ON S. 734, *supra* note 119, at H8346.

132. 12 U.S.C. § 1843(c)(1976).

matically apply to export trading companies.<sup>133</sup>

Five additional safeguards are intended to maximize protection against risks to export trading company investors. First, the aggregate investment in an export trading company is limited to five percent of the banking organization's consolidated surplus and capital.<sup>134</sup> The banking organization is prohibited from directly and indirectly investing or lending more than ten percent of its capital surplus in or to an export trading company.<sup>135</sup> Second, the Act requires prior approval by the Federal Reserve Board of all bank holding company investments in export trading companies.<sup>136</sup> The Board can disapprove the investment if (1) the disapproval is necessary to prevent unsafe banking practices, undue resource concentration, unfair competition, or conflicts of interest; (2) the investment would so affect the resources of the bank holding company as to endanger the safety and soundness of a subsidiary bank; or (3) the bank holding company refuses to furnish the required information.<sup>137</sup> Third, the Act prohibits a banking organization from making loans "on terms more favorable than those afforded similar borrowers in similar circumstances" or involving "more than the normal risk of repayment" to trading companies in which the bank holding company holds any interest.<sup>138</sup> This provision prevents favorable treatment or unusually risky loans. Fourth, banking organiza-

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133. REPORT ON S. 734, *supra* note 119, at H8347.

134. Export Trading Company Act, *supra* note 17, at § 203(3).

135. *Id.* at § 203(3)(B)(i).

136. *Id.* at § 203(3)(A). To facilitate "meaningful and effective participation" by bank holding companies and their progeny, Congress has provided guidelines for the Federal Reserve Board implementing its authority under the amendments to the Bank Holding Company Act of 1956, 12 U.S.C. § 1843(c)(1976 and Supp. 1980). Section 202 provides that the Board should pursue regulatory policies that (1) allow for establishment of export trading companies with powers broad enough to enable them to compete with foreign export trading companies; (2) with a particular emphasis on small and medium-size firms, afford a means of exporting to U.S. commerce, industry, and agriculture; (3) foster participation of regional and smaller banks; and (4) facilitate bank holding company-nonbank joint ventures that efficiently combine trade and financing services to create one-stop export trading companies.

These guidelines emphasize the potential importance of export trading companies to small and medium-size trading companies and banks. The Act is primarily directed toward these firms and banks because they have the greatest need for and can derive the greatest benefit from the opportunity to pool their resources and accomplish that which they could not begin to undertake individually.

137. *Id.* at § 203(3)(A)(iv).

138. *Id.* at § 203(3)(B)(iii).



tions are prohibited from engaging in manufacturing or agricultural production.<sup>139</sup> Incidental product modification is permitted to the extent necessary for foreign marketing. Fifth, the Act gives the Federal Reserve Board the power to order a banking organization to terminate or limit its investment in an export trading company when the Board determines the export trading company has taken positions in commodities or commodity contracts, in securities, or in foreign exchange, other than is necessary in the course of its business operations.<sup>140</sup>

The desired bank participation in export trading companies will be forthcoming if banking organizations are allowed to have a substantial or controlling voice in management.<sup>141</sup> The Act allows for such participation but protects the stability of banking organizations by providing an appropriate amount of federal regulation. This approach allows the flexibility necessary to stimulate banking involvement.

## 2. *Other Financing Provisions*

Title II recognizes the need for access to external financing and reduces restrictions on export financing in two ways. The Act authorizes the Export-Import Trade Bank of the United States to guarantee loans by private creditors to export trading companies when the private financing market is not providing adequate financing and when such guarantees would facilitate expansion of exports.<sup>142</sup> A major share of these loans is to be directed toward promoting exports from small, medium-size, and minority businesses or agricultural concerns. Additional bank support is made possible through liberalization of restrictions on the amount of bankers' acceptances that may be issued by a federally regulated bank.<sup>143</sup>

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139. *Id.* at § 203(3)(C)(ii).

140. *Id.* at § 203(3)(D).

141. S. REP. NO. 27, 97th Cong., 1st Sess. 13-15 (1981).

142. Export Trading Company Act, *supra* note 17, at § 206.

143. *Id.* at § 207. Bankers' acceptances facilitate sales by substituting a bank's credit standing for that of the buyer, with the bank guaranteeing payment to the seller. SUMMARY, *supra* note 127, at 2 n.4.

### C. Title III

Title III of the Export Trading Company Act attempts to improve upon the Webb-Pomerene provisions. The Act broadens eligibility,<sup>144</sup> provides for certification,<sup>145</sup> clarifies antitrust exemption provisions,<sup>146</sup> and vests administrative responsibility in the Department of Commerce.<sup>147</sup> One of the most significant differences from the Webb-Pomerene Act is the applicability of the Export Trading Company Act to the export of services.<sup>148</sup>

#### 1. Eligibility and Certification

To give exporters greater certainty about the permissibility of their activities, the Act establishes a certification procedure. Certification provides preclearance for specified activities and eliminates the uncertainty of the blanket immunity provided by the Webb-Pomerene Act.

Almost any individual or group of individuals can apply for a certificate of review. Under Title III, individuals, partnerships, corporations, associations, or combinations, by contract or arrangement, may apply.<sup>149</sup> The application must specify conduct limited to export trade and supply any information required under the rules.<sup>150</sup> The Secretary of Commerce is then required to publish in the Federal Register notice of the application, identifying the applicant and describing the conduct proposed.<sup>151</sup> The Secretary is also required to submit to the Attorney General the information given by the applicant.<sup>152</sup>

A certificate of review will be issued to any applicant establishing that its activities will not (1) result in a substantial decrease of competition or restraint of trade within the United States, or a substantial restraint on the export trade of any competitor;<sup>153</sup> (2) unreasonably affect prices within the United

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144. See also Export Trading Company Act, *supra* note 17, at § 311(5).

145. *Id.* at §§ 301-304.

146. *Id.* at § 306.

147. *Id.*

148. *Id.* at § 311(2).

149. *Id.* at § 302(a); *cf.* § 311(5).

150. *Id.* at § 302(a).

151. *Id.* at § 302(b)(1).

152. *Id.* at § 302(b)(2).

153. *Id.* at § 303(a)(1).

States;<sup>154</sup> (3) constitute unfair methods of competition;<sup>155</sup> (4) include any act which results or may reasonably be expected to result in sale or resale of exported goods or services in the United States.<sup>156</sup>

If the Secretary of Commerce determines that the applicant's activities meet the requirements of the Act, a certificate of review will be issued within ninety days of application. The certificate will specify "the export trade, export trade activities and methods of operation to which the certificate applies";<sup>157</sup> the person to whom it is issued;<sup>158</sup> and any terms of conditions necessary to assure compliance.<sup>159</sup> The Act provides for expedited certification in cases in which the applicant indicates a special need for prompt disposition.<sup>160</sup>

An applicant who has been denied certification must be notified by the Secretary and given the reasons for denial,<sup>161</sup> and may request reconsideration.<sup>162</sup> If a certificate was procured by fraud, it will be void *ab initio*.<sup>163</sup>

Any applicant to whom a certificate of review has been issued must promptly report to the Secretary any changes in relevant information and may submit an application to amend the certificate to conform with the changed circumstances.<sup>164</sup> Furthermore, if the Secretary or Attorney General has reason to believe that the applicant's business no longer complies with the requirements of the Act, the Secretary must request information

154. *Id.* at § 303(a)(2).

155. *Id.* at § 303(a)(3). If the Secretary is satisfied that there will be no adverse effect on domestic commerce, the competing companies that make up the export trading company will even be allowed to engage in price fixing in foreign markets with impunity. The problem in obtaining certification arises when the combining firms within the newly formed export trading company share information on total domestic and foreign sales. Although this information would logically be shared, the first three provisions would be violated by affecting domestic commerce, and thus run afoul of the very antitrust laws from which they are seeking exemption. The Departments of Commerce and Justice appear to be in a quandry over this complication and have issued a special appeal for comments. *Washington Post*, January 24, 1983, at A11.

156. Export Trading Company Act, *supra* note 17, at § 303(a)(4).

157. *Id.* at § 303(b)(1).

158. *Id.* at § 303(b)(2).

159. *Id.* at § 303(b)(3).

160. *Id.* at § 303(c).

161. *Id.* at § 303(d)(1).

162. *Id.* at § 303(d)(2).

163. *Id.* at § 303(f).

164. *Id.* at § 304(a)(1).

necessary to resolve the matter.<sup>165</sup> If such information is not forthcoming, the Secretary may, after notice, revoke or modify the certificate.<sup>166</sup>

The actions of the Secretary in granting or denying certificates of review or amendments thereto may be appealed to the district courts by any person aggrieved by the determination.<sup>167</sup> Negative determinations of the Secretary and the reasons therefore are inadmissible in support of any claim in administrative or judicial antitrust proceedings.<sup>168</sup>

## 2. *Extent of Protection*

Conduct which is specified in and complies with the terms of a valid certificate is exempt from criminal and civil suits under state and federal antitrust laws,<sup>169</sup> with the following two exceptions: (1) a civil suit for injunctive relief and actual damages may be brought by any person injured as a result of certified conduct;<sup>170</sup> and (2) the Attorney General may bring suit "to enjoin conduct threatening clear and irreparable harm to the national interest."<sup>171</sup> There are, however, several important limitations on the first exception. The litigant may recover only actual, not treble, damages.<sup>172</sup> The statute of limitations for the private litigant is two years from the date he has notice of failure to comply or four years from the time the cause of action accrues.<sup>173</sup> In any such action, there is a presumption that certified conduct complies with the Act's requirements.<sup>174</sup> Finally, if an exporter with a valid certificate successfully defends a civil suit, it is entitled to costs and attorneys' fees.<sup>175</sup>

The Secretary is authorized to issue guidelines which describe permissible and impermissible conduct and summarize

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165. *Id.* at § 304(b)(1).

166. *Id.* at § 304(b)(2).

167. *Id.* at § 305(a).

168. *Id.* at § 305(c).

169. *Id.* at § 306(a).

170. *Id.* at § 306(b)(1).

171. *Id.* at § 306(b)(5).

172. *Id.* at § 306(b)(1).

173. *Id.* at § 306(b)(2).

174. *Id.* at § 306(b)(3).

175. *Id.* at § 306(b)(4).

the factual and legal bases for its determinations.<sup>176</sup> These guidelines should help to define the application of antitrust laws to export trade.

#### D. Title IV

Title IV supplements the antitrust provisions of Title III by modifying the Sherman Act<sup>177</sup> and Section 5 of the Federal Trade Commission Act.<sup>178</sup> The modifications clarify that these Acts only apply to export trade if there is a "direct, substantial, and reasonably foreseeable effect"<sup>179</sup> on domestic or import commerce, or on United States export opportunities.

### IX. CONCLUSION

The Export Trading Company Act of 1982 could give rise to several different forms of export trading companies.<sup>180</sup> The major form would be a one-stop facility providing a full range of services from market analysis, documentation, and transportation, to legal and banking services. A second type of trading company might buy and sell on its own account, seeking out products of United States producers for which it had found a

176. *Id.* at § 307(a).

177. 15 U.S.C. §§ 1-7 (1976).

178. 15 U.S.C. § 45(a)(1976).

179. Export Trading Company Act, *supra* note 17, at §§ 402, 403.

180. Several export trading companies have already been created. General Electric, Sears Roebuck, General Motors, Rockwell International, and Control Data have all begun export trading company operations. Since these parent corporations already were involved in international trading and possessed extensive contacts, they were more prepared to make this transition.

The General Electric trading company offers one-stop export services, ranging from market identification to sales, distribution, and financing. The new company serves both General Electric and outside clients, and stresses industrial and technical lines. Although the company focuses on high-growth developing countries, it exports to any nation. The Sears Roebuck Trading Company will sell technology and management services, import components and parts, enter third-country trade, and engage in countertrade. General Motors engages primarily in countertrade. The Rockwell International Trading Company engages in two way trade. Control Data Commerce International emphasizes services for small businesses. It helps manufacturers develop and implement marketing plans, and absorbs the international elements by buying from the manufacturer and moving the product from the factory to the overseas customer. *Export Trading Companies*, Business America, 8-9 (October 18, 1982). Hopefully, small firms will soon begin to combine to create export trading companies.

market overseas. A third form of trading company might focus its activities on government procurement contracts. This company could specialize in creating goods and services packages to fill large foreign government contracts.<sup>181</sup>

Whatever form an export trading company assumes, the following basic requirements must be met for it to be successful:

- (1) strong ties to manufacturers;
- (2) product specialist capabilities;
- (3) strong foreign sales network under its control;
- (4) depth and continuity of management;
- (5) the ability to create substantial amounts of credit;
- (6) sufficient diversity of products and markets;
- (7) an integrative approach to exporting and the capability to deal with imports as well as exports; and
- (8) incentive and capital from outside the manufacturing sector.<sup>182</sup>

These requirements are crucial; their absence may make it impossible for a domestic firm to fully compete in foreign markets.

The Export Trading Company Act of 1982 is not a panacea, but it is a step in the right direction. The Act offers a viable alternative to the nonexporting manufacturer or producer by making export services more accessible and by making antitrust exemptions more predictable. The Act could easily be a major factor in the rehabilitation of the American economy.

*Suzanne Hulst Clawson*

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181. 1981 HEARINGS ON S. 144, *supra* note 3, at 104.

182. 1979 HEARINGS ON S. 864, *supra* note 12, at 343.

