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EXPORT TRADING COMPANY ACT OF 1982: PROSPECTS AND ANALYSIS

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I. INTRODUCTION

The principal focus of U.S. antitrust law enforcement efforts has centered on horizontal agreements between competitors — that is, agreements concerning pricing, customer allocation or territorial allocation between sellers of similar products.[1] Less enforcement emphasis has centered on vertical relationships, such as those involving resale arrangements that lead to final sale of the product.

The antitrust laws, of course, apply to both foreign and domestic commerce. Not only is foreign commerce expressly designated as subject to the proscriptions of the Sherman Act, but Section 4 of the Clayton Act deliberately includes foreign persons and corporations among those entitled to bring treble damage suits for antitrust law violations.[2]

The Sherman Act, that prohibits joint marketing activities by competitors, was passed in 1890. By 1918, Congress had become concerned that in many instances American companies were unable to compete against international cartels for foreign sales. In response to this concern, Congress enacted the Webb-Pomerene Act[3] which grants a limited exemption to the Sherman Act. It permits properly registered American companies to combine and sell jointly in export trade. Members of a Webb-Pomerene association may agree upon a common price for foreign sales and make market

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1. Assistant Attorney General William F. Baxter, head of the Antitrust Division of the Department of Justice, recently stated: "The Antitrust Division has concentrated its efforts in recent years on mergers that threaten horizontal competition; vertical and conglomerate cases are no longer a major enforcement focus." Testimony before the House Judiciary Committee, Subcommittee on Monopolies and Commercial Law, August 26, 1981.

William French Smith, in his first public statement since becoming Attorney General, stated this policy on June 24, 1981, in a speech before the District of Columbia Bar.

2. *See* Pfizer v. India, 434 U.S. 308 (1978) (holding that foreign governments are entitled to sue for violations affecting foreign commerce).

3. 15 U.S.C.A. §§ 61–65 (1973).

allocations abroad.[4] The exemption granted to Webb associations basically confers immunity from liability for prohibited horizontal activity. No corresponding exemption was granted with respect to vertical activities in export trade. American sellers of goods or services in foreign commerce, thus may be held to the same standard applied to companies engaged in purely domestic sales except for the horizontal-type immunity available through Webb-Pomerene registration.

For the last two years, Congress has been considering legislation that would allow the formation of export trading companies. This legislation would encourage vertical arrangements among American companies that are doing or want to do business abroad. Specifically, the Export Trading Company Act of 1981[5] permits, for the first time, the creation of single entities in which manufacturers, sellers of goods, and providers of financial and marketing services can combine vertical functions leading to the ultimate delivery of a product. Thus, a single trading company might coordinate product sales through market development, transportation arrangements, financing and insurance — functions traditionally assumed by banks or other nonmanufacturing companies.

In addition, the legislation would restructure the Webb-Pomerene Act in several important respects. It would confer antitrust enforcement exemption

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4. The Webb-Pomerene Act has not been free from controversy. Periodically, Congress re-examines the Act's necessity and usefulness and proposals for repeal have been introduced. In 1979 the National Commission for the Review of Antitrust Laws and Procedures recommended repealing or limiting Webb-Pomerene. The Department of Justice (which frequently has supported amendment or repeal of the Act) has countered the argument that without the Webb-Pomerene exemption American companies would be disadvantaged in competing against foreign cartels by referring to its business advisory procedure. Under this procedure, companies may describe to the Department of Justice a proposed course of action and the Department will indicate whether it intends to initiate *criminal* proceedings should such activities occur. In fact, once a favorable clearance has been received, the activity is not likely to be challenged in a civil proceeding, but the Department has the option of withdrawing its clearance, and any substantial change in the nature of the activity renders the advice ineffective. The problem with reliance on an advisory opinion is that the opinion is not binding on private parties who may wish to challenge the activity in an antitrust suit, and the risk associated with such activity remains with the companies.

5. The original bill, the Export Trading Company Act of 1980 S.2718, 96th CONG., 2d SESS. (1980); was passed by the Senate unanimously on September 3, 1980. The House of Representatives did not take up the bill in 1980. In the 97th Congress, Senator Danforth reintroduced the Export Trading Company Act which is nearly identical to the 1980 version. The 1981 Act, S.734, 97th CONG., 1st SESS. (1981) [hereinafter cited as the ETC Act]; passed the Senate unanimously on April 8, 1981, and has been referred to three committees of the House of Representatives.

on American companies that provide *services* as well as goods.[6] Jurisdiction over Webb associations would be transferred from the Federal Trade Commission to the Department of Commerce, and review by the Department of Justice and the FTC *prior* to registration would be mandated.

This article explores the effects on trading opportunities that the Export Trading Company Act of 1981 would offer if it becomes law.

II. THE PROPOSED LEGISLATION

A. *Rationale*

Proponents of export trading company legislation can point to a compelling array of figures to support their view that the health of the United States economy depends upon increasing exports, and that U.S. manufacturers are unduly restricted in the conduct of export trade.[7]

Large manufacturers, such as those in the steel, automobile, computer, rubber and shipbuilding industries, assume their own direct supply and marketing responsibilities both at home and abroad, rather than using intermediaries. While there are non-industrial American trading companies, they are generally specialized commodities traders handling grain, sugar, coffee, etc. There are also some 2,000 American export-import firms in New York alone which tend to specialize in single or related commodity groups.

Some Congressmen and business groups see a vast overseas market for manufactured goods (especially in developing countries) that has been penetrated by our international trade competitors, but not by U.S. companies. The Act is designed to facilitate the export of U.S. products (especially those made by small and medium-sized businesses) into the overseas market by permitting the combination of financial resources, expertise in market development and "dealmaking" into one-stop export service agencies. The Act's sponsors believe that these Export Trading

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6. A brokerage function, which in a sense is vertical, arguably might be available under the present Webb Act to associations formed to sell fungible commodities. In fact, Webb associations tend to sell either directly for their own account, by-passing the brokerage function, or sell to a broker who then resells to the foreign buyer.

7. The U.S. trade deficit for 1979 was $24.7 million; for 1980 it was just under $30 million. According to the International Trade Administration of the United States Department of Commerce, only a small percentage of American manufacturers (about ten percent, or 25,000–30,000 out of 250,000–300,000) engage in exporting. Just 1,900 of the firms in the export trade account for 84 percent of the total U.S. export trade. There are 20,000 more U.S. companies which could export profitably but do not. A 1980 study by the National Association of Manufacturers indicates that since 1970 imports of manufactured goods have increased four times faster than exports, with the margin growing in the latter half of the decade. Exports account for only 7.5 percent of our GNP, as opposed to 22.6 percent of Germany's and 22.3 percent of Italy's.

Companies (ETCs) will provide the economies of scale, diffusion of risk and marketing ability through which smaller businesses will be enabled to compete in international trade.

B. *Provisions of the Act*

The Act passed by the Senate on April 8, 1981, S.734, contains two titles — the first known as the Export Trading Company Act of 1981 and the second known as the Export Trade Association Act of 1981.

Title I provides that a banking organization may invest in the aggregate up to 5 percent of its consolidated capital and surplus in the voting stock of one or more export trading companies.[8] A banking organization may, within the five percent limitation, invest up to $10,000,000 in one or more ETCs without the prior approval of the appropriate Federal banking agency as long as the investment does not cause an ETC to become a subsidiary of the bank. It may invest more than $10,000,000 or make any investment that causes an ETC to become a subsidiary or owned or controlled by the bank only with the prior approval of the appropriate Federal banking agency.[9]

Title I imposes the following additional limitations on the relationship between investing banks and ETCs:

> 1) The name of any ETC shall not be similar in any respect to that of an investing bank organization unless the bank organization owns or controls a majority of the ETC's outstanding voting stock or other evidence of ownership.[10]
>
> 2) The total cost of investments by a bank combined with extensions of credit by the bank to an ETC may not exceed 10 percent of the bank's capital and surplus.[11]

8. A banking organization "means any State bank, national bank, Federal savings bank, bankers' bank, bank holding company, Edge Act Corporation or Agreement Corporation." The ETC Act, S. 734, 97th CONG., 1ST SESS. § 105(a)(1) (1981). An Edge Act Corporation or Agreement Corporation not engaged in banking may invest up to 25 percent of its consolidated capital and surplus. *See* § 105(b)(1).

9. *Id.* § 105(b)(1)(A) and (B). "Appropriate banking agency" means:

(a) the Comptroller of the Currency with respect to a national bank or any bank located in the District of Columbia;

(b) the Board of Governors of the Federal Reserve System with respect to a State member bank, bank holding company, Edge Act Corporation, or Agreement Corporation;

(c) the Federal Deposit Insurance Corporation with respect to a State nonmember insured bank; and

(d) the Federal Home Loan Bank Board with respect to a Federal savings bank. ETC Act § 105(a)(9).

10. *Id.*, § 105(c)(1).

11. *Id.*, § 105(c)(2).

3) A bank may be forced to terminate its ownership or be subjected to other conditions in its relationship with an ETC if the appropriate banking agency determines that the ETC has taken positions in commodities, securities, or foreign exchange other than those necessary to its business operations.[12]

4) Banking organizations may not extend credit to an ETC in which they hold stock on terms more favorable than those extended to similar borrowers in similar circumstances.[13]

5) Other limitations or conditions, including termination of ownership by a banking organization, may be required by the appropriate federal banking agency to limit the bank's financial exposure, or prevent conflicts of interest and unsound banking practices.[14]

Title I also directs the Export-Import Bank of the United States to guarantee loans by financial institutions and other private creditors to ETCs when such loans are secured by export accounts receivable or inventories of exportable goods. If adequate financing is not otherwise available, the Export-Import Bank may proceed as determined by its Board of Directors. The Bank must attempt to ensure that a major share of these export loan guarantees goes to small, medium-sized and minority businesses or agricultural concerns.[15]

Title II amends the Webb-Pomerene Act[16] to allow firms that provide services as well as goods to combine to facilitate joint exporting. It transfers responsibility for administering the Act from the Federal Trade Commission to the Secretary of Commerce. Under this title, export trade associations that are formed for the sole purpose of engaging in export trade and that do not substantially lessen competition or restrain trade within the United States are exempt from the operation of antitrust laws with respect to their export trade activities once the association is certified by the Secretary of Commerce.[17]

The Act requires that applicants provide certain information prior to certification as an export trade association. The Secretary of Commerce, after consultation with the Attorney General and the Federal Trade Commission, may approve or deny certification. The Secretary of Commerce will have the responsibility to draw up guidelines by which ETC applications shall be reviewed.[18] Although the Secretary of Commerce has primary responsibility

12. *Id.*, § 105(c)(3).
13. *Id.*, § 105(c)(4).
14. *Id.*, § 105(d)(2) and (4).
15. *Id.*, § 106.
16. 15 U.S.C. §§ 61–65 (1976).
17. The ETC Act, *supra* note 5 § 204.
18. *Id.*, § 106(a). Title II provides for automatic certification of Webb-Pomerene Associations registered with the FTC as of January 1, 1981.

for issuing a certificate, only the Attorney General or the FTC may bring an action for revocation of a certificate.[19] No person other than the Attorney General or the FTC will have standing under the Act to bring an action against an ETC. Therefore, while an ETC may lose its certification, it may not be sued either by private parties or by the government for damages resulting from activities outside those permitted by the Act.

III. TITLE I: EQUITY PARTICIPATION BY FINANCIAL INSTITUTIONS IN EXPORT TRADING COMPANIES

The Export Trading Company Act has been inspired in some measure by the success of the Japanese "*sogo shosha*."[20] These are multi-billion dollar trading conglomerates with huge assets and interlocking ties to government, banking and manufacturing. These conglomerates provide financial services, business information and auxiliary international trade services such as documentation, insurance, warehousing and transportation. They conduct extensive two-way, third-country, "barter and switch" trade, as well as arranging for the export of Japanese products.

The development of these post-war Japanese trading conglomerates has been characterized by the intricate involvement of banks. The shortage of capital and underdevelopment of Japan's export market has also resulted in a capital structure for Japanese corporations that is leveraged far beyond that of U.S. corporations.

The Act's sponsors believe that by removing barriers to the establishment of "one-stop" export service organizations, average-size American businesses will be able to enter the export market and compete successfully with their foreign counterparts.

A. *The Japanese Model*

The *sogo shosha* provide a phenomenally successful model for general trading companies. Their trade expertise has enabled Japan, one of the world's most densely populated countries and one least blessed with natural resources, to survive economically. To obtain vital raw materials, Japan had to import; to pay for imports, Japan had to export.[21]

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19. *Id.*

20. Certain European countries and Brazil also have strong trading companies.

21. In 1977, Japan imported 99.7 percent of its petroleum, 76.6 percent of its coal, 73.0 percent of its natural gas, 98.8 percent of its iron ore, 92.8 percent of its copper, 100 percent of its lumber, 100 percent of its wool and cotton, 96.0 percent of its wheat, 97.0 percent of its soybeans. Japan External Trade Organization (JETRO), The Role of Trading Companies in Internation Commerce 21 (1980).

While there are approximately 8,000 trading companies in Japan, there are nine giant, highly diversified firms that are known as *sogo shosha* — general trading companies.[22] During the 1975 Japanese fiscal year, they had gross sales of $155 billion, accounted for 56.4 percent of Japan's exports, 55.6 percent of its imports, and 18 percent of its domestic wholesale total.[23] Though none has a strong manufacturing base, the *sogo shosha* facilitate the trade of thousands of products while functioning as a trade intermediary.[24] They provide financial services, business information, and auxiliary international trade services such as documentation, insurance, warehousing and transportation.[25] Since the 1970's, with the establishment of foreign subsidiaries and branches, the *sogo shosha* have also been actively organizing and investing in overseas manufacturing projects.

The nine major companies are primarily large-volume, first stage wholesale traders of industrial raw materials and grains, and of such standardized intermediate products as steel, synthetic fiber and fertilizer. Price, speed of information and economies of scale are important in sales of these kinds of products, which require little engineering service to manufacturers, minimum sales promotion and minimal repair or other after-sale service to retail customers.

The Export Trading Company Act contemplates a multi-service trading organization designed to foster the export of goods manufactured in the United States — probably with substantial participation by the manufacturer in the trading company itself. Japanese trading companies, on the other hand, conduct much of their business in two-way buyer-seller transactions and third-country trade. An example of two-way trade would be the purchase of iron-ore and coal from an Australian mining company and sale of mining and transportation equipment manufactured in Japan in return, or the importation of grain from the United States and reciprocal sale of fertilizer to U.S. farmers. Third-country trade is trade between two foreign countries where the Japanese firm would handle negotiations, contracting and financial arrangement, without the direct involvement of Japan as a source of supply or market. For example, Japanese trading companies might sell U.S.-manufactured gas turbines to Indonesia or import Brazilian coffee to

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22. In order of sales volume, they are: Mitsubishi, Mitsui, C. Itoh & Co., Marubeni, Sumitomo, Missholwai, Toyo Menka Kaisha (Tomen), Kanematsu-Gosho, and Michimen.

23. YOUNG, THE SOGO SHOSHA: JAPAN'S MULTINATIONAL TRADING COMPANIES 4 (1979) [hereinafter cited as YOUNG].

24. Each trading company typically handles from 10,000 to 20,000 products — principally foodstuffs, textiles, metals, machinery and chemicals. *Id.*

25. *Id.* at 57–68.

Europe.[26] Third-country trade is expected to provide greater opportunities for the *sogo shosha* in the future, because of the increasing exports of industrial plants and equipment for international engineering projects — particularly in developing countries.[27]

The trading firms also conduct "barter-trade" (exchange of goods between two countries without the use of money) and "switch trade" (import of goods from a second country through the use of a third country's currency as a currency of settlement).

The nine *sogo shosha* are, in short, trading conglomerates, not manufacturing conglomerates. They own hundreds of small subsidiaries and joint ventures in Japan and elsewhere that engage in resource prospecting and development, manufacturing and processing, construction, financing, leasing, and subcontracting. All are owned and run to support the core purposes of buying, selling and generating new business opportunities. For these reasons, a majority of the subsidiaries controlled by the *sogo shosha* are involved in sales, warehousing, transportation and other service industries.[28]

B. *History and Character of Bank Involvement in Sogo Shosha*

The origin of general trading companies dates from the 1870's when Japan, under the control of the new Meijii government, resumed international trade after two centuries of self-imposed isolation. The government embarked on a program of industrialization through the development of foreign trade. The modern trading companies had their start as family-run business entities similar to Western corporations, but with strong family loyalties and obligations. The heads of these families had close political ties

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26. YOUNG cites the following examples of multi-country trade conducted entirely outside Japan by one of the trading giants:

> [U]pon receiving a request from a Brazilian textile manufacturer for Polyester fibers, a large general trading company approached a major American chemical company. The chemical firm was willing to supply the fibers but was short of ethylene glycol, an essential raw material. The general trading company asked a French firm to supply the necessary ethylene glycol, but was informed that they could do so only if the trading firm could provide them with benzene. The general trading company turned to firms in the U.S. and Holland and obtained the benzene for the French manufacturer, who then supplied the trading company with ethylene glycol. Thus, the American chemical concern was finally able to provide the Brazilian textile maker with polyester fibers. The transaction involved four countries and five different trading company offices. It was concluded in one week.

YOUNG at 11.

27. *See, e.g., Special Advertising Supplement on Japanese Trade,* FORTUNE, August 10, 1981, at 82.

28. YOUNG, *supra* note 23 at 12–13.

to the government, which gave them financial assistance and encouragement. Beginning usually with trade in one dominant commodity or industry, they gradually expanded into banking, ship building, mining and other areas that supported their trading activity. Ownership remained in the hands of the founding families until the mid-1930s, when stock in certain of the trading conglomerates was first offered on a limited scale to the Japanese public. After that time, while the founding families continued to exert control over the conglomerate through holding companies, day-to-day management gradually was transferred to professional managers.

After World War II, occupation authorities forced the families to dispose of their stock in the holding companies, and split the two largest conglomerates, Mitsui and Mitsubishi, into many separate companies (170 and 139 respectively). The breakup of these two giants allowed the growth of other small and medium-sized firms engaged in foreign trade.

In addition, "bank-centered" conglomerate groups began forming in the post-war period. In particular, three large banks unaffiliated with earlier large trade organizations, prodded firms that were financially dependent on them into forming new interlocking conglomerates that in turn became affiliated with trading companies. Those three trading companies are now large enough to be included among the nine *sogo shosha*.[29]

In general, the development and regrouping of the post-war trade conglomerates was fostered and characterized by the involvement of banks. Financial institutions were largely exempt from dissolution orders and antitrust laws under the occupation.[30] The practice of giving preferential loans at lower rates to selected groups, the shortage of capital in Japan's rapidly growing economy, and the underdevelopment of Japan's export market led to the dependence of manufacturing firms on the financial institutions. These elements also led to the highly-leveraged capital structure of Japanese corporations.[31]

The relationships among financial institutions, members of conglomerate groups and the *sogo shosha* remain complex and interlocking, with significant mutual stock holdings. Although the *sogo shosha* do not limit their financial and trade dealings to affiliated banks and manufacturing firms, their complex interrelationships generally assure them access to important

29. The Daiichi Kangyo Bank group, the Sanwa Bank group and the Fuyo group each rely on one of the *sogo shosha* as their core supply and distribution channel. YOUNG at 37.

30. There was a limit on stock investment by a financial institution in a given domestic corporation that was raised in 1953 from five to ten percent of the institution's own capital. YOUNG at 36.

31. *Id.*

assets which facilitate their trade activities, such as: capital at preferred rates, expertise, raw materials, equipment, and advanced technology.

C. *The Banking Committee Hearings: Support and Reservations*

Prior to passage of the Act in April 1981 a subcommittee of the Senate Banking Committee held hearings on S.734 in February and March 1981.[32] Extensive hearings had been held on the 1980 Act by the full Senate Banking Committee, a Senate Banking subcommittee, and two House banking subcommittees. The House committee has not yet held or scheduled hearings on the 1981 Act.

The 1981 Senate hearings revealed strong bipartisan support for the bill. (Senator Heinz pointed out in his opening statement that every member of the committee who was in the Senate in 1980 voted for the bill that year.) Senator Proxmire, expressing some reservations about whether the U.S. trade profile necessitated unbridled bank control of ETCs, favored an amendment to minimize bank equity risk, but acknowledged that the bill had no real opposition. His statement before the 1980 full committee hearings, which he chaired, showed considerably more concern about the banking and antitrust implications of the bill. However, Senate passage of the bill this year seems assured, despite those concerns.

The justification for bank equity participation was stated by former Senator Stevenson, who returned for the hearings in order to support the legislation he is credited with initiating:

> The American banks are uniquely situated to organize and operate trading companies. They have networks and correspondents which reach all firms in the United States in all markets, in all regions of the United States, and into all markets of the world. With those correspondent relationships, their financial resources, branches, trade financing experience, banks are positioned as are no other institutions in the United States to get the trading companies off the ground and operating on a profitable basis.[33]

The primary opponents of the bill's banking provisions, the Federal Reserve and the Federal Deposit Insurance Corporation, argued that the Act represents an unprecedented breach of the separation of banking and

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32. *Hearings before the Subcommittee on International Finance and Monetary Policy of the Committee on Banking, Housing and Urban Affairs, on S. 734,* 97th CONG., 1st SESS. (February 17, 18 and March 5, 1981) [hereinafter 1981 Senate Banking Subcommittee Hearings].

33. *Id.* at 4.

commerce functions that has long been traditional in this country. The separation is felt to be necessary in order to avoid substantial risk to the safety and soundness of the banking system and to preserve the banks' role as impartial arbiters of credit.[34] The Federal Reserve Board recommended that bank ownership interest be limited to less than 20 percent of the stock of an ETC. With a higher ownership interest, a bank may be tempted by the rule of equity accounting to push a trading company into relatively risky types of operations in the hope of realizing short-term gains in bank earnings.[35] The risk is exacerbated by the high level of leveraging that the trading companies frequently require. Moreover, while bankers have the necessary financial expertise, export trading companies will be complex commercial enterprises requiring management expertise in many diverse areas.

It was further argued that a bank might be motivated to assist a foundering export trading company that it sponsored. Also, a bank might incur legal liability if, for example, it provided management or engaged in significant intercompany transactions. Moreover, a bank might take unwarranted risks to aid such a troubled subsidiary in order to protect the parent company's reputation in the business community.[36]

These fears were realized to some extent through recent experiences with bank-sponsored Real Estate Investment Trusts (REITs). In 1972 in particular, banks suffered large losses that were attributed to their provision of assistance to REITs because of legal liability stemming from interlocking officers and directors, the provision of advisory services, and because they feared that failure to aid sponsored REITs would damage their reputations in business and financial circles as well as the general community.

These risks led the Chairman of the Federal Deposit Insurance Corporation, Irvine H. Sprague, to propose in both the 1980 and the 1981 hearings that the Act be amended to limit any one bank's interest in an ETC to twenty percent of the voting stock, and any group of banking organizations to fifty percent. The recommendations were not adopted. In addition, the FDIC recommended that any investment by a banking organization be subject to prior approval by the appropriate Federal banking agency.

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34. *Id.* at 66. (Statement of Henry C. Wallich, Member, Board of Governors, Federal Reserve System).

35. Under the equity accounting rule, at a level of ownership interest of 20 percent or above, a bank can include in its earnings a proportionate share of the earnings of a trading company. At a level of ownership below 20 percent, a bank could count as earnings only the dividends received from the trading company.

36. *1981 Senate Banking Subcommittee Hearings, supra* note 32 at 117–18. (Statement of Irvine H. Sprague, Chairman, Federal Deposit Insurance Corporation).

Supporters of the Act responded to these concerns by pointing to risk-limiting safeguards built into the legislation. They insisted that a substantial degree of bank equity participation is necessary to assure the success of ETCs and that precedent exists to demonstrate successful bank equity participation in Small Business Investment Companies (SBICs).

There are six safeguards in the Act designed to prevent any exposure beyond traditional prudential limits for either controlling or noncontrolling investments. These are:

(1) A provision that no banking organization (except an Edge Act Corporation not engaged in banking) may invest more than five percent of its capital and surplus in the stock of one or more ETCs.

(2) A provision that no banking organization may invest and lend more than ten percent of its capital and surplus in the aggregate and on a consolidated basis in or to an ETC. This ensures that the financial limitations of Section 23A of the Federal Reserve Act apply to all banking organization/ETC investments, irrespective of whether the ETC is a majority-controlled affiliate. In contrast, bank-sponsored REITs have been considered outside the limitations of Section 23A. This provision thus puts a total cap on exposure to a controlled or non-controlled ETC.

(3) The name of an ETC cannot be similar in any respect to that of a banking organization investor. This eliminates public confusion between a banking organization and an ETC affiliate and avoids some of the problems that arose in the REIT area.

(4) A banking organization must terminate its ownership of an ETC if the ETC takes speculative positions in commodities. This protects against an ETC affiliate's engaging in non-productive, purely speculative activities that could put a banking organization investment at risk. In this regard, this provision effectively will require any banking organization investor to ensure that there are adequate internal controls against speculation by the ETC.

(5) The Act specifically prohibits a bank from making preferential loans to an ETC in which it has an equity interest; this prohibition includes preferential loans to any customer of such ETC. The language of the prohibition parallels that in the Financial Institutions Regulatory and Interest Rate Control Act of 1978 (FIRICA) on insider loans, and is thus a type of prohibition regularly enforced by bank examiners and bank regulatory agencies.

(6) The banking agencies are given authority to require divestiture of any ETC investment that may constitute a serious risk to a banking organization investor. Again, this parallels powers which the

Federal Reserve was given under FIRICA over other bank holding company investments.

In addition, there are the following regulatory safeguards provided over controlling investments:

(1) Any controlling investment, even if less than $10 million, must be approved by a bank regulatory agency.

(2) No group of banks can acquire more than fifty percent of an ETC without prior agency approval.

(3) The agencies can disapprove any application for investment where, in their judgment, adverse banking factors outweigh export benefits.

(4) The agencies can impose additional conditions and limitations on controlling investments to limit a banking organization's financial exposure or prevent possible conflicts of interest or unsound banking practices.

(5) The agencies can examine banking organization-controlled ETCs and use cease-and-desist authority to enforce any and all requirements imposed under the law.

Representatives of banking organizations described an additional safeguard which is not contained in the language of the Act, but is created by the realities of doing business: a banking organization with a controlling investment, may itself be in the best position to protect its investment and regulate risk exposure. In this regard, many U.S. banking organizations already follow a policy in their international operations of favoring controlling investments, since equity control ensures operational control and thereby better risk management.[37] The banks that are most likely to form and participate in ETCs already have national and foreign operations through branches, agents, or correspondant banks. They are already in the business of evaluating risks, researching foreign markets and providing financing. They have existing relationships with many domestic manufacturing companies. They are in the best position to provide access to capital, expertise in marketing services, maximum efficiency, and have the ability to serve as "dealmakers" by virtue of their familiarity with all aspects of international transactions and their ability to bring together the essential parties to such a transaction.

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37. *Id.* at 195. (Statement of J. Hallam Dawson, President, Bankers Ass'n for Foreign Trade, and President, Crocker National Bank).

Whatever dangers or risks of banking involvement remain despite statutory and regulatory safeguards, equity participation by banks is generally regarded as essential to the success of ETCs and successful ETCs are widely regarded as a potential contributor to the economic health of the United States. The various banking committee and subcommittee hearings make clear that there has never been a realistic hope of passing legislation, at least in the Senate, that disallowed bank control.

It is expected, however, that the bill will encounter some resistance in the House Committee on Banking Finance and Urban Affairs from Congressman Fernand J. St. Germain (R.I.), Chairman of the Subcommittee on Financial Institutions Supervision, Regulation and Insurance. During hearings on the 1980 Act, St. Germain expressed doubts that any but a small number of large banks would be able to surmount the bureaucratic registration hurdle to participation in ETCs, and doubts as to whether banks would use impartial judgment in financing enterprises in which they themselves have a substantial interest.

IV. AN APPRAISAL: EFFECTIVENESS OF THE ACT MAY BE JEOPARDIZED BY CONFLICTING OBJECTIVES

The foregoing summary of the Act and its debated points presents a dichotomy of views which suggest that the Act may have difficulty in achieving its intended purpose. This appears due to the attempted accommodation of different policy objectives.

An analysis begins with the asserted necessity for the Act and the benefits to be derived from it. The success of the *sogo shosha* in penetrating world markets and the resulting boost to the Japanese economy is the model for success. If the *sogo shosha* could succeed, then American companies should be able to do likewise. The problem is that the American model does not parallel the Japanese system, but departs significantly with respect to certain crucial elements.

One of the first and most apparent departures from the Japanese system is the continued limitation on capital/equity involvement by the American banks which are supposed to be the driving force in the establishment and success of the export trading companies. A five percent limitation on the use of bank assets to be invested in an export trading company effectively precludes most American banks from competing on an equivalent basis with the nine leading *sogo shosha*. The prospect of various banks pooling investments to form a single export trading company may not be an attractive alternative since there will be dispersion of management and perhaps a corresponding lack of clear direction and control.

Another immediately apparent limitation on the success of the concept is the $10 million capital contribution limitation. Provision is made for larger investments with the prior consent of the appropriate banking agency, but guidelines for such approval have not been established and there is at least a suggestion inherent in the limitation that approval may be given grudgingly.

The capital limitation provision thus presents a scenario where many export trading companies would rapidly encounter size and capital limitations. One speculates that really large projects will continue to be financed as they are today, since the benefits of combining vertical functions may be lost in the complexities of overcoming severe limitations on capital contribution. The erection of barriers to the size of ETCs probably is not accidental. It reflects a traditional suspicion of large business entities and a concern that the perceived project opportunities of the ETCs should not flow exclusively to a comparatively small handful of giant financial institutions. Thus, an environment of trading companies limited in size and capital in many respects is consistent with the desire of certain sponsors of the Act. It follows the theme of opening up export opportunities to small and medium-sized American companies. However, to reiterate, small and medium-sized American companies may not turn out to be effective competitors of larger trading companies, chartered in other counties, which impose less severe capital limitations.

Another reflection of the Act's self-limitation is the provision which requires the Export-Import Bank to ensure that a major share of loan guarantees support small and medium-size minority businesses or agricultural concerns. Once again, policy objectives related to small business are not necessarily consistent with a statutory framework providing for maximum American competition in foreign markets.

The American ETC model presents yet another major contrast with the Japanese model. We have seen that the *sogo shosha* concentrate on trading and are likely to serve as the intermediary between a manufacturer and a consumer. This is not to say that the *sogo shosha* do not possess manufacturing capability and they are certainly capable of carrying products and inventory to supply any market they wish to serve. They display a certain flexibility in moving in and out of product markets and trade on a short-term basis in products for which they have made no long-term commitment. A basic premise of the American Export Trading Company Act, on the other hand, is that manufacturing companies will be long-term equity owners or affiliates of the ETC. Continuity of market and creation of long term demand are objectives of the American plan to enhance the sales of medium and small-size manufacturing companies. The American premise, therefore, locks American firms into a set corporate enterprise with an attendant reduction in flexibility.

The success of the *sogo shosha* has been established. One may only speculate as to whether American ETCs will be able to match their established success in light of these fundamental differences in operating structure. Certainly, to the extent that major equity interests in an ETC are represented by dedicated manufacturing facilities, the American companies will be tied to sales of particular products on a far more long-term basis.

Referring to yet another of the "safeguard" provisions, we see that the ETC may not attempt to borrow credibility from the name of a sponsoring financial institution. This is a reflection of long-held American concerns for the safety of banks, and as noted, some unfortunate recent experiences with real estate investment trusts. However, the same reasons which caused the REITs to choose names linked to their bank sponsorship would seem to apply in the area of export trade. If the Act is designed to enable American companies to compete vigorously for foreign sales, identification with recognized names should be an important asset of these new business ventures. The same safeguard provisions which reflect concern over the stability of our financial institutions, may impose competitive limitations on the success of the new ETCs.

Limitations on capital contributions, size, control, and the ability to utilize established names, all suggest tenuous commitments by financial institutions to ETCs which at least initially will prevent most of them from matching the marketing muscle of established Japanese competitors. The anti self-dealing provision that requires banks to deal with their export trading companies on terms no more favorable than the terms extended to other customers, again contrasts with the Japanese example.[38] The Japanese financial institutions dealt with their captive trading companies on more favorable terms than those offered to other customers in order to build up the strength of the concern. American policies dealing with the proper role of banks and the quality of access to capital markets conflict with the Japanese model.

The above examples illustrate that because of the conflict between the purpose of the ETC Act and historic American policy considerations, there are conflicting tensions within the Act. The examples also illustrate that resolution of these tensions may impose reduced effectiveness on the ETC concept or may result in a lack of interest in the formation and use of ETCs.

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38. While it is beyond the scope of this article, the most-favored nations clause presents some intriguing issues of its own. How does one determine which of a bank's customers are most favored? How is that favoritism expressed? Are these return considerations to the bank which justify the favored status (*e.g.*, favoritism expressed in terms of a lower interest rate may be offset by the borrowing corporation carrying a high corresponding balance)? If so, would these same return considerations apply to the ETC or could it merely demand as a matter of statutory right that it receive the favored treatment?

V. TITLE II: ANTITRUST IMPLICATIONS OF THE ACT

Under the Senate bill, the Commerce Department could immunize from the antitrust laws the "export trade activities and methods of operations" of ETCs. If Commerce later determined that the activities of ETCs had substantial anticompetitive effect in the United States, it could revoke the immunity. Even were this to occur, however, neither private parties nor the government could sue the ETC for damages.

Following House Judiciary Committee hearings in early 1981, Chairman Rodino proposed that, rather than establish ETCs through a separate bill, the antitrust laws should be amended to create a simplified ETC certification procedure and to allow private single (rather than treble) damage suits against ETCs found to have domestic anticompetitive effect. The Rodino proposal was the result of a compromise between the recognition of the value of ETCs and the inevitability of the Act's passage, and recurring objections to the ETC concept as presented in the Senate bill. The principal objections based upon possible anticompetitive effects are:

> (1) The certification procedure is so cumbersome that only large businesses will be able to successfully pursue it. Thus, the Act's purported benefit to small and medium-sized businesses is a disguise to allow large manufacturers to engage in anticompetitive practices without a penalty once they surmount the hurdle posed by registration.[39]
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> (2) The Webb-Pomerene Act has failed to serve its intended purpose of enabling smaller businesses to compete in foreign markets; expanding it would not help firms, but would hurt them by allowing large corporations to pursue cartel-related activities at home and abroad. In 1979, the National Commission for the Review of Antitrust Laws and Procedures recommended eliminating or at least limiting Webb-Pomerene. As of November 1978, only twenty-nine Webb-Pomerene associations existed, which accounted for less than two percent of export trade, and eighty percent of those were composed of large firms.
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> (3) Creating exceptions to U.S. antitrust laws to foster export cartels would create foreign policy embarrassments adversely affecting

39. Once again, crossed purposes lead to tensions within the Act. If the objective of the Webb-Pomerene Act is to enable small and medium-sized American companies to achieve economies and foreign competitors in the world market, the criticism may be valid. On the other hand, if an objective is to enable U.S. companies to compete against large foreign competitors in the world market, then artificial restrictions on the size of the U.S. companies participating will be counterproductive.

pro-competitive diplomatic activities. For example, any anti-OPEC initiative in the face of the ETC Act would seem hypocritical. It would also appear ironic that during the occupation following World War II, the United States created antitrust laws and dismantled and prosecuted the Japanese cartels which we now seek to emulate.

(4) Putting the certification and revocation procedure in the hands of the Commerce Department ensures that antitrust considerations will be given short shrift. Commerce's function is to promote trade, not to enforce antitrust laws.

These criticisms of the Act also raise the philosophical issue of whether the United States can, in good conscience, encourage other commercial nations to adopt U.S.-type antitrust laws.

With respect to the philosophical criticism, it seems dubious that with or without Webb-Pomerene or ETC registration other nations will move to adopt their own equivalents of the Sherman Act. Some countries, *e.g.*, Canada and the EEC nations, already have antimonopoly legislation and the adoption of their laws was not influenced appreciably by the existence of the U.S. Webb-Pomerene Act. Moreover, foreign nations wishing to emulate the American antitrust standard can forbid sales by Webb associations.

The past utility of Webb associations raises the issue of the success of the Webb-Pomerene Act itself. Accepting a figure of two percent for the volume of export trade channeled through Webb associations, that figure is still large in terms of absolute dollars. Even if the Act is under-utilized, there is little reason to disturb sales now made through Webb-Pomerene associations. If one reads the figures as showing a successful history of Webb-Pomerene associations, then continuation of the legislation is consistent with the general purpose of the Export Trading Company Act.

In sum, critics of the present Webb-Pomerene Act do not appear to have presented any valid reasons for its dismantling or for the creation of ETCs. This is particularly true if expansion of export trade has become more, rather than less, of a commercial policy objective of the United States.

Changes in Webb Act administration and operation proposed in the ETC Act are not likely to have significant impact on its use, although administration by the Commerce Department may be beneficial and stimulate interest in Webb association membership. However, a more complex qualification and registration procedure, involving a more active role for the Department of Justice, can serve only to discourage additional registrations — especially in industries that have not taken advantage of the Webb-Pomerene opportunity for foreign sales in the past. Despite these pros and cons, the changes do not appear so monumental as to be controlling over a decision whether to form a Webb association or an ETC. The changes may have some impact on close decisions, or where an industry consensus is difficult to achieve, but where there is fairly universal agreement within an industry to form an ETC or to sell through a Webb association, registration hurdles are not likely to pose an insuperable barrier. Some comfort may be taken from the fact that associations which have already met the criteria for registration will enjoy antitrust immunity under the new Act.

VI. CONCLUSION

The ETC Act offers an interesting possibility for expansion of U.S. foreign trade. Other countries, notably Japan, have been successful in utilizing trading companies to combine vertical functions which enables the integrated unit to efficiently compete against the separate and disjointed U.S. entities that each pursue different functions in the overall transaction. The ETC Act is an attempt by the United States to follow the foreign model. The legislation as presently drafted, however, appears tentative in its support of the concept. The attempt to satisfy policy concerns (which historically have limited bank involvement in commercial ventures) and the desire to promote small business participation do not harmonize and may inhibit the overall effectiveness of the trading companies chartered under the Act. Such inhibition may limit the Act's effectiveness in achieving its goal of expanding U.S. foreign trade.