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Government Supports United States Exporters

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Government supports United States exporters

The Export Trading Company Act permits banks to provide an improved service to US exporters. Will banks take this opportunity?

The latest addition to the US law of international trade, the Export Trading Company Act of 1982 (the Act), was passed by Congress with a claim that it will put US exporters on more competitive footing with their foreign counterparts. It was signed by President Reagan with a claim that it will create hundreds of thousands of jobs in the US.

US exports, as a percentage of gross national product, nearly doubled from 6.3 per cent in 1971 to 12.5 per cent in 1981. Major trade competitors of the US, however, such as Japan and West Germany, are exporting more than 20 per cent of GNP. The US share of world exports has declined from approximately 25 per cent in 1960 to well below 20 per cent today. Each billion dollars worth of exports is estimated to represent 40,000 to 50,000 domestic jobs. The signing of the Act by President Reagan was delayed to follow by one day the announcement of September's unemployment figures for the US, the highest since World War II.

Many factors contribute to the weakening of the US position in international trade. Most frequently cited is the increase in the price of imported oil. US trade competitors in Western Europe and Japan have faced the same problem, which suggests that the US has had additional difficulties.

One such problem is that 80 per cent of US exporting is done by one per cent of the country's businesses. Less than 10 per cent of the manufacturing firms in the US sell overseas. Most small and medium-sized US firms lack the expertise or the initial capital necessary to penetrate foreign markets. Although there are between 700 and 800 export management companies in the US, many work exclusively for relatively large corporations of which they are subsidiaries. Others are hampered by the difficulty of obtaining sufficient credit to finance export transactions. Therefore, most US firms that export goods or services take an independent approach.

By contrast, approximately two thirds of Japan's exports are handled by trading companies, of which there are more than 6,000. Several of these companies have operations in the US, and one of them - Mitsui - recently ranked fifth among exporters of US goods.

As intermediaries, export trading companies can offer small and medium-sized businesses expertise and economies of a scale otherwise unobtainable. Why, then, has the growth of export trading corporations in the US not kept pace with their proliferation elsewhere? At congressional hearings held last year two major obstacles were identified: financing and legal restrictions.

With regard to financing, it was urged by representatives of public and private sector entities that the US

banking industry should be allowed to participate in the export business. Commercial banks especially, it was argued, could provide not only crucial capital but also experience and an important network of international contacts. In addition, the larger banks, with their many local branches, would be most likely to have contact with smaller businesses, and to have earned their confidence. The legal barriers separating banking and commerce in the US should perhaps be modified for this limited and specific purpose.

The second major obstacle identified in the congressional hearings was the restrictions imposed by US anti-trust laws. Although the Webb-Pomerene Act of 1918 afforded limited antitrust exemptions for exporters of US goods, fear of suits by competitors or by the US government still inhibited cooperative export arrangements among US firms.

The bill in Congress

Four years elapsed between the introduction of the export legislation and its signing, on October 8, by President Reagan. The bill originated in the Senate. Subsequently, the House of Representatives offered an 'amendment' which deleted almost all the text of the Senate bill and substituted parallel, but significantly different language. An acceptable compromise was worked out by the Committee of Conference after a tedious process that offers much insight into congressional aims and concerns.

Perhaps the most fundamental difference between the Senate and House bills was the definition of an 'export trading company'. The Senate definition required that such a company be organised and operated principally for the purposes of exporting US goods or services, and providing export trade services to unaffiliated business entities exporting US goods or services. By requiring that the corporation provide services to unaffiliated business entities, the Senate bill would have excluded those companies which export solely their own goods and services, or those of their parent or subsidiary corporations.

The rationale for this Senate definition was the desire to force trading companies associated with big corporations to share their expertise by exporting also for small and medium-sized firms. However, the House of Representatives' definition, which prevailed, required only that export trading companies operate principally for the export of US goods or services, or for facilitating exports by unaffiliated business entities. Thus, companies with a single supplier can qualify for the benefits of coverage under the Act.

US merchandise trade*

Year	Merchandise exports (FAS value)	Merchandise imports (FAS value)	Balance of merchandise trade	Balance of payments**
1981	233,677	261,305	- 27,628	+ 4,471
1980	220,626	244,871	- 24,244	+ 1,520
1979	181,860	209,458	- 27,598	- 466
1978	143,681	174,762	- 31,081	- 14,773
1977	121,232	150,390	- 29,158	- 14,068
1976	115,223	123,477	- 8,254	+ 4,384
1975	107,652	98,503	+ 9,149	+ 18,280
1974	98,042	102,575	- 4,533	+ 2,124
1973	70,938	70,473	+ 465	+ 7,140
1972	49,252	56,364	- 7,112	- 5,795
1971	43,600	46,170	- 2,570	- 1,433

*Data supplied by the US Departments of Commerce and Treasury. All figures are in millions of US dollars; certain figures have been rounded to the nearest million.

**Includes merchandise trade plus services and other international money flows.

On the question of whether non-profit corporations would meet the Act's definition of an export trading company, the Conference Committee agreed with the Senate that non-profits should be included. The inclusion of non-profit organisations will be important to state and local government entities such as port authorities and industrial development corporations, and to private non-profit organisations such as agricultural cooperatives.

The Senate version of the bill also included the potentially significant definitions of 'US goods' as those including not more than 50 per cent (by value) imported components or materials, and 'US services' as those whose value was at least 50 per cent attributable to US contributions. The House version of the bill included no such definitions. The Conference Committee agreed with the House and did not include such content quotas in the definitions of the US goods and services. The Act expressly authorises the US Department of Commerce to issue regulations further defining the terms used in the Act. It may be that content quotas will be reintroduced at the administrative level.

The Senate and House were largely in agreement on the need for the legislation, and the differences which did exist were readily compromised. The following list of official factual findings emerged from the investigations:

- exports are responsible for one out of every nine manufacturing jobs in the US and one out of every seven dollars in total US goods produced;
- service-related industries provide 70 per cent of the jobs in the US and 65 per cent of its gross national product, but these services are greatly under-exported;
- tens of thousands of small and medium-sized US businesses produce exportable goods or services, but do not engage in exporting;
- the US is the world's leading agricultural exporter, but is failing to take full advantage of world markets;
- export trade services in the US are fragmented and inefficient;
- the resulting trade deficits contribute to the decline of

the dollar on international currency markets and to inflation in the US economy.

Based primarily upon these findings, the Act declares that its purpose is to 'increase United States exports of products and services by encouraging more efficient provision of export trade services to United States producers and suppliers.'

Key provisions

The Act's key provisions effect changes in three areas of US law and regulation.

The first is banking. The Act amends the Bank Holding Company Act of 1956 to allow any bank holding company to invest up to five per cent of its consolidated capital and surplus in the shares of one or more export trading companies, or in the formation of one or more new companies. Such investments are subject to disapproval and prohibition, or to termination, by the Board of Governors of the Federal Reserve System (the Board) and to other restrictions. The Act also authorises banker's banks and certain bank holding company subsidiaries - Edge Act companies and agreement corporations - to invest in one or more export trading companies. Such subsidiaries, if engaged in banking, may invest up to five per cent of their consolidated capital and surplus in the companies. The limit increases to 25 per cent for Edge Act and agreement corporations not engaged in banking.

The Act authorises and directs the Export Import Bank of the United States to establish a programme to guarantee loans to export trading companies and other exporters if the loans are secured by exportable inventories or export accounts receivable, and the Export Import Bank's Board of Directors determines that the guarantee is necessary to facilitate exports for which the private credit market will not otherwise provide adequate financing.

The last of the Act's banking provisions amends the Federal Reserve Act to ease restrictions on the acceptance

of certain international trade related drafts and bills of exchange. Previously, banks were permitted to accept such drafts and bills in aggregate amounts up to 50 per cent of their capital and surplus or, with the approval of the Federal Reserve Board, up to 100 per cent of their capital and surplus. The Act increases these limits – to 150 per cent and 200 per cent, respectively – for international trade-related acceptances having no more than six months' right to run. The increased limits also apply to acceptances involving the domestic shipment of goods, or which are secured by certain warehouse receipts or similar documents.

The Act also makes significant changes in US antitrust law. It establishes a procedure whereby an exporter may obtain, from the US Department of Commerce, a certificate of review of intended export trade and related activities. A certificate of review affords potentially significant legal protection. A certificate does not preclude liability altogether, but neither a criminal nor a civil action can be brought under US antitrust laws on the basis of export-related activities carried out in compliance with a valid certificate.

The Export Trading Company Act also amends two of the US antitrust law's basic statutes. The Sherman Act is amended to exclude export trade from its coverage – unless such trade has a 'direct, substantial, and reasonably foreseeable effect' on non-export trade within the US, or on another person or business entity, within the US, who is engaged in export trade. The unfair competition section of the Federal Trade Commission Act is amended in essentially the same fashion.

The third area addressed by the Act concerns US government oversight and facilitation of export activities. The Act establishes, within the Department of Commerce, an office of export trade responsible for the promotion and encouragement of export trade associations and export trading corporations, the facilitation of contacts between the corporations and producers of exportable goods and services.

Thus, the key provisions of the Act are likely to be those relating to banking industry participation in export activities, and those amending US antitrust law.

Banking industry participation

Under the new law, the bank holding company will be the front line of banking industry participation in the export business. The record suggests that by lodging the new investment authority in bank holding companies rather than in banks, Congress intended to minimise the direct risk to banks and to streamline the process of regulating banking industry investments in export trading companies. Unlike individual banks, which are regulated by a number of government agencies, bank holding companies are primarily subject to the regulatory authority of the Board of Governors of the Federal Reserve System. Thus, the regulation of banking industry participation in the export business can be centralised and, it is hoped, uniform and consistent.

The Board will regulate banking industry involvement in export trading corporations primarily through the process by which bank holding companies obtain required approval for individual investments. The Act includes three features apparently intended to ensure that the Board does not defeat this provision's purpose by exercising its authority in an unduly conservative manner.

First, the Act expressly instructs the Board to pursue regulatory policies that:

- provide for the establishment of export trading companies with powers sufficiently broad to enable them to compete with similar foreign-owned institutions in the United States and abroad;
- afford to United States commerce, industry and agriculture especially small and medium-sized firms, a means of exporting at all times;
- foster the participation by regional and smaller banks in the development of export trading companies; and
- facilitate the formation of joint venture export trading companies between bank holding companies and non-bank firms that provide for the efficient combination of trade and financing services designed to create export trading companies that can handle all of an exporting company's needs.

Secondly, the Act provides that the Board may disapprove a proposed investment only if:

US exports as a percentage of GNP*

Year	GNP	Exports**	Percentage
1981	2937.7	367.3	12.5
1980	2633.1	339.2	12.8
1979	2417.8	281.4	11.6
1978	2163.9	218.7	10.1
1977	1918.3	182.7	9.5
1976	1718.0	170.9	9.9
1975	1549.2	154.0	9.9
1974	1434.2	146.2	10.1
1973	1326.4	109.6	8.2
1972	1185.9	77.5	6.5
1971	1077.6	68.8	6.3

*Data supplied by US Department of Commerce. All figures are in billions of US dollars.

**Includes goods and services.

- such disapproval is necessary to prevent unsafe or unsound banking practices, undue concentration of resources, decreased or unfair competition, or conflicts of interest;
- the Board finds that such investment would affect the financial or managerial resources of a bank holding company to an extent which is likely to have a materially adverse effect on the safety and soundness of any subsidiary bank of such bank holding company; or
- the bank holding company fails to furnish relevant information requested by the Board.

The entire process is slanted in favour of approval, as the Board must act affirmatively in order to disapprove a proposed bank holding company investment in an export trading company. A bank holding company is required to give the Board 60 days prior written notice. Within this period, the Board can disapprove the proposed investment, give notice of intent not to disapprove, or, if the bank holding company has failed to furnish required information, extend the period once by an additional 30 days. If the Board takes none of these actions, the proposed investment will be deemed approved.

Once approved, a bank holding company investment in an export trading company is subject to two types of restrictions under the Act. The first concerns the relationship between the bank holding company and the export trading company; the second concerns the activities of the company itself.

Restrictions on holding company

A bank holding company may not, for example, extend credit to an export trading company in excess of 10 per cent of the bank holding company's consolidated capital and surplus. All credit extended to the company by the bank holding company's subsidiaries is included for the purpose of this limit, as is the bank holding company's investment in the shares of the export trading company. Nor may a bank holding company which invests in an export trading company extend credit to that company on terms more favourable than those afforded similar borrowers in similar situations. The prohibition also applies to credit extended to the company by subsidiaries of the bank holding company.

Once a bank holding company has invested in an export trading company, that company's activities are subject to certain substantive restrictions. It may not engage in the securities business to a greater extent than could the investing bank holding company, and the company may not engage in agricultural production activities or in manufacturing (except for repackaging and product modification incidental to the export business). These restrictions are intended to prevent bank holding companies from using export trading companies to circumvent the more basic restrictions to which they are subject under US law.

Antitrust provisions

The Act's antitrust provisions are presented in two separate parts of the legislation. The first establishes the certification procedure mentioned earlier; the second restrains, in a more general way, the application of US antitrust law to international trade.

To obtain a certificate of review with the protection it affords from suits brought under the US antitrust laws, an exporter is required to file a written application with the Department of Commerce. The application must specify

the trade activity contemplated by the exporter, and other information relating primarily to market conditions.

Within seven days of receiving such an application, the Department of Commerce must forward it, along with any other information it deems relevant, to the US Department of Justice. Within 10 days of receiving the application, the Department of Commerce must publish in the Federal Register the names of the applicants and a description of the conduct for which they seek approval.

A certificate of review will be issued within 90 days of the submission of an application if the Department of Commerce determines, with the concurrence of the Department of Justice, that the applicant's proposed export activities will:

- result in neither a substantial lessening of competition or restraint of trade within the United States nor a substantial restraint of the export trade of any competitor of the applicant;
- not unreasonably enhance, stabilise, or depress prices within the United States of the goods, wares, merchandise or services of the class exported by the applicant;
- not constitute unfair methods of competition against competitors engaged in the export of goods, wares, merchandise, or services of the class exported by the applicant; and
- not include any act that may reasonably be expected to result in the sale for consumption or resale within the United States of the goods, wares, merchandise, or services exported by the applicant.

While the Department of Commerce need not wait 90 days to issue a certificate, it cannot issue one sooner than 30 days after notice of the underlying application is published in the Federal Register. This latter provision is presumably intended to give potential competitors and other opponents an opportunity to convince the Department of Commerce that the application does not meet these standards.

Certificate of review

A certificate of review, once issued, specifies the applicants to whom it was issued, the export activities to which it applies, and any additional conditions or terms that the Department of Commerce or Justice deems necessary to assure compliance with the standards described above. A successful applicant is required to notify the Department of Commerce of any changes in the information upon which the grant of the certificate was based and to report certain information to the Department at least once a year.

If an application for a certificate is denied, the Act affords the applicant one opportunity to request reconsideration and an express right to pursue the matter subsequently in federal court.

A valid certificate of review protects its holder against civil and criminal antitrust suits based on activities covered by the certificate. A person or business claiming to have been injured by the certified conduct is not left without legal recourse but must show that the activity did not comply with the Act's standards for the issuance of a certificate, listed above. A private party claiming injury cannot sue a certificate holder for treble damages based on activities covered by the certificate. Moreover, as an additional disincentive to bringing a legal action, one who sues the holder of a certificate under this provision and loses must pay the certificate-holder's legal fees.

The Act's more general antitrust provisions undercut, to some extent, the need for certification procedure.

These were added to during the last weeks the Act's four year development. Their effect is to deny the extra-territorial applicability of US antitrust laws, except when an international transaction has 'a direct, substantial and reasonably foreseeable effect' on domestic commerce or domestic competition.

Proponents of these provisions, which amend the Sherman and Federal Trade Commission Acts, say their effect is not so much to change the law as to provide much-needed clarification. They claim that the courts and the Department of Justice have been inconsistent in their interpretation and application of the antitrust laws to the foreign commerce of the US and that the resultant uncertainty in the minds of exporters has stifled the development of cooperative ventures.

Will the Act be used?

Will the banking industry take advantage of the new investment authority? Will export trading companies, whether newly formed or not, take advantage of the Act's antitrust provisions?

The probable extent of banking industry involvement is difficult to estimate. A spokesman for the American Bankers' Association said, however, that he thinks banks will involve themselves gradually. He said about 25 of the country's 14,500 banks are expressing an interest in export trading companies, and about 10 banks have specific plans.

At a recent New York seminar sponsored by the National Foreign Trade Council, experts declined to speculate on how heavily involved the banking industry is likely to become in exporting. It was suggested, however, that the industry is more likely to invest in existing companies than to establish and operate new ones and that this is probably beneficial. While many large banks have significant experience in international financial transactions, most lack expertise in the particularities of international trade. The most appropriate professional combination for joint ventures would appear to be banking industry entities and existing export trading or export management companies.

Bankers are expected to applaud relaxation of the restrictions on the types of investments they are allowed to make. However, the export business, with its highly variable profit margins and relatively unpredictable risks may not provide irresistible opportunities. Industry experts seem to believe that the big US banks are husbanding their reserves for the day when deregulation will make it possible for them to expand significantly without abandoning their traditional role.

With regard to the companies themselves, it seems clear that the Act has had a positive effect. It signals a governmental policy that is pro-exports. Although the precise impact of this policy declaration is not yet apparent, a number of US corporations have already moved to establish export trading companies; some even in advance of the Act's passage by Congress. Some of the companies established by large US firms such as General Electric, Sears Roebuck, and Burlington Northern, are essentially reorganisations of those firms' international marketing divisions. This is unlike the Japanese prototype on which the Export Trading Company Act seems to have been based.

One US trading company which appears to fit the Act's ideal is the Mid-American International Trading Company (MITCO) of Minneapolis, Minnesota. MITCO began operations in April, 1982 with capital

raised through the sale of shares primarily to corporate investors in the Minneapolis area. It is organised to market the goods and services of small and medium-sized firms operating in its region of the US. MITCO expects its sales this year to exceed US\$5m. The company's President, William R. Keye, says he thinks the Act's chief value is psychological.

Protection from antitrust suits

Will export trading companies use the new certification procedure to protect themselves from antitrust actions? If they follow the advice of antitrust lawyers, the answer seems to be that certification is less attractive in light of the Act's provisions limiting the application of US antitrust law to international transactions.

Some antitrust lawyers believe that while a certificate of review affords significant legal protection, it creates other problems. For example, a certificate cannot be issued in connection with a transaction that may reasonably be expected to result in the reimportation of the goods or services into the US. If such reimportation does occur, the exporter may be in a less advantageous position than if it had ignored the certification process and relied instead on the Act's more general antitrust provisions. Also, because the certification process requires that the Department of Commerce publish certain essential information from each application, an exporter cannot apply without publishing certain basic information about its marketing plans. This prospect is likely to be particularly unattractive from a competitive viewpoint.

No one seems to expect the Export Trading Company Act of 1982 to solve the balance of trade problem for the US, but it is hoped that it will contribute to a solution.

The number of export trading companies operating in the US is already increasing, perhaps not because of the new legislation but for some of the reasons that prompted the legislation: economic uncertainty, technological advances and inefficient use of productive capacity. In a sense, therefore, the Act will be a success even if it does no more than signal government support for the efforts of export trading companies. □

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