THE DEAN RUSK AWARD

The Dean Rusk Award is given each year to the author of the most outstanding paper written on a topic concerning international and comparative law. The competition, sponsored by the Georgia Society of International and Comparative Law, is open to law students currently enrolled in accredited Georgia law schools. The Georgia Journal of International and Comparative Law is pleased to present the winning papers for 1983-84, and 1984-85.

The 1983-84 award was presented to Mark Grambergs, for his paper, The Export Trading Company Act of 1982: Theory and Application. Judges for last year's award were: Bertis Downs, University of Georgia School of Law; Dean Rusk, Samuel H. Sibley Professor of International Law, University of Georgia School of Law; and Professor Gabriel Wilner, University of Georgia School of Law.

The 1984-85 award was presented to David Stepp, for his paper, The 1984 "Country of Origin" Regulations for Textile Imports: Illegal Administrative Action Under Domestic and International Law? Judges for this year's award were: Bertis Downs, University of Georgia School of Law; Louis Sohn, Woodruff Professor of International Law, University of Georgia School of Law; Professor Gabriel Wilner, University of Georgia School of Law; Philip Ray, United States Department of Commerce; and Kevin Conboy, associated with the firm of Powell, Goldstein, Frazer & Murphy of Atlanta, Georgia.
THE EXPORT TRADING COMPANY ACT OF 1982: THEORY AND APPLICATION

I. INTRODUCTION

Before 1971, the international mercantile trade of the United States had never shown a deficit. In the period from 1971 to 1976, however, the United States experienced a cumulative $5 billion trade deficit, and suffered annual deficits of at least $25 billion through 1982. The United States trade deficit for 1982 was over $42 billion. The United States share of the world market in industrial goods has declined from 21.3% in 1970 to 17.4% in 1980, representing the largest relative market share decline among major industrial exporters. In addition, during the seventies the United States lost market share in eight European Community nations and in twelve of thirteen OPEC nations. In the past decade, imports of manufactured goods to the United States have increased nearly four times as rapidly as exports, and while the United States trade in these goods has remained relatively balanced during this time, Japan and West Germany have had respective trade surpluses of $70 billion and $60 billion.

These figures are the result of a variety of factors, not the least of which is the volume of oil imports. The high cost of United States labor relative to other countries, a strong dollar, decreases in worldwide demand, recessions, and protectionist policies of foreign governments all add to the negative export picture in this country. There is a lack of accessibility to many foreign markets due in part to their isolation, cultural differences, and tariff and

2 Id.
5 Id. With the addition of Greece, there are presently ten states in the Community.
7 Id.
8 Hirschhorn, supra note 1, at 746. In 1981 the oil import bill was $77 billion.
9 Ferchill, supra note 3, at 287.
non-tariff barriers imposed on imports. The aggressive practices of foreign competitors entering new markets puts United States producers at a disadvantage. The federal government has also been reluctant to remove disincentives to exports and to encourage domestic industry in seeking overseas markets. Moreover, United States manufacturers are as a whole not export-minded and find it much easier to sell in the large, familiar domestic market, with its common language and customs and its efficient distribution system.

While export promotion is a major policy objective of the governments of West Germany and Japan, the United States government has no definitive export policy. Thus, as recent data from the International Trade Administration shows, only 8.3% of 300,000 American manufacturers have any regular export practice, and of these, fewer than 5,000 account for 84% of United States exports. Former Senator Adlai E. Stevenson estimated that there are 20,000 American companies presently capable of exporting that simply do not. Of the firms that do export, 92% employ less than five people and limit themselves to a single product line or geographical area. Consequently, exports of goods account for only 7.5% of the United States Gross National Product (GNP), the lowest of any industrialized nation.

The size of the nation's domestic demand has historically kept average-sized firms from investigating foreign markets. These manufacturers have had little interest in involving themselves with

---

11 Note, supra note 6, at 769.
12 Hirschhorn, supra note 1, at 746-47.
16 Cole, supra note 13, at 279.
17 Id.
18 Senator Stevenson was a former chairman of the Subcommittee on International Finance, Senate Committee on Banking, Housing, and Urban Affairs. Neill, supra note 15, at 449.
19 Id.
20 Hirschhorn, supra note 1, at 747.
21 Development, supra note 14, at 116.
22 Cole, supra note 13, at 279.
the "red tape" of international trade\textsuperscript{23} and the cost of maintaining the substantial staff needed to penetrate a market.\textsuperscript{24} It has been estimated that if the volume of United States exports could be increased so that the GNP would correspondingly increase by one percentage point, $3 billion of the merchandise trade deficit could be eliminated.\textsuperscript{25} With the intent of facilitating such an increase in exports, Congress passed the Export Trading Company Act of 1982.\textsuperscript{26}

The Export Trading Company Act (ETC Act) is designed to increase the level of United States exports of both goods and services\textsuperscript{27} by authorizing banking organizations to invest in export

\textsuperscript{23} Id. (One study found that 828 million documents and 6.5 billion copies were used in international trade each year).

\textsuperscript{24} Neill, supra note 15, at 450. A government survey on obstacles to exporting faced by small businesses found that four basic problems accounted for 70% of all responses: 1) lack of information necessary to enter the world market; 2) compliance with United States and foreign exporting regulations; 3) expenses incurred in exporting overseas; 4) financing.

On the question of how the government could cure these hindrances, the survey indicated that only five general categories of suggested government actions accounted for over 82% of the responses: 1) provide more financing; 2) provide exporting information; 3) provide Outreach Programs; 4) simplify regulations; 5) improve existing federal services. COMMITTEE ON SMALL BUSINESS, 97TH CONG., 2D SESS., SURVEY OF FINDINGS ON OBSTACLES TO EXPORTING FACED BY SMALL BUSINESSES (Comm. Print 1982).

Regarding lack of information, respondents complained of being unaware of potential foreign customers and the identities of their agents, a general scarcity of information on foreign markets, and uncertainty as to the foreign demand for their products. In the area of federal regulations, the main difficulties faced by the respondents included excessive paperwork at both the domestic and foreign end, the restrictive nature of foreign laws, and the restrictive nature of United States regulations. In terms of expense, respondents saw foreign tariffs, transportation, and promotional/marketing expenses as being prohibitive of exporting. Even if these difficulties were overcome, the small businesses saw difficulties in obtaining payment for their goods, problems in obtaining credit, and bank inefficiency as further reasons not to export. Respondents wanted the federal government to provide aid in financing in the form of tax incentives, subsidized exports, expanded trade fairs, and increased low interest loans. The respondents overwhelmingly desired information on how to locate foreign buyers. Respondents desired a more expansive Outreach Program, with more seminars on "How to Export," increased local assistance contracts, and general help in marketing and promoting American products. Id.

\textsuperscript{25} Development, supra note 14, at 117.


\textsuperscript{27} It is not only United States goods but services as well that are stifled by foreign competition. The United States shipping industry encounters extreme costs when discriminatory foreign regulations are applied to its right to transport foreign cargoes. United States airlines must compete with subsidized foreign carriers, exorbitant landing fees, less favorable ground handling treatment, restrictions on airport use, and denial of access to airline reservation systems. Administrative delays make operating licenses difficult to obtain. For example, Norway has not licensed a foreign insurance firm in 40 years. Discriminatory treatment of foreign banks is widespread outside the United States, and includes prohibitions on the
trading companies, by exempting many export activities of United States businesses from United States antitrust law, and by instructing the Department of Commerce to take a more active role in encouraging small and medium-sized companies to increase their exports overseas. Sponsors of the legislation contend that the development of export trading companies (ETCs) will benefit other companies desiring to export through the creation of economies of scale and by the diffusion of risk. The Act was intended to prompt billions of dollars of new exports and to create hundreds of thousands of new jobs in exporting industries by 1985.

While the ETC Act has been described as leaving a myriad of difficulties unsolved in overseas trade, or as dealing with only the tip of the international trade iceberg, it is clear that the very existence of the legislation represents an awareness of the difficulties in international export trade being faced by small businesses today. Such recognition is in itself a psychological boost to American exporters, and can only presage greater improvement in export trade problem-solving in the future. This examination studies the beneficial changes in banking and antitrust regulations made by the ETC Act, discusses the remaining problems left unanswered by its four titles, and analyzes the responses to date of exporters and banking organizations to the Act's provisions. An inquiry into the difficulties, benefits, and practical application of the ETC Act today can provide important insight to prospective overseas traders. This Note emphasizes developing patterns, areas of needed im-

---

establishment of bank branches, and restrictions on currency and operating methods. In Europe and elsewhere there are efforts under way to inhibit trans-border flow of data. For example, French officials are presently discussing the placement of a duty on imported computer software, based not on the value of the medium itself, but on the information that the medium carries. Robinson, Why Service Sector Trade Policies Must Change, 7 DIRECTORS & BOARDS, Fall 1982, at 22, 23-24.

The term "export trading company" means a person, partnership, association, or similar organization, whether operated for profit or as a nonprofit organization, which does business under the laws of the United States or any State and which is organized and operated principally for purposes of: (A) exporting goods or services produced in the United States; or (B) facilitating the exportation of goods or services produced in the United States by unaffiliated persons by providing one or more export trade services. 15 U.S.C. § 4002(a)(4).

Bruce and Pierce, Understanding the Export Trading Company Act and Using (or Avoiding) its Antitrust Exemptions, 38 Bus. LAW. 975 (May 1983).

Development, supra note 14, at 118.

Bruce, supra note 29, at 975. See also H.R. REP. No. 629, 97th Cong., 1st Sess. 8-9 (1982).


provement, and points of potential concern for small and medium-sized export firms, bank holding companies, and individual exporters.

II. History

An ETC is a company doing business in the United States principally to export goods and services produced in this country, or to facilitate such exports for producers.\(^{34}\) The concept is not new. European traders used trading companies as early as the eleventh century, refining them in an attempt to find the cheapest way to transport oriental products over long distances with the least amount of risk.\(^{35}\) The growth of “bullionism”\(^{36}\) in the seventeenth and eighteenth centuries led to the acquisition of resource-rich colonies, and the development of the joint stock company, the predecessor of the modern trading company. These joint stock companies enabled groups of investors to pool their capital, limit risks, and take advantage of European colonial expansion in a way no individual or monarchy was capable of working.\(^{37}\)

The ETC Act, however, was not patterned exclusively after the European example, but also was inspired by the success of the Japanese “sogo shosha,”\(^{38}\) or general trading company.\(^{39}\) The seed for

---

\(^{34}\) United States Department of Commerce, Summary of Export Trading Company Legislation

In its ideal form an ETC should include among its attributes:

1) strong ties to manufacturers;
2) product specialist capabilities;
3) a strong foreign sales network under its control;
4) depth and continuity of management;
5) the ability to create substantial amounts of credit;
6) diversity of products and markets;
7) capability to deal with imports as well as exports; and
8) incentive and capital from outside the manufacturing sector.

Export Trading Companies and Trade Associations: Hearings on S. 864, S. 1499, S. 1633 and S. 1744 before the Subcomm. on Int'l Finance at the Senate Comm. on Banking, Housing, and Urban Affairs, 96th Cong., 1st Sess., 413, 437-50 (1979); Note, supra note 6, at 785.

The ETC combines these factors to establish an overseas market for goods and to provide transportation, documentation, and other services needed to route these goods efficiently from the United States manufacturer to overseas buyers. Neill, supra note 15, at 450.

\(^{35}\) Note, supra note 6, at 760.

\(^{36}\) “Bullionism” refers to seventeenth and eighteenth century European beliefs that possession of gold and silver was an indication of national prosperity. European powers began to seek colonies during this period that had these precious metals, and these mercantilist theories directly linked themselves with the growth of European trading companies. Id. at 761.

\(^{37}\) Id. at 761.

\(^{38}\) Rigler and Lottman, Export Trading Company Act of 1982: Prospects and Analysis, 7 Int'l Trade L.J. 1, 6 (1981-82).
the present-day Japanese trading giants developed out of a fear that European colonialism in the Far East would envelop Japan. To prevent a conquest of their own country, a small group of Japanese overthrew the government based on the failing feudal system and instituted the Meiji Restoration.\textsuperscript{40} The goal of the movement was to build the military strength of Japan, and only through exporting could Japan obtain the needed funds for militarization and industrial growth.\textsuperscript{41} The family-owned companies that dominated this export activity evolved and specialized, eventually controlling banking, mining, ship-building, and other industries.\textsuperscript{42} The form of these trading companies changed after World War II,\textsuperscript{43} however, as the Allied forces introduced antitrust regulations. Many of the trade conglomerates broken up by the Allies began to subsequently regroup around banking institutions.\textsuperscript{44} In Japan's post-war developing economy, the rapid growth coupled with the under-developed Japanese export market led to the reliance of manufacturers on their financial institutions.\textsuperscript{45} This association in turn allowed banks\textsuperscript{46} to build organizations of manufacturers that became affiliated with trading companies, some of these groups comprising the present-day sogo shosha.\textsuperscript{47}

Today there are over 8,000 trading companies in Japan,\textsuperscript{48} but there are only nine giant, highly diversified firms that are known as sogo shosha.\textsuperscript{49} The sogo shosha are not manufacturers\textsuperscript{50} but rather entities which facilitate trade of a wide range of products. As in-

\textsuperscript{40} Cole, supra note 13, at 280.
\textsuperscript{41} Note, supra note 6, at 761.
\textsuperscript{42} Id.
\textsuperscript{43} Id. at 762. These entities were termed “zaibatsu”, and were under the control of a larger family-owned holding company.
\textsuperscript{44} For the most part, the sogo shosha of today do not pre-date World War II.
\textsuperscript{45} Rigler and Lottman, supra note 38, at 9.
\textsuperscript{46} Id.
\textsuperscript{47} Id. Banks were able to give preferential loans at lower rates to selected groups because financial institutions were largely exempt from Allied regulation during the occupation.
\textsuperscript{48} The Daichi Kangyo Bank group, the Sanwa Bank group, and the Fuyo group each rely on a sogo shosha as their supply and distribution channel. Id. at 9 n.29.
\textsuperscript{49} Cole, supra note 13, at 281.
\textsuperscript{50} Id. They are: Mitsubishi, Mitsui, C. Itoh & Co., Marubeni, Sumitomo, Misaholwai, Toyo Menka Kaisha (Tomen), Kanematsu-Gosho, and Michimen. Id. at 281 n.22.
\textsuperscript{50} The nine major trading companies are essentially high-volume wholesale traders of industrial raw materials, grain, steel, synthetic fiber, and fertilizer. The sogo shosha specialize in areas such as speed of information, pricing, economies of scale, and they become involved where there is little engineering service to manufacturers, minimum sales promotion, and minimal repair or post-sale service to customers. Rigler and Lottman, supra note 38, at 7.
intermediaries, they provide financial services, business information, and auxiliary international trade services such as documentation, insurance, warehousing, and transportation. The sogo shosha utilize these services by engaging in two-way trade, barter trade, "switch trade," and third-country trade.

It is the unique nature of bank involvement with the sogo shosha that is particularly important to their success in Japan. The size and diversity of the sogo shosha make them good loan customers for banks. Since the sogo shosha act as intermediaries with smaller firms, banks can avoid dealing with thousands of small business loans by providing financing to the general trading companies. Consequently, the sogo shosha can make more favorable interest rates available to their clients and evaluate more carefully the risks involved in making any loan.

---

51 Sogo shosha supply credit, loans, and loan guarantees to their customers, serving as risk-absorbers between their trade customers and commercial banks. They make short-term loans for purchasing equipment, plant construction, and real estate investment. The six largest sogo shosha in Japan extended 34% of all the commercial credit given Japan's 452 major corporations in 1974. Dr. Hoshii, a writer on Japan's banking and investment systems, fears that the attention the sogo shosha give to their small customers may inhibit the traders from cutting-off credit when risks maximize, as would a bank. This would result in the sogo shosha having to suffer losses from collateral liquidation. Cole, supra note 13, at 284.

52 During the 1976 fiscal year, the top six sogo shosha spent $192 million on communication expenses. After the initial expense of establishing the communications network, the cost of processing information is marginal, and the sogo shosha will share the information they collect with their customers, usually for free. Id. This information extends beyond simple business and economic statistics, to global political and legal data, socio-cultural environment analysis, demographic data, and any information on world trends likely to affect the Japanese economy. Note, supra note 6, at 765.

53 Cole, supra note 13, at 281.

54 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. Rigler and Lottman, supra note 38, at 7.

55 Barter trade involves the exchange of goods between two countries without the use of currency. Id. at 8.

56 "Switch" trade is the import of goods from a second country through the use of a third country's currency as a currency of settlement. Id.

57 In third-country trade, two foreign countries exchange products, with a third country acting to handle negotiations, contracts, and financial arrangements, though not involved as a source of supply. With the increase in demand for industrial plans and equipment for projects in developing countries, third-country trade is expected to become very important to the sogo shosha in the future. Id. at 7.

58 Cole, supra note 13, at 284.


60 Note, supra note 6, at 766.

61 Id. Firms in the six largest sogo shosha groups transacted an average of 10 to 30% of their total purchases and sales in their own group, and completed 20% of their borrowing
This relationship contrasts sharply with the American example. While the United States banking regulations carefully monitor bank investment and loan practices, the Japanese have opted for a capital structure that makes Japanese corporations leveraged far beyond their United States counterparts. The United States has not developed export trading companies to the degree that the Japanese have for a variety of reasons. Though it is desirable to encourage small businesses to export, both because of the substantial beneficial effect it has on the economy and the sector's vulnerability during slump market periods, legal barriers, as well as American lack of interest in foreign culture, unique manufacturing practices, and fundamental social differences, will make the Japanese example difficult to follow.

The 1890 Sherman Antitrust Act, prohibiting the joint marketing activities of competitors, was one of the legal barriers Congress tried to mitigate with the Webb-Pomerene Act. Concerned with instances where United States firms were not able to compete with international sales cartels, Congress provided an exemption under Webb-Pomerene whereby properly registered American companies could combine and sell jointly in export trade, absent any Sherman restrictions. These Webb-Pomerene associations reached their peak in the 1930's, accounting for as much as 19% of total United States exports, though by 1979 that percentage had dropped to

---

needs within the sogo shosha. Cole, supra note 13, at 385-86.

63 Rigler and Lottman, supra note 38, at 6.


66 Note, supra note 6, at 768. Vast resources and a large domestic market have kept American manufacturers preoccupied. A significant factor in keeping this attitude strong is the protectionist conduct of labor, which will not admit that some industries function better outside the United States. Rather than looking toward the potential increase in export-related jobs, labor prefers to protect non-competitive job positions. Id.


67 These Webb-Pomerene associations were exempt from Sherman Act jurisdiction only if they did not restrain trade within the United States, restrain the export trade of domestic or association competitors, substantially lessen United States competition or trade, or artificially influence prices within the United States of that type of good being exported. Golden and Kolb, supra note 59, at 747-48.


[a]n association entered into for the sole purpose of engaging in export trade and actually engaged solely in such export trade, or an agreement made or act done in the course of export trade by such an association, provided such association, agreement, or act is not in restraint of trade with the United States. 

---
just 2%. There were three primary problems with Webb-Pomerene associations: 1) many associations prematurely applied for registration before making assessments of export market opportunities; 2) many members within associations were unable to agree on prices, market share, or other association activities; 3) extreme diversity of association member's products made them incompatible with single-agency exporting. This lack of effectiveness caused exporters to search for other trading tools, leading to a current exporting aid, the Export Management Company (EMC).

The EMC is a specialized form of trading company with a product-oriented, as opposed to a market-oriented, export role. It is generally small and operates through United States sales offices using a chain of distributors that place products in markets with which those distributors have contacts, rather than marketing in response to world demand. Yet even with EMCs and Webb-Pomerene associations, there is no exporting entity that combines a comprehensive list of services that an exporter would desire: knowledge of foreign markets, cultures, economies, laws, government regulations, communications networks, and financing ability. At the same time, however, the number of dollars sent by the United States overseas through trade deficits and shrinking United States markets have substantially increased the potential for exporters to penetrate foreign markets. Moreover, recent multilateral trade agreements and bilateral efforts by the United States have eroded tariff and non-tariff barriers to United States export-

---

Note, supra note 6, at 772.

Newman, Exports and Antitrust: Webb-Pomerene Associations and Agricultural Exporters, 2 AGRIC. L.J. 434, 445 (1980). The decline in number of Webb-Pomerene associations was due to many factors, including uncertainty as to the application of the Sherman Act to the associations, lack of membership discipline, reoccupation with domestic markets, and lack of market domination which helped the exercise of foreign market price control. Note, supra note 6, at 772. As a result, between 1918 and 1965, 37% of all registered associations functioned for five years or less, while 26% never became active at all. Newman, supra note 71, at 445.

Note, supra note 6, at 773.

Id. at 773-74. The EMC performs the service of arranging and coordinating exports through firms that handle marketing and sales strategy, pricing policy, documentation, insurance, overseas servicing of goods, and customer contacts. The relationship between a manufacturer and the EMC is usually short, as the EMC is viewed as a method to "open the door" to export sales. Once market entry is established, the manufacturer's next step is to begin exporting directly. Lewis, supra note 63, at 480.

Note, supra note 6, at 758.

Neill, supra note 15, at 449.
ers.\textsuperscript{76} These factors, coupled with the estimate that enormous numbers of new jobs in manufacturing are directly linked to exporting,\textsuperscript{76} set the stage for a new export trading entity, the Export Trading Company.

III. THE EXPORT TRADING COMPANY

A. In General

The Export Trading Company Act of 1982\textsuperscript{77} was a bipartisan effort by the Congress to cure two problems inhibiting the development of exporting organizations: undercapitalization\textsuperscript{78} and antitrust regulations.\textsuperscript{79} The ETC Act confronts these dilemmas by providing for limited bank investment in ETCs,\textsuperscript{80} and procedural reform of the Webb-Pomerene antitrust exemption legislation.\textsuperscript{81} Only the first two of the ETC Act's four titles specifically encourage the formation of trading companies, while the final two, the antitrust titles, apply equally to all export activity.\textsuperscript{82} Title I is a general statement of purpose and creates an office of export trade in the Department of Commerce.\textsuperscript{83} Title II, the Bank Export Services Act, provides for expanded financial resources to be made available to ETC's authorizing bank holding companies, banker's banks, and Edge Act and Agreement Act corporations\textsuperscript{84} to directly invest in and extend credit to ETCs.\textsuperscript{85} This title also authorizes the Export-Import Bank to guarantee loans made by financial institutions or other public or private creditors to ETCs and other exporters who satisfy certain conditions.\textsuperscript{86} Title III provides for export trade certificates of review, whereby potential exporters can

\textsuperscript{75} Id.
\textsuperscript{76} Huszagh and Barksdale, Barter and Countertrade: A "New" Approach to International Marketing (February 10, 1983) (available from the Department of Marketing & Distributions, College of Business Administration, University of Georgia).
\textsuperscript{77} Export Trading Company Act of 1982, Pub. L. No. 97-920, 96 Stat. 1233 (1982). The bill, S. 734, was sponsored by Senator John Heinz of Pennsylvania, and was essentially the same as S. 2718 which passed the Senate unanimously on September 3, 1980, but died in the House of Representatives due to inaction. In the 97th Congress, Senator Danforth reintroduced the bill as S. 734.
\textsuperscript{78} Development, supra note 14, at 118.
\textsuperscript{79} Hawk, supra note 34, at 229.
\textsuperscript{81} Development, supra note 14, at 115.
\textsuperscript{82} Bruce and Pierce, supra note 29, at 975.
\textsuperscript{86} 12 U.S.C. § 635(a)(4).
obtain an exemption from anti-trust laws for their combined domestic export activities. These exemption certificates are issued with the concurrence of the Commerce and Justice Departments, upon the satisfaction of criteria assuring that the certified export trade activities will not adversely affect United States commerce or restrain trade within the United States or between domestic competitors.\(^7\) Title IV, the Foreign Trade Antitrust Improvements Act of 1982,\(^8\) amends the Sherman Act\(^9\) and Federal Trade Commission Act\(^9\) to further the intent of the ETC Act.

B. Title I: The Export Trading Company Act of 1982

This title lists eleven congressional findings emphasizing the importance of export trade to the American economy,\(^9\) and defining certain export terminology. The importance of this section stems from its change in direction from prior legislative attitudes ignoring the contribution of United States service industries to the economy,\(^9\) and the great potential for the export of these services. One of the major elements of world trade is services, and the United States is the world's largest exporter with over $60 billion in 1982.\(^9\) The exclusion of services from qualification for exemption was a significant problem with the Webb-Pomerene Act,\(^9\) and their inclusion in the ETC Act is a vital boost to service industries.\(^9\)


\(^{8}\) 15 U.S.C. §§ 1(b)(a) and 45(a)(3).


\(^{9}\) Hawk, supra note 34, at 216.

\(^{9}\) Robinson, supra note 27, at 23.

\(^{9}\) Id. According to the United States Department of Commerce Bureau of Economic Analysis, seven out of every ten American workers are employed in service industries. Over the past 15 years productivity in this industry has increased by 20% largely due to the computer and telecommunications revolution. Service industries also contribute to the stability of the economy, as consumer spending for services seems to be less vulnerable to recession than other sectors of the economy. For example, during the 1974-75 recession, while consumer spending for durable goods dropped eight percent, personal spending for services grew by more than two percent. Id.

\(^{9}\) There are some who voiced opinions during the debate on S. 734 that the bill was unnecessary because the United States export situation has not yet reached crisis proportions. Though it is true that with its vast exports of services the United States maintains an overall trade surplus, the export of services represents a shrinking portion of total trade, amounting to slightly more than 40% of trade in goods, a decline of 10 points in 10 years. Reinsch, supra note 4, at 77-78.

\(^{9}\) The construction industry will benefit tremendously from the ETC Act service exemption. Such an exemption will provide, by estimate of the National Construction Agency, $2
“Services” includes an expansive list of technical, professional, repair, and construction activities that export trading companies may engage in overseas.96 “Export trade services” mentioned by the ETC Act relate to activities ETCs can use to facilitate the export of goods or services from the United States.97 While “services” exported by an ETC may include data processing, communications, insurance, management, or architectural work, “export trade services” provided by an ETC may include international market research, trade documentation, freight forwarding, warehousing, or taking title to goods. These examples are not exhaustive, and the ETC Act contemplates a wide variety of service exports.

A point of interest in Title I is the language in section 103(a)(4)98 which defines an “export trading company” as an entity that is organized and operated “principally” for purposes of exporting. Some commentators consider this language bothersome, noting that ETCs must be free to engage in barter, countertrade, and third-country trade to be successful.99 Those commentators contend that restrictions on the ETCs’ ability to import could impair the ETCs’ flexibility, close their markets, and reduce opportunities for them to gain valuable commercial experience that would enhance their competitiveness in the international market.100 The fear may be unfounded. Though an ETC must be “principally” engaged in exporting, it does not have to be “exclusively” engaged in exporting, making barter and countertrade permissible.101 The wording of the section only implies that a majority of the ETC’s activity be related to exporting, and not that there is any set limit

billion in receipts for construction firms. Lewis, supra note 63, at 482 n.97.
96 Export Trading Company Act, 15 U.S.C. § 4002(a)(2) (1983). The term “services” includes, but is not limited to accounting, amusement, architectural, automatic data processing, business, communications, construction, franchising and licensing, consulting, engineering, financial, insurance, legal, management, repair, tourism, training, and transportation services. Id.
97 Export Trading Company Act, 15 U.S.C. § 4002(a)(3) (1983). The Term “export trade services” includes, but is not limited to, 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 provided in order to facilitate the export of goods or services produced in the United States. Id.
99 Cole, supra note 13, at 297.
100 Id.
101 Hirschhorn, supra note 1, at 747.
on that activity. The language may simply be a method of distinguishing an ETC, which can export goods and services of unaffiliated organizations and import as well, from a Webb-Pomerene association, which traditionally has been characterized as involved solely in export trade among its members.102

C. Title II: The Bank Export Services Act

The preamble of the ETC Act103 represents a radical departure from past governmental principles of bank regulation.104 Over the past sixty years, United States banking laws and regulations such as the Glass-Steagall Act105 and the Bank Holding Company Act106 have established a general policy of separating banking from commerce.107 The purpose of these special regulations was to insure the soundness of banking organizations and to protect public and private sources from the risk of bank failure.108

In recent years, banks and bank holding companies have had moderate success in expanding their activities into the few areas that were exempt from Glass-Steagall and Bank Holding Company Act restrictions.109 During this same period there has also been a

---

103 Export Trading Company Act, 15 U.S.C. § 4001(10) (1983). "If United States trading companies are to be successful in promoting United States exports and in competing with foreign trading companies, they should be able to draw on the resources, expertise, and knowledge of the United States banking system, both in the United States and abroad. . . ." Id.
104 Ferchill, supra note 3, at 268.
105 The Glass-Steagall Act, Banking Act of 1933, 48 Stat. 162 (codified as amended in scattered sections of 12 U.S.C.), created a complete separation of banking and commerce. Congress felt that such a division was needed to insure that deposits were managed in a responsible manner and that combinations of banking and commercial firms could not create unregulated concentrations of power. The Act allowed banks to become involved only in traditional banking activities, unless a specific non-banking activity was exempted by the Act. Ferchill, supra note 3, at 268.
106 The Bank Holding Company Act of 1956, 12 U.S.C. § 1841 (1976), was created to bring states regulated and unregulated non-banking companies that controlled banks under federal control. The provisions of the Act are similar to the Glass-Steagall Act in that they prohibit bank holding companies from investing in the shares of a company engaged in non-banking activities, unless such activities were exempted. Id. at 269. The most important of these exceptions is that allowing bank holding companies to start or acquire non-banking activities which are "so closely related to banking as to be a proper incident thereto" and which produce "public benefits." Cole, supra note 13, at 288.
107 Id. at 287.
108 Id. at 289.
109 Ferchill, supra note 3, at 269. In the past laws were enacted permitting bank invest-
growing realization that other countries, not having comparable laws, were gaining considerable competitive advantages over United States exporters, and that bank equity would enable ETCs to make the "split-second" decisions necessary to take advantage of opportunities as they arise in international markets. This growing awareness, plus the successful precedent that was established by bank equity participation in Small Business Investment Companies, provided the framework for banking involvement in the ETC Act.

Banks can supply what is often the most important aspect of an export sale: financing. Banks have the ability through their present organization to provide ETCs with foreign correspondent bank connections, knowledge of foreign markets, communication and operations systems, information on foreign currency transactions, and managerial expertise for large-scale inventory control. To bid competitively, move goods quickly, and penetrate foreign markets, an effective ETC needs the capital and lending capacity of banking organizations. Indeed, because there are fewer foreign restrictions on commercial banking overseas, many branches of United States banks have already developed special training in merchant banking.

The ETC Act amends the Bank Holding Company Act to permit bank holding companies, banker's banks, and Edge Act or

---

110 Development, supra note 14, at 119.
112 Rigler and Lottman, supra note 38, at 12.
113 Cole, supra note 13, at 290.
114 Hirschhorn, supra note 1, at 748.
115 Cole, supra note 13, at 289.
116 Id. at 291. Not only do banking organizations have extensive overseas connections, but they also maintain a domestic retail banking network which reaches a larger number of the small and medium-sized companies that manufacture exportable products. Id. at 290.
117 A bank holding company is a holding company that owns at least 25% of any bank subsidiary and which is registered with the Federal Reserve Board (Board) under the Bank Holding Company Act, 12 U.S.C. § 1841 (1976). Bank holding company activities have traditionally been closely related to banking, such as credit cards or leasing. SUMMARY OF EXPORT TRADING COMPANY LEGISLATION, supra note 34.
118 A banker's bank is a bank whose only clients are other banks. Small banks form banker's banks to offer a variety of services that they could not independently offer. Inclu-
Agreement Act corporations to invest in ETCs without the old considerations of whether the activities of the ETC are "closely related to banking." The bank holding company, was chosen over individual banks to work with ETCs because Congress felt that such a structure could adequately minimize the potential risk to member banks and insure that there was a separation of the bank's export activities from its deposit-taking functions. The bank holding provisions of the ETC Act are permissive and do not limit the the bank holding company's investment in ETCs, so long as there are no violations of other laws concerning formation of companies in international trade.

Although the form of bank holding company ownership is not limited by the ETC Act, the extent of bank investment is limited. Any bank holding company investment in an ETC will be subject to prior approval by the Federal Reserve Board of Governors. The ETC Act requires that a banking organization notify the Board at least sixty days before making an investment in an ETC, with the Board having the option to extend this review period thirty days if necessary information is not filed or is inaccurate. If the Board does not object, the investment may proceed at the end of the waiting period.

An Edge Act Corporation, 12 U.S.C. § 601 (1976), is a corporation chartered, supervised, and examined by the Federal Reserve Board for the purpose of engaging in foreign or international banking or other foreign or international financial operation. They participate in certain limited deposit-taking functions in the United States. An Agreement Act Corporation, 12 U.S.C. § 611 (1976), is a federally or state chartered corporation that has entered into an agreement or undertaking with the Federal Reserve Board that it will not exercise any power that is impermissible for an Edge Act corporation. Id. Neither does the Act restrict ETC ownership to exclude foreign investors. The legislation will allow a foreign bank, but not individual to own an ETC. Neill, supra note 15, at 451. A bank holding company may choose to create or acquire a wholly owned ETC subsidiary, or may wish to make a partial investment in an ETC joint venture with some other banking or non-banking entities. Ferchill, supra note 3, at 284.

The ETC Act prohibits a bank holding company from:

1) investing more than 5% of its consolidated capital and surplus in an ETC, § 1843(3)(14);

2) extending credit to ETCs in an amount totalling more than 10% of its con-
Once Board approval has been granted and a bank holding company has invested in an ETC with up to 100% ownership, the Board can exercise regulatory power over the banking interests and can terminate investment under certain conditions. In order to prevent any speculative activity by bank holding companies, Congress gave the Board the power to limit or revoke investment authorization in ETCs if the Board determines that the ETC has taken positions in commodities or commodity contracts, in securities, or in foreign exchange, beyond what is necessary in the course of normal business operations. This regulatory interest, however, does not extend to the actual operation of the ETC. The Board's concern only applies to the initial bank holding company investment approval and the later compliance with any Board orders and any limitations in the initial approval or in the ETC Act.

Title II also contains two other provisions to help investment in ETCs. First, to negate a perception that the Export-Import Bank was not helping to finance small business, Congress added to the ETC Act authorization for the Bank to guarantee loans extended by financial institutions or other public or private creditors to

solidated capital and surplus, § 1843(3)(14)(B)(i);
3) extending credit to ETCs in which it has an investment, or to customers of that ETC, at terms more favorable than those given similarly situated borrowers, or where the extension of credit involves more than normal risks, § 1843(3)(14)(B)(iii);
4) engaging in agricultural production or manufacturing activities, except for any incidental product modification that is necessary to make United States goods or services conform to foreign requirements or facilitate overseas sale. § 1843(3)(14)(C)(ii).

The Board may disapprove of an application only if necessary to prevent the following: unsound banking practices, undue concentration of resources, decreased or unfair competition, conflicts of interest, an effect on 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, or situations in which the bank holding company fails to furnish the required information. Export Trading Company Act, 12 U.S.C. § 1843(3)(14)(A)(iv)(I)-(III).

Ferchill, supra note 3, at 278.

Id. The Board recognized that bona fide hedging was a necessary activity in the ordinary course of trade, but desired to eliminate speculation. For guidance as to the line drawn by the Board between hedging and speculation, see generally the rules of the Commodities Futures Trading Commission, 17 C.F.R. §1.3(z) (1982), in connection with commodity contracts.


Ferchill, supra note 3, at 281.

C. Martel, Memorandum to the United States House of Representatives, Committee on Small Business, Subcommittee on Export Opportunities and Special Small Business Problems 5 (September 17, 1982) (available from the Atlanta Chamber of Commerce).
ETCs.\textsuperscript{134} Congress qualified this guarantee program by making it available only when necessary to facilitate exports that would not otherwise be made,\textsuperscript{135} and when the private credit market was not satisfying the demand for money.\textsuperscript{136} It is important for the Board of Directors of the Export-Import Bank to see that a major share of the loan guarantees actually go to the small businesses that the ETC Act was intended to help.\textsuperscript{137} The Bank guarantees can be a boost to these small, medium-sized, minority, and agricultural concerns if Congress supplies adequate funding. The amount of beneficial impact will depend on the level of support given this portion of the ETC Act during appropriations.\textsuperscript{138}

Second, the ETC Act addresses the need for liberalization of restrictions on the rules governing bank acceptances.\textsuperscript{139} The ETC Act amends the Federal Reserve Act\textsuperscript{140} to permit any member bank or Federal or State branch of a foreign bank to accept drafts or bills of exchange in an amount not exceeding 150% of its paid-up and unimpaired capital stock and surplus.\textsuperscript{141} Under certain conditions, the Board may authorize this limit to reach 200% of such capital and surplus.\textsuperscript{142} The ability to use more bank acceptances is important as this process allows the seller to forego concern for the buyer's credit worthiness, as he can look to the bank for payment guarantees. In this manner many sales can be made between buyers and sellers who do not know each other and would not ordinarily trade.\textsuperscript{143}

\begin{flushright}
\textsuperscript{134} Export Trading Company Act, 12 U.S.C. § 635 a-4.
\textsuperscript{135} Id. § 635 a-4 (2).
\textsuperscript{136} Id. § 635 a-4 (1).
\textsuperscript{137} Id. § 635 a-4.
\textsuperscript{138} Ferchill, supra note 3, at 282.
\textsuperscript{139} Export Trading Company Act, 12 U.S.C. § 372. Banker's acceptances aid sales by substituting a bank's credit standing for that of the buyer, with the bank guaranteeing payment to the seller. The previous limits on banker's acceptances were imposed in 1913. Since that time, however, a dramatic increase in the use of acceptances in international trade has occurred. Congress acknowledged that banker's acceptances were safe and liquid investments. It increased the level of acceptances allowable from 50%, or with Board approval 100%, of capital and surplus, to the present ETC Act levels. Ferchill, supra note 3, at 281-82.
\textsuperscript{141} Export Trading Company Act, 12 U.S.C. § 372.
\textsuperscript{142} Id. at § 372. In reviewing ETC investment proposals which exceed the ETC Act's limits, the Board must examine the financial and managerial resources, competition, and future of the banking organization and the ETC. The Board must also consider the benefits of such changes in limits to United States business, industrial, and agricultural concerns, keeping in mind that the overall purpose of the regulations is to help small, medium-sized, minority and agricultural concerns to compete overseas. Cole, supra note 13, at 292 n.75.
\end{flushright}
There are reservations as to the value of Title II of the ETC Act. One problem stems from the reluctance of the Federal Reserve and the Federal Deposit Insurance Corporation to breach the traditional separation between banking and commerce.\(^\text{144}\) These bankers argue that precisely because of this fifty-year separation, banks that now attempt to become involved in export trading will encounter problems which they have no skills to resolve. Difficulties with the mechanics of shipping, insurance, and taking title to goods, all common activities of an ETC, would be totally new to conservative, risk-averse institutions such as banks.\(^\text{145}\)

Commentators suggest that a bank holding company new to the export trade area will feel compelled to rescue ETCs that are financially unstable and whose failure would unfavorably stain the bank organization's reputation and balance sheets.\(^\text{146}\) Yet, an attempt to solve the problem from the inside might bring charges against the bank holding company for improper management, risking liability far beyond the mere capital investment should the "corporate veil" be lifted.\(^\text{147}\) These concerns led the Federal Deposit Insurance Corporation to propose in 1980 and 1981 that the ETC Act be amended to limit any one bank's interest in an ETC to 20% of voting stock, and any banking group to 50%.\(^\text{148}\) The Federal Reserve Board supported these proposals, noting that a bank may be tempted to push a trading company into risky types of operations in the hope of realizing short-term gains, unless their ownership was restricted.\(^\text{149}\) The proposals, however, were not adopted.\(^\text{150}\)

The AFL-CIO felt that the ETC Act created increased competition for already scarce funds, resulting in a loss of capital normally available for productive investment, and a subsequent loss of jobs.\(^\text{151}\) The funds remaining would then be subject to bank holding companies playing "favorites" with their ETCs, and third-parties would be given unsound, unfair credit from banking organizations only interested in the customer's purchase of goods or

\(^{144}\) Rigler and Lottman, supra note 38, at 10-11.

\(^{145}\) Commentators suggest that a bank holding company new to the export trade area will feel compelled to rescue ETCs that are financially unstable and whose failure would unfavorably stain the bank organization's reputation and balance sheets. Yet, an attempt to solve the problem from the inside might bring charges against the bank holding company for improper management, risking liability far beyond the mere capital investment should the "corporate veil" be lifted. These concerns led the Federal Deposit Insurance Corporation to propose in 1980 and 1981 that the ETC Act be amended to limit any one bank's interest in an ETC to 20% of voting stock, and any banking group to 50%. The Federal Reserve Board supported these proposals, noting that a bank may be tempted to push a trading company into risky types of operations in the hope of realizing short-term gains, unless their ownership was restricted. The proposals, however, were not adopted.

The AFL-CIO felt that the ETC Act created increased competition for already scarce funds, resulting in a loss of capital normally available for productive investment, and a subsequent loss of jobs. The funds remaining would then be subject to bank holding companies playing "favorites" with their ETCs, and third-parties would be given unsound, unfair credit from banking organizations only interested in the customer's purchase of goods or

\(^{146}\) Commentators suggest that a bank holding company new to the export trade area will feel compelled to rescue ETCs that are financially unstable and whose failure would unfavorably stain the bank organization's reputation and balance sheets. Yet, an attempt to solve the problem from the inside might bring charges against the bank holding company for improper management, risking liability far beyond the mere capital investment should the "corporate veil" be lifted. These concerns led the Federal Deposit Insurance Corporation to propose in 1980 and 1981 that the ETC Act be amended to limit any one bank's interest in an ETC to 20% of voting stock, and any banking group to 50%. The Federal Reserve Board supported these proposals, noting that a bank may be tempted to push a trading company into risky types of operations in the hope of realizing short-term gains, unless their ownership was restricted. The proposals, however, were not adopted.

The AFL-CIO felt that the ETC Act created increased competition for already scarce funds, resulting in a loss of capital normally available for productive investment, and a subsequent loss of jobs. The funds remaining would then be subject to bank holding companies playing "favorites" with their ETCs, and third-parties would be given unsound, unfair credit from banking organizations only interested in the customer's purchase of goods or

\(^{147}\) Commentators suggest that a bank holding company new to the export trade area will feel compelled to rescue ETCs that are financially unstable and whose failure would unfavorably stain the bank organization's reputation and balance sheets. Yet, an attempt to solve the problem from the inside might bring charges against the bank holding company for improper management, risking liability far beyond the mere capital investment should the "corporate veil" be lifted. These concerns led the Federal Deposit Insurance Corporation to propose in 1980 and 1981 that the ETC Act be amended to limit any one bank's interest in an ETC to 20% of voting stock, and any banking group to 50%. The Federal Reserve Board supported these proposals, noting that a bank may be tempted to push a trading company into risky types of operations in the hope of realizing short-term gains, unless their ownership was restricted. The proposals, however, were not adopted.

The AFL-CIO felt that the ETC Act created increased competition for already scarce funds, resulting in a loss of capital normally available for productive investment, and a subsequent loss of jobs. The funds remaining would then be subject to bank holding companies playing "favorites" with their ETCs, and third-parties would be given unsound, unfair credit from banking organizations only interested in the customer's purchase of goods or

\(^{148}\) Commentators suggest that a bank holding company new to the export trade area will feel compelled to rescue ETCs that are financially unstable and whose failure would unfavorably stain the bank organization's reputation and balance sheets. Yet, an attempt to solve the problem from the inside might bring charges against the bank holding company for improper management, risking liability far beyond the mere capital investment should the "corporate veil" be lifted. These concerns led the Federal Deposit Insurance Corporation to propose in 1980 and 1981 that the ETC Act be amended to limit any one bank's interest in an ETC to 20% of voting stock, and any banking group to 50%. The Federal Reserve Board supported these proposals, noting that a bank may be tempted to push a trading company into risky types of operations in the hope of realizing short-term gains, unless their ownership was restricted. The proposals, however, were not adopted.

The AFL-CIO felt that the ETC Act created increased competition for already scarce funds, resulting in a loss of capital normally available for productive investment, and a subsequent loss of jobs. The funds remaining would then be subject to bank holding companies playing "favorites" with their ETCs, and third-parties would be given unsound, unfair credit from banking organizations only interested in the customer's purchase of goods or

\(^{149}\) Commentators suggest that a bank holding company new to the export trade area will feel compelled to rescue ETCs that are financially unstable and whose failure would unfavorably stain the bank organization's reputation and balance sheets. Yet, an attempt to solve the problem from the inside might bring charges against the bank holding company for improper management, risking liability far beyond the mere capital investment should the "corporate veil" be lifted. These concerns led the Federal Deposit Insurance Corporation to propose in 1980 and 1981 that the ETC Act be amended to limit any one bank's interest in an ETC to 20% of voting stock, and any banking group to 50%. The Federal Reserve Board supported these proposals, noting that a bank may be tempted to push a trading company into risky types of operations in the hope of realizing short-term gains, unless their ownership was restricted. The proposals, however, were not adopted.

The AFL-CIO felt that the ETC Act created increased competition for already scarce funds, resulting in a loss of capital normally available for productive investment, and a subsequent loss of jobs. The funds remaining would then be subject to bank holding companies playing "favorites" with their ETCs, and third-parties would be given unsound, unfair credit from banking organizations only interested in the customer's purchase of goods or

\(^{150}\) Commentators suggest that a bank holding company new to the export trade area will feel compelled to rescue ETCs that are financially unstable and whose failure would unfavorably stain the bank organization's reputation and balance sheets. Yet, an attempt to solve the problem from the inside might bring charges against the bank holding company for improper management, risking liability far beyond the mere capital investment should the "corporate veil" be lifted. These concerns led the Federal Deposit Insurance Corporation to propose in 1980 and 1981 that the ETC Act be amended to limit any one bank's interest in an ETC to 20% of voting stock, and any banking group to 50%. The Federal Reserve Board supported these proposals, noting that a bank may be tempted to push a trading company into risky types of operations in the hope of realizing short-term gains, unless their ownership was restricted. The proposals, however, were not adopted.

The AFL-CIO felt that the ETC Act created increased competition for already scarce funds, resulting in a loss of capital normally available for productive investment, and a subsequent loss of jobs. The funds remaining would then be subject to bank holding companies playing "favorites" with their ETCs, and third-parties would be given unsound, unfair credit from banking organizations only interested in the customer's purchase of goods or

\(^{151}\) Commentators suggest that a bank holding company new to the export trade area will feel compelled to rescue ETCs that are financially unstable and whose failure would unfavorably stain the bank organization's reputation and balance sheets. Yet, an attempt to solve the problem from the inside might bring charges against the bank holding company for improper management, risking liability far beyond the mere capital investment should the "corporate veil" be lifted. These concerns led the Federal Deposit Insurance Corporation to propose in 1980 and 1981 that the ETC Act be amended to limit any one bank's interest in an ETC to 20% of voting stock, and any banking group to 50%. The Federal Reserve Board supported these proposals, noting that a bank may be tempted to push a trading company into risky types of operations in the hope of realizing short-term gains, unless their ownership was restricted. The proposals, however, were not adopted.

The AFL-CIO felt that the ETC Act created increased competition for already scarce funds, resulting in a loss of capital normally available for productive investment, and a subsequent loss of jobs. The funds remaining would then be subject to bank holding companies playing "favorites" with their ETCs, and third-parties would be given unsound, unfair credit from banking organizations only interested in the customer's purchase of goods or
services from the bank-affiliated ETCs. Any funds coming from government programs, it was argued, were not beneficial to an ETC-type program because government credit alone would not provide business leadership, or improve the "red-tape" complications.

There have been critical comments on other points as well. The restriction against banking-affiliated ETCs in agricultural or manufacturing activities is a limitation not imposed on ETCs unattached to bank groups. Any limitation on bank-affiliated ETCs could make them less attractive and deter bank investment. Also, banks may be forced to deal with the possibility that their investment in an ETC will be considered a conflict of interest. In addition to the favoritism complaint, customers of banks might view the ETC investment as direct competition with their own enterprises and move their business to other banks.

These fears may be exaggerated. Banking is a very competitive industry and will certainly welcome the opportunity to develop new sources of revenue. There should be little concern over bank inexperience in the work common to ETCs, as the banks most likely to participate in ETCs already have foreign branches, and are trained in evaluating risks, researching markets abroad, and providing elaborate financing. This position makes them potential "deal-makers" with access to capital, expertise in marketing services, and efficiency and familiarity with a variety of international transactions. A logical result of a bank investing in an ETC substantially is that the holding company with a controlling interest may be the one in the best position to protect its investment and regulate its exposure to risk. Equity control creates operational control, and thereby better risk management, rather than instability. The control also enhances the general reduction of risk in

---

152 Cole, supra note 13, at 295. The counter-argument is that by the very limitation of credit available from banking organizations, hindering some ETCs affiliated with the groups from obtaining more favorable conditions, Congress may have undermined its intent to increase trading company access to additional financing. Ferchill, supra note 3, at 272.

153 Cole, supra note 13, at 280.

154 At least the restrictions are not as severe as those imposed on bank-affiliated ETCs.

155 Ferchill, supra note 3, at 272.

156 Cole, supra note 13, at 294.

157 Ferchill, supra note 3, at 283-84.

158 Development, supra note 14, at 121.

159 Rigler and Lottman, supra note 38, at 13.

160 Id.

161 Id.
international trade, thereby resulting in reduced loan rates to affiliated ETCs, increasing overall United States competitiveness.\(^{162}\)

The ETC Act's changes in restrictive banking regulations are beneficial to bank investment as well. Congress, in the preamble to the ETC Act, issued a strong directive to the Federal Reserve Board to encourage bank participation in ETCs.\(^{163}\) To interest banks in ETC investment, Congress and the Board excluded any rules in the ETC Act providing for protests or public hearings on a bank holding company's application to invest in an ETC.\(^{164}\) The ETC Act also shifts the traditional burden of proof in demonstrating violation of banking rules. The legislation places the burden on the Board to show that a proposed investment would violate the ETC Act, and does not require the investor, as was previously the case, to prove that the investment is authorized.\(^{165}\) The new increase in allowable banker's acceptances will permit small banks, which were more likely to be constrained by lower acceptance levels before the ETC Act than larger banks, to increase substantially their international trade activities.\(^{166}\)

While there is always the possibility of insider misconduct in business transactions, that chance is not increased when ETCs are involved. The stringent requirements of the ETC Act in this regard reduce the possibility of any harm coming to bank depositors for managerial overlaps or self-dealing.\(^{167}\) In addition, banks and ETCs will still be subject to many laws directing business activity in the United States\(^{168}\) and abroad that will mitigate any possible negative effects of mismanagement.\(^{169}\) What is apparent is that the maintenance of a barrier between banking and commerce merely

\(^{162}\) Ferchill, supra note 3, at 272. A controlling interest in an export trading company does not necessarily threaten the soundness of a bank more than a non-controlling interest. A bank's financial exposure is determined more by its total assets at risk in the ETC, an element already controlled by the ETC Act's capital and surplus tests. Cole, supra note 13, at 293.


\(^{164}\) Ferchill, supra note 3, at 275. Such procedures under the Bank Holding Company Act of 1956, 12 U.S.C. §§ 1841-50 (1976), have substantially delayed and increased the cost of bank holding company ventures under consideration. Ferchill, supra note 3, at 275. Bank investment approval letters from the Federal Reserve Board are available for public inspection.

\(^{165}\) Ferchill, supra note 3, at 275-76.

\(^{166}\) Id. at 282.

\(^{167}\) Cole, supra note 13, at 294.

\(^{168}\) For example, United States customs bonds and regulations in trade over the border with Mexico will still apply to ETCs.

\(^{169}\) Ferchill, supra note 3, at 287.
for the sake of tradition neither helps the banking community, nor the businesses in the United States seeking to become involved in the international export challenge.\textsuperscript{170} The ETC Act is a valuable tool in breaking down this barrier.

D. Title III: Export Trade Certificates of Review

There has been a growing demand for a comprehensive assessment of the United States antitrust laws in recent years.\textsuperscript{171} The Justice Department, however, has disagreed with the need for any changes.\textsuperscript{172} Despite this difference in opinion, it seems clear that the complexity and ambiguity of the antitrust laws do make it difficult for counsel to act aggressively when dealing with antitrust and international trade.\textsuperscript{173} American firms are hampered by restrictive antitrust laws in domestic competition, while foreign competitors are free to pursue the open market at will, either because there are no foreign antitrust laws to limit them, or because there is a lack of jurisdiction over them by the United States.\textsuperscript{174} The changes in the importance of international trade to the United States and the demand for a more definitive export policy have made it imperative that the United States re-examine its antitrust legislation.\textsuperscript{175}

\textsuperscript{170} Cole, supra note 13, at 289.
\textsuperscript{171} Hawk, supra note 33, at 201. The National Association of Manufacturers issued a report several years ago which concluded that the United States antitrust laws were significantly hampering the competitive ability of American firms to do business abroad. Id. at 229.
\textsuperscript{172} Id. at 229-30.
\textsuperscript{174} Hawk, supra note 33, at 231.
\textsuperscript{175} Proclamation No. 5046, 48 Fed. Reg. 15,443 (1983). In addition to those factors there are other reasons to examine the United States antitrust laws. There has been increasingly hostile foreign reaction to recent United States attempts to cure antitrust regulation difficulties. Though the hostility is not new, the methods used by foreign governments to counter antitrust advances in the United States are recent. "Blocking" and "claw-back" provisions are being increasingly imposed by other nations. These provisions are being increasingly imposed by other nations. They are intended to deter or block United States antitrust investigations and actions involving foreign parties or governments, particularly when the conduct takes place outside the United States and within the territory of the objecting government. The British Protection of Trading Interests Act contains a "claw-back" provision that creates a cause of action in British courts for recovery of the punitive awards portion of a foreign multiple damages judgment. Australia, Canada, France, the Netherlands, and Great Britain also have statutes that block enforcement of United States pre-trial orders for production of information in antitrust actions. There has also been a growing demand among developing nations for regulation of restrictive business practices, monopolies, and multinational firms. These countries have been motivated by the economic, social, and political power of multinationals more than by antitrust concerns, but they re-
The basis of much of the United States antitrust policy has been the Sherman Act,\textsuperscript{176} with specific problems in international trade governed by the Webb-Pomerene Act.\textsuperscript{177} The Sherman Act allowed the Justice Department to supervise the prohibition of contracts, combinations, and conspiracies in restraint of interstate commerce or trade with foreign nations.\textsuperscript{178} The Webb-Pomerene Act exempted small associations of companies solely engaged in export from the Sherman Act's restrictions,\textsuperscript{179} and was supervised by the Justice Department and Federal Trade Commission.\textsuperscript{180}

Repeated antitrust challenges brought by the federal government and private parties proved to be very chilling to Webb-Pomerene association attempts.\textsuperscript{181} A 1973 General Accounting Office study concluded that the ability of the Justice Department to prosecute under antitrust laws, regardless of whether the Federal Trade Commission had first made an investigation or recommendation, led many to fear the possibility of reckless antitrust prosecution.\textsuperscript{182} This ambiguity in the roles of the Federal Trade Commission and the Justice Department with regard to antitrust exemptions was an adversity that few small and medium-sized businesses were prepared to face.\textsuperscript{183}

In order to give these potential exporters the security needed for them to become involved in the international market, Title III of the ETC Act\textsuperscript{184} established a procedure for antitrust review and certification entitling the certificate holder to limited antitrust exemption.\textsuperscript{185} The conduct covered by such a certificate is immune from state as well as federal antitrust laws and can only be chal-

\textsuperscript{178} Neill, Export Trade Associations, supra note 15, at 55.
\textsuperscript{179} Id. The Webb-Pomerene associations were immune so long as they did not (1) restrain the export trade of any domestic competitor, (2) restrain trade within the United States, (3) artificially or intentionally influence domestic prices of commodities of the type exported by the association. Id.
\textsuperscript{180} Hirschhorn, supra note 1, at 749.
\textsuperscript{181} Id. at 748.
\textsuperscript{182} Newman, supra note 70, at 438 (citing General Accounting Office report). Indeed, the Webb-Pomerene Act did provide for Federal Trade Commission investigation, and then a recommendation to the violating firms involved of ways to adjust their practices, prior to Justice Department or Federal Trade Commission prosecution. Id.
\textsuperscript{183} Hirschhorn, supra note 1, at 749.
\textsuperscript{185} SUMMARY OF EXPORT TRADING COMPANY LEGISLATION, supra note 34, at 2.
lenged by suit for single damages or injunctive relief, if there is a charge that the exporter's conduct violated the minimum standards set out in the title.\textsuperscript{186} The Department of Commerce was selected to administer the title's provisions, although both the Federal Trade Commission and Justice Department can provide advice to Commerce on certification, and Justice can in certain situations enjoin conduct of exporters or deny a license for exemption.\textsuperscript{187} Title III certification is available to any United States resident\textsuperscript{188} or virtually any entity doing business in the United States, although foreign residents are not eligible for protection.\textsuperscript{189} Unlike the Webb-Pomerene Act,\textsuperscript{190} Title III does not require that a certificate holder be solely engaged in exporting, and a certificate can cover not only goods but services as well.\textsuperscript{191} A certificate can also exempt export trade activities\textsuperscript{192} or methods of operation by which export trade is conducted.\textsuperscript{193} Though a certificate holder can engage in importing and other activities, the protection of the certificate only applies to export conduct.\textsuperscript{194}

There are four criteria that the Commerce and Justice Departments consider before issuing a certificate exempting an applicant from antitrust liability. It must be established that an applicant's specified export trade, export trade activities, and methods of operation do not violate these standards:

\textit{First Standard}

A certificate of review shall be issued to any applicant that establishes that its specified export trade, export trade activities, and methods of trade 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 com-

\begin{footnotesize}
\textsuperscript{187} Id. § 4014(b)(2).
\textsuperscript{188} Id. § 4021(5).

\textsuperscript{189} Bruce and Pierce, supra note 29, at 999. Certification is available under Title III not only for the traditional export of goods, but also services, which under the statutory definition can be nearly any type of service within the minimum requirements of the ETC Act. A certificate, however, can only immunize the actual export of services or an ETC's services given through its methods of operation. It is not clear whether Congress intended to deny certification to export service or facilitation companies, such as freight forwarders not related to an ETC, but providing export services. It seems to be very unlikely, however, that Congress meant to penalize independent suppliers of these services in such a manner. \textit{Id.}

\textsuperscript{192} Export Trading Company Act, 15 U.S.C. § 4021(3).
\textsuperscript{193} Id. § 4021(4).
\textsuperscript{194} Bruce and Pierce, supra note 29, at 998.
\end{footnotesize}
petitor of the applicant.\textsuperscript{196}

This standard states that conduct having a “substantial” anti-competitive impact will not be certifiable. This is a codification of existing court interpretations of the Webb-Pomerene Act, plus those of the Justice Department and the Federal Trade Commission, that have ignored insubstantial effects on competition in applying sanctions.\textsuperscript{196} The certification analysis will balance the probable pro-competitive and anticompetitive effects of the proposed action with each relevant market to determine whether the impact is unreasonably restrictive on competition. If the net impact of the restraint will not substantially lessen competition, it will be certified. Strict scrutiny will be applied to reveal any anticompetitive effects of proposed conduct when markets are highly concentrated or when applicants have a large market share.\textsuperscript{197}

\textit{Second Standard}

A certificate of review shall be issued to any applicant that establishes that its specified export trade, export trade activities, and methods of trade activities will not unreasonably enhance, stabilize, or depress prices within the United States of the goods, wares, merchandise, or services of the class exported by the applicant.\textsuperscript{198}

This requirement is based entirely on the Webb-Pomerene Act, which contains very similar language.\textsuperscript{199} The difference is that while the Webb-Pomerene Act forbids “artificial or intentional” increases or decreases in price, the ETC Act prohibits “unreasonable” price effects. Congress wanted the ETC Act to contain a more objective test that depended on foreseeable consequences of con-

\textsuperscript{196} Bruce and Pierce, supra note 29, at 1002-03.
\textsuperscript{197} Guidelines for the Issuance of Export Trade Certificates of Review, 48 Fed. Reg. 15,937 (1983). This requirement resembles Title IV of the ETC at 15 U.S.C. § 1 notes, which provides that the Sherman Act and the Federal Trade Commission Act do not apply to conduct involving foreign commerce unless it has a substantial, direct, and reasonably foreseeable anticompetitive effect on United States interstate commerce or the export business of a competitor. Bruce, supra note 29, at 1002.
\textsuperscript{199} Bruce and Pierce, supra note 29, at 1003. Title III was originally designed as an amendment to the Webb-Pomerene Act, 15 U.S.C. §§ 61-65 (1976), but was included in the ETC Act by a conference committee action in 1982. The conference committee grafted many provisions of the original Senate bill onto the certification procedures of the House version, creating a “hybrid.” Thus, many provisions of Title III must be read in terms of the Webb-Pomerene Act, even though that act still remains in force and has nothing to do with the ETC Act. See generally H.R. REP. No. 637, 97th Cong., 2d Sess. 18-19 (1982).
duct rather than states of mind. Congress also desired to make it clear that the restrictive effect on the United States market was of prime concern, and not the well-being of foreign markets.

**Third Standard**

A certificate of review shall be issued to any applicant that establishes that its specified export trade, export trade activities, and methods of trade activities will 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.

This standard of the ETC Act is important because of the implications of its enforcement. Although the Federal Trade Commission has the power to prevent violations of antitrust law, Title IV cuts the Commission's power to regulate ETCs and transfers it to the Commerce Department. Both the Commerce Department and Justice Department, which have never before regulated unfair competition, are suddenly the "watchdogs" under this title. This creates concern on two fronts. First, Commerce is a pro-trade organization now placed in the position of looking for unfair competition. Second, there is concern that the inexperience of the Commerce Department may allow for some unfounded antitrust findings. Ideally, the Commerce and Justice Departments will find unfair competition only in cases where there is an actual violation of some federal antitrust law, as has been done by the Federal Trade Commission in the past.

**Fourth Standard**

A certificate of review shall be issued to any applicant that establishes that its specified export trade, export trade activities, and methods of trade activities will 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.

Analysis of this standard involves considering whether the applicant reasonably expects the exported goods or services to reenter

---

200 Bruce and Pierce, supra note 29, at 1003.
201 Id.
203 They, therefore, have no precedent to guide their actions other than that provided by other agencies with differing goals from Commerce and Justice.
204 Bruce and Pierce, supra note 29, at 1004.
the United States and, if so, whether that re-entry will have a significant domestic impact. Concern developed that this standard might cause problems with goods and services exported from the United States and incorporated into other products overseas for re-importation. The Commerce Department, in its Guidelines for Issuance of Export Trade Certificates of Review, solved this problem by exempting these products or services from consideration when incorporated or significantly transformed in character overseas.

Prior to the point of certification or denial, publication of a notice in the Federal Register identifies the applicant and describes the export conduct to be certified. No certificate will be filed for an applicant until at least thirty days after publication in the Federal Register to allow interested parties time to submit information relevant to the determination of whether a certificate should be issued. The Justice Department must concur with a Commerce Department decision to certify conduct, and either department can deny the issuance of the certificate by a finding that an applicant's conduct does not comply with the Title III standards of the ETC Act.

Once an applicant's proposed export activities have been certified under the four standards of Title III, that conduct which is specifically addressed in the certificate of review is exempt from criminal and civil suits under state and federal antitrust laws. There is one condition. The certified applicant's export conduct must remain within the four standards of Title III. Should that conduct deviate from the standards, the applicant could be sued on two levels. A private suit may be brought for injunctive relief and actual damages by any person injured by the deviation from

---

206 Guidelines for the Issuance of Export Trade Certificates of Review, 48 Fed. Reg. 15,937 (1983). Foreseeability is at issue here, and re-importation is considered foreseeable when there is a market for goods and services in the United States, and when the price at which the certificate holder exports the goods or services, plus the cost of export transportation, plus re-importation costs, plus taxes and tariffs, is still lower than the prevailing United States market price. Bruce and Pierce, supra note 29, at 1005.

207 Bruce and Pierce, supra note 29, at 1005.


209 SUMMARY OF EXPORT TRADING COMPANY LEGISLATION, supra note 34, at 2.


211 Id. § 4013(b).

212 Hawk, supra note 33, at 217.
certified conduct, or the Attorney General may bring suit to enjoin any conduct considered to threaten clear and irreparable harm to the national interest. To aid both the Commerce and Justice Departments in assuring that conduct remains within the standards, Title III provides for the submission of annual reports to update information required by the application for certification.

In regard to private actions, Title III is important in its restrictions on plaintiffs. A legal action brought by a plaintiff for an exporter's deviation from the standards of the ETC Act standards must begin within two years after the plaintiff knows of the non-compliance with the title. Suit may be filed no later than four years after the cause of action accrues. Significantly, a successful plaintiff is allowed to recover only actual damages and not treble damages, if he can prove that the certificate holder's actions were outside the scope of certified conduct. This remedy is not an antitrust remedy, but it is unique to the standards of Title III of the ETC Act, and these are the exclusive standards applicable to such an action.

Title III provides other protections to a certificate holder. The ETC Act lists two deterrents to frivolous actions against certificate holders meant to forestall their export activities. First, there is a presumption that the certified conduct complies with the Title III sections which list the standards for export conduct. A plaintiff must overcome this presumption and prove that he was injured to obtain any recovery. Second, if the plaintiff does not overcome this presumption, the court shall award to the certificate holder the costs associated with defending against the claim. This double protection could prove to be an important method of preventing

---

214 Id. § 4016(5). Foreigners injured by anticompetitive conduct in exporting cannot recover damages unless there is some substantial anticompetitive harm to United States interstate commerce or imports. Though denying foreigners the right to sue may seem inequitable, the ETC Act is designed to protect United States domestic and foreign export markets, not those of other nations. Bruce and Pierce, supra note 29, at 1011.
216 Id. § 4016(b)(2).
217 Id.
218 Id. § 4016(b)(1).
219 Id.
220 Id. § 4016(b)(3).
221 Id. § 4016(b)(4). A plaintiff can lose an action under this section and still not have to pay the defendant's costs and attorney's fees only if he can prove that a violation of one of the four standards occurred, but cannot prove that he was injured by the violations. Bruce and Pierce, supra note 29, at 1012.
unfounded suits against certificate holders who could lose substantial overseas business if preoccupied domestically on questions as to their present and future export conduct.

The foregoing discussion has been restricted to affirmations of certificate applications. Should the Commerce Department or Justice Department deny or modify an application, in whole or in part, the aggrieved party can appeal to the appropriate district court within thirty days for a decision to set aside the determination as erroneous.222 A negative decision on an application, however, is not a liability to the applicant. Neither the negative decision on the application, nor the statement of reason for the denial of certification by the Commerce Department is admissible into evidence in any administrative or judicial proceeding for violation of antitrust laws.223 Thus, applicants need not worry about the disclosure of confidential information in their applications.

E. Additional Considerations

There are several criticisms of the Title III antitrust certification process, the foremost of which is whether a certificate would provide any meaningful protection and, if so, whether the available protection is worth the cost of certification.224 The certification process has been described as overly complicated and a deterrent to small businesses that are interested in exporting but unable to comply with time-consuming and expensive requirements.225 The procedure has also been criticized on confidentiality grounds. Many fear that the publication provisions of proposed conduct and business partnerships may inhibit some from applying for certification. There is also a fear that once a business begins the application process, sensitive information may be leaked to competitors or be used in some manner by the Justice Department should it decide to step out of export promotion and back into antitrust prosecution.226

The basic problem with the Title III antitrust certification process is that it does not give a total guarantee of antitrust immunity. That guarantee is less than total because of the private cause

---

223 Id. § 4015(c).
224 Bruce and Pierce, supra note 29, at 1014.
225 C. Martel, supra note 133, at 9.
226 Bruce and Pierce, supra note 29, at 1016.
of action suits that are allowed. Commentators argue that the existence of a private cause of action merely perpetuates the very problem that the certification process should solve. Additionally, the criteria set out in the Title III export conduct standards may be more stringent than those used in formation of Webb-Pomerene associations, making the latter a more attractive method of seeking antitrust immunity in export activity. From another perspective, even if the Title III provisions are fairly stringent, one might wonder if the pro-trade Commerce Department will overlook some noncompliance, allowing the potential for domestic and foreign price-fixing to get out of control.

The Title III antitrust certification procedure also has many positive points. First, the title signifies governmental acknowledgement of the need for changes in antitrust regulation to benefit exporters. Second, past United States antitrust law enforcement has focused on horizontal agreements and their pricing, customer, and territorial arrangements. The ETC Act will deal with vertical arrangements and their various resale agreements that lead to final sale overseas. The ETC Act will permit the creation of single entities in which manufacturers, sellers of goods, and providers of financial and marketing services will use the vertical functions to ultimately export a product.

Title III provides a valuable opportunity for exporters to discuss their plans for overseas trade with the government, obtain preclearance, and gain the benefit of antitrust treble damage immunity. This forum allows both parties to negotiate, eliminating ob-

---

227 C. Martel, supra note 133, at 9.
228 Id. A private plaintiff can sue for unfair competition or a foreseeable resale to United States consumers under Title III. No such suit can be brought against one who does not hold a certificate. Bruce and Pierce, supra note 29, at 1016.
229 Hawk, supra note 33, at 218. With significant competition for credit and customers in an efficient market, businessmen in the United States are free to wait until their conduct has been challenged before bothering to raise any defenses. Some feel that this will be a difficult attitude to change and will be a detriment to any certification. Bruce and Pierce, supra note 29, at 1015.
230 Development, supra note 14, at 120.
231 Horizontal activities are those that occur among suppliers of similar products or services that attempt to create a uniform pricing system and manufacturing procedure.
232 Vertical activities are those which take the product that has been created by the horizontal activity below and move it through a hierarchy of distributors until it reaches the consumer either in the country of the product's manufacturer, or abroad.
233 Rigler and Lottman, supra note 38, at 1.
234 Id. at 2.
235 Bruce and Pierce, supra note 29, at 1015.
jectionable portions of an application while guaranteeing antitrust protection for others. Disclosure of information harmful to the applicant was a problem taken seriously by Congress, and the ETC Act contains a section devoted entirely to protection of confidential or privileged information. Since the primary purpose of certification is to protect certain conduct from antitrust law, not make it more accessible to prosecution, it is unrealistic to argue that the Justice Department may use sensitive information, obtained from certificate applications, in its prosecution of antitrust violations. The ETC Act states that any information obtained during the certification process, even that information negative enough to preclude certification, may not be used in support of any claim under antitrust laws.

A final point to emphasize is the importance of Commerce Department review of the certification process. Certainly, exporters will feel more comfortable with trade encouragement from an agency such as Commerce, rather than the Federal Trade Commission. The Commerce Department has supported this belief by assuring potential exporters that the Antitrust Division of the Justice Department has agreed to fully cooperate with Commerce to structure the certification process so as to aid the formation of ETCs.

F. **Title IV: The Foreign Trade Antitrust Improvements Act of 1982**

When Congress passed the Sherman Act in 1890, it paid little attention to its application to international trade. Legislative history provides no help in determining the relationship of the Act to overseas trading nor in discovering the policies and national interests that justified its impact on international trade. Clearly, Congress originally desired to fully exercise its Commerce Clause.

---

236 Id.
238 Id. § 4015(c).
239 Development, supra note 14, at 122.
240 Meeting at the Department of Commerce (January 10, 1983). The purpose of the meeting was to answer questions of interested parties on the implications of portions of the Export Trading Company Act.
243 U.S. Const. art. I, § 8, cl. 3.
powers over trade with other nations.\textsuperscript{244} In recent years, however, the legislative intent has been to limit the reach of antitrust laws when export conduct does not have significant effects on United States firms.\textsuperscript{246} Title IV of the ETC Act attempts to improve the Sherman and Federal Trade Commission Acts by restricting their applicability to foreign business transactions, and by codifying their jurisdictional reach.\textsuperscript{248} It also presents an alternative to Title III certification.

Title IV amends both the Sherman and Federal Trade Commission Acts\textsuperscript{247} by stating that these Acts do not apply to United States exporting and totally foreign transactions unless the export conduct has a direct, substantial, and reasonably foreseeable effect on domestic trade or commerce.\textsuperscript{248} Some confusion may result from the breadth of this title. One might argue that it would be better to forego certification under Title III and elect the blanket protection of Title IV. If protected by the general reach of Title IV, then there would be no need to go through the effort of Title III certification.\textsuperscript{249} A Title IV exporter without a certificate of review would not have to publish his intended conduct in the Federal Register, would avoid warning competitors of his future actions, and would not be subject to the private cause of action for deviation from the standards of Title III.\textsuperscript{250} By pursuing such a course of action, however, the exporter proceeds without the protections of Title III as well. In choosing not to obtain a certificate of review the exporter loses the immunity from antitrust treble damage suits.\textsuperscript{251} For many, the risk of these increased damage suits may justify the effort of certification.

With the options presented by the Title III and Title IV provisions, it is important to look at the implications of the "direct, sub-

\textsuperscript{244} Bruce and Pierce, \textit{supra} note 29, at 980.
\textsuperscript{246} Golden and Kolb, \textit{supra} note 59, at 781.
\textsuperscript{247} Bruce and Pierce, \textit{supra} note 29, at 979.
\textsuperscript{248} Export Trading Company Act, 15 U.S.C. \textsection 1 note. Specifically, section 6 of the Sherman Act, 15 U.S.C. \textsection 1, and section 5 (a) of the Federal Trade Commission Act, 15 U.S.C. \textsection 45(a), are amended by Title IV. Enactment of the ETC Act does not modify the Webb-Pomerene Act directly. Presently existing associations formed under the Webb-Pomerene Act are not required by the ETC Act to change their operations or to re-apply for any protection.
\textsuperscript{249} Export Trading Company Act, 15 U.S.C. \textsection 1 note.
\textsuperscript{250} Bruce and Pierce, \textit{supra} note 29, at 977. The amendments are self-executing. There is no need to file an application or take any action to have them apply. \textit{Id}.
\textsuperscript{251} Golden and Kolb, \textit{supra} note 59, at 781.
stantial, and reasonably foreseeable effect" language in the ETC Act. In United States v. Aluminum Company of America, this so-called "effects test" focused principally on the place where the particular anticompetitive conduct had its effects rather than where the conduct itself occurred. The case also considered where the conduct was intended to have effect. In drafting Title IV, the House Judiciary Committee decided to use foreseeability language because it felt that intent was not a sufficiently objective test to use and would encourage exporters to feign ignorance of the consequences of their actions if ever questioned. This change eliminated the concern that after a transaction had occurred, suit could be brought against businesses charging that they intended some impermissible and anticompetitive effects by their actions. Under the present ETC Act, anticompetitive effects would only hurt a business if it failed to anticipate such consequences as a result of negligence. The reasonableness standard in Title IV of the ETC Act protects businesses from uncertain tests of their conduct and replaces those tests with a rule which declares conduct to be illegal only if it unreasonably restrains trade.

255 148 F.2d 416 (2d Cir. 1945).
256 Reinsch, supra note 4, at 976.
257 Golden and Kolb, supra note 59, at 782.
258 Antitrust law is primarily concerned with economic effects, whether actual or predicted. Intent, however, is important as well since: 1) it is frequently an excellent predictor of effect, and 2) condemning the wrongful intent by itself simplifies the judicial administration of complex legal questions and serves as a deterrent to illegal conduct. Allison, The Antitrust Implications of Barter, 58 CHI.-KENT L. REV. 89, at 96-7 (1981).
259 H.R. REP. No. 686, 97th Cong., 2d Sess. 9 (1981). Thus, part of the jurisdictional test is "whether the effects would have been evident to a reasonable person making practical business judgments, not whether actual knowledge or intent can be shown." Id.
260 Bruce and Pierce, supra note 29, at 985-86. In 1977, the Justice Department issued its Antitrust Guide for International Operations. It stated that United States antitrust standards would apply for foreign activities in exporting in cases where "there is a substantial and foreseeable effect on the United States commerce." ANTITRUST DIVISION, UNITED STATES DEPARTMENT OF JUSTICE, ANTITRUST GUIDE FOR INTERNATIONAL CORPORATIONS (January 26, 1977).

The Restatement also calls for substantial, direct, and foreseeable effects. Restatement (Second) of Foreign Relations Law of United States § 18 (1965).
261 Bruce and Pierce, supra note 29, at 986.
262 Golden and Kolb, supra note 59, at 783.
263 Allison, supra note 255, at 96. The construction of this rule of reason is important because of the confusion that has prevailed since United States v. Aluminum Company of America (Alcoa), 148 F.2d 416 (2d Cir. 1945), on exactly what test would be used to examine anticompetitive conduct toward United States business. Many cases applied different approaches to this question than the one used in Alcoa. Timberlane Lumber Company v. Bank of America, N.T. & S.A., 549 F.2d 597 (9th Cir. 1975), developed a three-part test that involved a balancing approach to antitrust violations weighing the magnitude of the viola-
Title IV also clarifies and reduces the Sherman and Federal Trade Commission Acts' effect on business exporters in this country. Prior to the enactment of Title IV, United States antitrust laws protected all victims of anticompetitive conduct whether it affected United States import, export, or domestic commerce.\textsuperscript{261} The Sherman Act could even apply to agreements and conduct among foreigners if their agreements were intended to and did affect United States imports.\textsuperscript{262} Title IV limits the pervasiveness of the Sherman Act provisions. The amendments promote one central idea: anticompetitive acts directed solely at exports of products or services, without any effect on the domestic market or import commerce or exports of a United States domestic person, will be treated as purely foreign transactions and will be protected by Title IV.\textsuperscript{263}

Congress, in passing the ETC legislation, was not concerned with the complaints of foreign citizens and businesses who felt that the
antitrust laws of the United States should have no extraterritorial
effect. Instead, Congress hinted through Title IV that some
anticompetitive conduct might be allowed in order to promote inter-
national trade.\textsuperscript{264} The only protection granted foreign interests is
that of the Sherman Act where the anticompetitive conduct of a
United States entity has negative effects on United States imports
or on interstate commerce.\textsuperscript{265} Although \textit{Pfizer, Inc. v. Government
of India}\textsuperscript{266} acknowledges a right of foreign governments to recover
damages for injuries suffered outside the United States, under Ti-
tle IV the damages will be limited to actual and not treble dam-
ages.\textsuperscript{267} The main consideration for an exporter under Title IV,
therefore, will be the impact of foreign antitrust laws, from which
Title IV offers no immunity.\textsuperscript{268}

Although there is a need for additional clarification of what will
constitute direct, substantial, and reasonably foreseeable effects on
United States imports and interstate commerce, administrative
agencies and the courts will develop interpretations to remedy the
problem.\textsuperscript{269} Title IV is further evidence of governmental perception
of antitrust problems in international trade, and it is a significant
attempt to codify a relaxed standard for the benefit of United
States exporters. Under the new ETC legislation, United States
companies can now do business abroad under the same terms as
their foreign competitors, without having to satisfy United States
antitrust law as well as foreign law. Indeed, the very measure of
the potential of the ETC Act may be the degree of hostile foreign

\textsuperscript{264} Golden and Kolb, \textit{supra} note 59, at 785.
\textsuperscript{265} Bruce and Pierce, \textit{supra} note 29, at 979.
\textsuperscript{266} 434 U.S. 308 (1978). In \textit{Pfizer}, the court noted that denying foreigners the right to
antitrust remedies confuses the purpose of antitrust law the protection of competition of
United States domestic and foreign markets, with the question of who can invoke its reme-
dies. It was feared that if foreign plaintiffs were not able to seek remedies for their antitrust
injuries, persons doing business abroad would be tempted to enter into anticompetitive con-
spiracies eventually affecting American consumers. The potential profits from anticompeti-
tive conduct would offset the losses to plaintiffs. Bruce and Pierce, \textit{supra} note 29, at 990.
\textsuperscript{267} Golden and Kolb, \textit{supra} note 59, at 785.
\textsuperscript{268} Id. at 785-89. Foreign plaintiffs injured by anticompetitive export conduct would have
to resort to their home courts in most cases, as under Title IV. Unless there was a direct,
substantial, and reasonably foreseeable effect on United States import or interstate com-
merce, the plaintiff's case would be dismissed for lack of subject matter jurisdiction. A do-
nestic exporter may sue for anticompetitive conduct of another exporter, if his injury occurs
due to the effect of the competitor's conduct on interstate commerce. The Sherman Act and
Federal Trade Commission Act, however, would be applied only to the portion of the ex-
porter's conduct that was export-oriented, and not any domestic portion of that business.
Bruce and Pierce, \textit{supra} note 29, at 991.
\textsuperscript{269} Golden and Kolb, \textit{supra} note 59, at 784.
reaction to it, much like the negative response given the liberal jurisdictional standards and alleged sovereignty infringement of the “effects” test.270

IV. PRESENT STATUS OF THE EXPORT TRADING COMPANY ACT

The Department of Commerce issued the first Export Trade Certificates of Review under the ETC Act on November 1, 1983.271 Though it is difficult to determine long-term trends from the data that is available, certain observations can be drawn from the response to the ETC Act that answer many of the concerns that have been discussed previously.

The first certificates of review, as stated in a release by the Commerce Department to mark the event, went to two small businesses, and an agricultural concern among others.272 At present, small trading companies develop primarily by representing small businesses and large firms in overseas trade.273 Even individuals are involved, as is evidenced by one firm composed of a trading corporation, three dentists, and four other persons.274 The applicants come from all parts of the United States, though the majority appear to be from the Midwest and South.275 There has also been a great deal of interest among banks in export trading company investment, and investment approval has been given in several instances. In addition, there have been approvals from the Export-Import Bank of loan guarantees for businesses unable to secure adequate financing from the private sector.276 Commentators consider the response to the ETC Act to be promising, and the number and variety of applicants indicates that the certification

270 Reinsch, supra note 4, at 977.
272 Id. The agricultural association was joined in its certificate by a consortium of our individual firms.
275 The Midwest now is home to 14 ETC’s while the South claims 17.
276 Telephone interview with Garrett Boyd, Special Assistant to the Vice Chairman, Exporter Credits and Guarantees Division, Export-Import Bank of the United States (Nov. 4, 1983).
and investment approval process is not as cumbersome or complicated as many believed it would be.

A. The Bank Export Services Act

Approval for bank holding company investment in ETCs has been steady,\(^{277}\) though the strong dollar overseas and the general risks of international trade presently have lowered the amount of interest in trading overseas.\(^{278}\) These banking organizations are scattered throughout the United States, although the East and West Coast predominate, and have expressed an interest to trade in geographic areas rather than in specific product lines.\(^{279}\) The bank holding companies are not involved with existing ETCs as much as they are in creating their own ETCs, with 100% ownership in their hands.\(^{280}\) As a consequence, they are advancing very general proposals to the Federal Reserve Board about the nature of their future export trade, unrestrained by any ties a presently operating ETC might encounter.\(^{281}\) The range of banking organizations becoming affiliated with ETCs extends from some of the largest, such as Citicorp, to small holding companies in Texas and New Jersey.\(^{282}\) Comments on the future of the Bank Export Services Act are positive,\(^{283}\) although the approach of the Federal Reserve Board is different from that of the trade-oriented Commerce Department. The attitude of the Board has been described as "not obstructionist," but mindful of the safety and soundness of the banking organizations that the Board protects.\(^{284}\)

\(^{277}\) The Federal Reserve Board does not officially certify bank holding company investment in ETCs. Instead, it gives tacit approval through a letter of notification that states any reservations or limits that the Board may have on the investment. Id.

\(^{278}\) At the time of this writing 34 investment inquiries had been given approval and two are pending. Telephone interview with James Keller, Manager, International Banking Applications, Division of Banking Supervision and Regulation, Board of Governors of the Federal Reserve System (Nov. 10, 1983).

\(^{279}\) Those companies on the West Coast prefer to trade in the Far East rather than in Europe, while the East Coast bank holding companies seem to be more interested in European trade. This is considered to be due to the relative home countries of each holding company's present clientele, who are thus potential trade contacts.

\(^{280}\) Keller, supra note 278.

\(^{281}\) Id.

\(^{282}\) Id.

\(^{283}\) The Federal Reserve Board will soon be conducting a survey on the number of bank holding companies that have been authorized to engage in ETC investment, have done so, and are currently exporting. Id.

\(^{284}\) Id. The Federal Reserve Board is not in the business of encouraging ETC investment by bank holding companies due to its traditional concern over the separation of banking and commerce. There seems to be no problem, however, in following the directives of Congress.
As with the Bank Export Services Act investment authorization, the Export Trading Company Loan Program of the Export-Import Bank is considered to be consistent with Congressional intent as well as a viable alternative to the private credit market.\textsuperscript{5} Congress has recently given added funding to the Export-Import Bank to cover its obligations,\textsuperscript{286} and the Bank has attempted to make itself more accessible to small businesses by liberalizing its policies toward acceptance of inventory as collateral.\textsuperscript{287} Projections for an exact analysis of the usefulness of the program will be available next year after a twenty-seven city survey of bankers and the exporting community.\textsuperscript{288}

B. Antitrust Certificates of Review

Applicants for antitrust certification represent a varied group of manufacturers and service-oriented businesses, leading to the conclusion that service industries as well as manufacturing industries are willing to take advantage of ETC legislation.\textsuperscript{289} Neither the service nor manufacturing interests are having difficulty stating the scope of their activities, as shown by the wide range of conduct being certified.\textsuperscript{280} The Commerce and Justice Departments are apparently giving great latitude to applicants to prove that, as stated in the text of the first certificate of review notice, "[m]ore companies will seek the world of exports when they realize that government is not an adversary. It is your partner."\textsuperscript{281}

The diversity in activity and product lines represented by certificating approval of banking organization investment in ETCs.

\textsuperscript{5} Boyd, supra note 276.
\textsuperscript{286} One billion dollars has recently been authorized to fund Export-Import Bank projects. Id.
\textsuperscript{287} Id.
\textsuperscript{288} Id.
\textsuperscript{290} International Marketing and Procurement Services, Inc., for example, is now certified to engage in "any number of non-exclusive agreements with United States manufacturers and suppliers or with buyers in the export markets to act as a sales representative or broker," and "to enter into agreements with suppliers." This is a fairly broad range of activity. Export Trade Certificate of Review, 48 Fed. Reg. 50,383 (1983).
\textsuperscript{281} Id.
fied export conduct or pending applications is significant as well. No one product or service seems to predominate. Computers, military equipment, records, health care goods, commercial construction equipment, and agricultural products are all in the range of export items being readied for overseas shipment. While some companies prefer to engage in an array of products with multiple suppliers, others will represent a sole manufacturer and one product.

There also appears to be interest in the areas of barter and countertrade, which have experienced a period of revitalization in the 1970's and 1980's. Involvement in these trading methods can be beneficial to trading companies for a variety of reasons. The importance of barter and countertrade to international transactions has grown due to economic factors such as inflation, recession, accelerating balance of payments deficits, and costs of petroleum products. Both types of trade can move obsolete or otherwise stagnant inventory out of the warehouse and into the market, stimulating demand for low demand goods overseas, improving production efficiency, and reducing industry interest costs. Basically, barter and countertrade can provide an alternative to conventional international trade financed by commercial banks or government subsidies, allowing companies an additional method in which to trade abroad.

An ETC utilizing barter and countertrade can open vital routes with third world nations. Japanese sogo shosha have long recognized that their export activities give them an ideal foundation and

---

292 There are at least six applications now pending.
293 U.S. Farm-Related Fish Trading Company, Inc., will even engage in the export sale of farm-raised catfish to Europe and the Far East. Id.
296 Texas First Intercontinental Trading Company desires to become certified in the areas of barter and countertrade, as well as a number of other activities and methods of operation. Export Trade Certificate of Review; Applications, 48 Fed. Reg. 43,062 (1983).
297 Allison, supra note 255, at 90.
300 Allison, supra note 255, at 99-100.
301 Huszagh and Barksdale, supra note 76, at 1.
advantage in import operations and in third world countries. They are vigorously expanding their third-country trade with developing nations, while simultaneously moving into direct investment opportunities. Some major United States corporations, such as McDonnell Douglas Corporation, General Electric Company, and Rockwell International, have established their own trading companies to handle countertrade along with their other trading activities. These trading companies have actively sought international projects by encouraging barter and countertrade contracts. Others, such as Bechtel Corporation, have missed these opportunities because they are reluctant to consider countertrade options. To some extent the ETC Act is similarly short-sighted because it may not adequately recognize the importance of countertrade, barter, and third world nations. When Western governments reduce the credits of third world and Eastern bloc countries on the brink of insolvency, barter and countertrade can provide a method for solving hard currency shortages. Barter and countertrade can also improve scarce commodity trade, where a vital commodity is exchanged for other goods needed by the commodity holder. These scarce commodities, such as industrial chemicals and machinery, and transportation equipment and parts, are the most frequently bartered and countertraded.

The fact remains, however, that the ETC Act is opening the door for increased barter and countertrade. Any reluctance to the removal of all barriers may be due to a deep-seated suspicion of these reciprocal dealings by United States antitrust enforcers who do not believe that such transactions enhance efficiency in trade. Whereas in a competitive economy buyers make their purchasing decisions based on their best combinations of low price, high qual-

302 Williams and Baliga, supra note 299, at 233.
303 Id. at 234.
304 Id. at 233-34.
305 Huszagh and Barksdale, supra note 76, at 2. OPEC nations find barter and countertrade especially useful in exchanging oil supplies for technical military and industrial equipment. Id.
306 Allison, supra note 255, at 100-01. For example, in 1972-74 there was a bulk industrial chemical shortage of chemicals such as benzene, ethylene, phenol, and toluene. It was discovered that through barter and countertrade the holders of these commodities could be persuaded to exchange them for other chemicals that were not in short supply and would have otherwise been stockpiled. Id.
307 Huszagh and Barksdale, supra note 76, at 16. For higher technology purchases, countries seem willing to allocate hard currency. Id. at 17.
ity, and availability of service, in a countertrade transaction these traditional criteria may be replaced. The new elements might include an examination of the foreign firm's purchasing power and the availability of substitutes for the products being offered by the United States firm.\(^\text{309}\) Thus, an American firm may agree to purchase goods of higher price or lower quality than it would in a normal competitive situation, just to get the benefit of the countertrade deal.\(^\text{310}\) Such purchases may result in a misallocation of resources to the detriment of the consumer.\(^\text{311}\) At least one writer, however, has noted that so long as the purchaser is not forced to make the purchase, the choice as to higher price or lower quality can be viewed as a decision that the purchaser should be free to make because the market will penalize the purchaser if the decision is economically incorrect.\(^\text{312}\)

A survey of the certified trading companies and those currently seeking certification shows considerable interest in the barter and countertrading countries of the third world.\(^\text{313}\) In fact, there is more interest in Africa than there is in the traditional European markets. Not only does this provide some encouragement to third world nations trying to overcome currency shortages, but it also focuses on the potential for the United States export community to move into large and virtually unexplored markets through ETCs. Though most applicants express a desire to engage in world-wide trade, some have limited themselves to significantly less.\(^\text{314}\) Yet even those ETCs that limit themselves to trading with one nation help to prove the extreme diversity of interest shown by the appli- 

\(^{309}\) Id.  
\(^{310}\) Id.  
\(^{311}\) Id. Other concerns also arise. It has been argued that countertrade output will in most instances tend to be sold in the western purchaser's domestic market at marginal prices, which in the long-term will suppress domestic production, halt growth in domestic supply, and create a dependence on the low price foreign commodity as the domestic producers leave the market. Id. A concentration of the market could occur in such a situation, where reciprocal dealings would force competitors out of the market. Similarly, sales of foreign goods in the United States below cost or at less than fair value might constitute an unreasonable restraint of competition or an unfair method of competition. Id. at 239. Unfortunately, there are no reported cases which might analyze the application of United States antitrust laws to countertrade transactions. Id. at 240-41.  
\(^{312}\) Id. at 238. See also Hausman, Reciprocal Dealing and the Antitrust Laws, 77 HARV. L. REV. 873 (1964).  
\(^{313}\) Nations in the Far and Middle East, Latin America, and Africa were among the prime export markets noted by ETCs giving a preference.  
cants for certification.³¹⁸

Should all of the present applicants receive certificates of review from the Department of Commerce, they will join in developing the export activities presently engaged in by some non-ETC Act trading companies.³¹⁶ General Motors, Control Data, Sears Roebuck and others mentioned previously have begun trading companies and become active in the international market which the ETC Act is designed to open.³¹⁷ General Electric, for example, sees itself as a "mother hen" for smaller companies hoping to export³¹⁶ and will offer one-stop service to export clients, handling market distribution, sales, and financing.³¹⁹ As with many trading companies, it will initially be focusing on exporting³²⁰ but will develop into an importer and third-country trader with its clients in the Middle East and in growth markets of developing countries.³²¹

These new ETCs will also join the ever-growing world of foreign trading companies. Canada,³²² France, Brazil, South Korea,³²³ and

³¹⁸ Whereas some ETCs are interested in fixing long-term relationships with overseas traders, other ETCs are not so inclined. DMT World Trade, Inc. is requesting certification of conduct that includes the purchase and export of machinery on a "one time only or infrequent basis." This might be due to the volatile nature of the areas in which it was interested in exporting: Southeast Asia, the Middle East, and Latin America. Export Trade Certificate of Review; Applications, 48 Fed. Reg. 38,266 (1983).

³¹⁹ Associations which have already met the registration criteria of the Webb-Pomerene Act will enjoy continued antitrust immunity under the ETC Act. Rigler and Lottman, supra note 38, at 19.

³²¹ General Motors is engaged primarily in countertrade. The Rockwell International Trading Company is involved in two-way trade. Control Data Commerce International provides services. Sears Roebuck Trading Company will sell technology and management services, import, enter into third country trade, and countertrade. Note, supra note 6, at 784 n.180.


³²³ Note, supra note 6, at 784 n.180.


³²¹ Id. General Electric's principal markets are in the Middle East, primarily Saudi Arabia, with Europe and Japan close behind. General Electric expects to do increasingly more trade with its developing growth markets in Latin America and Southeast Asia. General Electric sells medium technology products such as transformers, circuit breakers, and relays. Id.

³²² The Journal of Commerce and Commercial, Mar. 15, 1982, at 3C, col. 2. Canada recently released the report of its Special Committee on a National Trading Corporation. This committee recommended:

1) That the federal government sponsor the development of a major Canadian trading corporation.

2) That the Canadian Trading Corporation be established by a new act of Parliament.

3) That it ultimately be capable of selling any commercially viable product.

4) That it give the highest priority to establishing selected foreign-based operations in growth market regions.
Taiwan have all either introduced national export trading companies to their nations, or have studied their potential, in an attempt to gain an increased share in world trade. A national trading company can combine the economic producers of its nation into a force that will fit uniquely into each country’s geographic and political climate, maximizing the producers’ commercial effectiveness.\(^3\)

V. PRACTICAL CONSIDERATIONS IN APPLYING FOR CERTIFICATION

Chase Econometrics estimates that passage of the ETC Act will create 320,000 to 640,000 new jobs for American workers by 1985. Further, the Act could help to increase the GNP by anywhere from $27 billion to $55 billion while reducing the federal deficit by an amount between $1 billion and $22 billion.\(^2\) The estimates and theories predicting the positive impact of the ETC Act are meaningless, however, if domestic exporters do not take advantage of Congressional efforts to increase the activity of United States firms in the international trade arena.

In forming a successful business plan and developing a certifiable application for immunity, the first consideration for a potential ETC and its customers must be the actual need for certification of export conduct. One counseling a prospective ETC client should examine the desires of that client and determine if the proposed conduct is unquestionably beyond any antitrust laws, or whether that conduct may pose problems if reviewed later in time. In the former case, a certificate is unnecessary, and an export plan may be devised under the pervasive application of Title IV of the ETC Act. In the latter case, a certificate may provide the certainty

\(^{5}\) That it be established with an initial equity commitment by shareholders of at least $300 million.

\(^{32}\) \textit{Id.}

\(^{33}\) \textit{Id.} The general trading companies of South Korea have been fashioned in the image of the Japanese sogo shosha. Their goals are specific:

1) to penetrate domestic and foreign markets;
2) to establish a global distribution network;
3) to finance smaller Korean companies that act as suppliers.

\(^{32}\) \textit{Id.}

Unlike the Japanese general trading companies, however, Korean trading companies concentrate largely on exporting products produced only in Korea. Their imports into Korea represent less than 20% of their business. Since these trading companies were initiated in 1975, they have experienced tremendous growth. Part of the reason for this growth has been the positive effect of various government assistance programs, including low loan rates and tax incentives designed to promote expansion. Williams and Baliga, \textit{supra} note 299, at 232.

\(^{33}\) Williams and Baliga, \textit{supra} note 299, at 232.
needed by a client desiring reassurance that his investment will be protected. It is important to note that the Commerce Department's Office of Export Trading Company Affairs encourages applicants for antitrust certificates of review to seek advice on preparing their applications, and such a source of information should be utilized to the fullest extent to avoid difficulties in the later stages of certificate examination. The clearer the response to Commerce's questions on the application, the quicker the approval of export conduct.

There are three basic guidelines that an applicant for a certificate of review should follow in order to obtain the maximum potential for approval of his application. An applicant should:

1) Know what export conduct is desired to be considered for certification.
2) Be specific.
3) Expect that what is proposed during the application process will be taken seriously by the Departments of Commerce and Justice.

A. Know What You Want Certified

An application that is so general that it does not raise any antitrust issues is useless to the Commerce and Justice Departments in the review process. If there is a possible antitrust issue in the proposed export conduct, one should address it in the application with specific, detailed plans for export conduct that bring the issue to the forefront. A general statement of intention, a vague description of products to be exported, or a listing of export activities that will probably be involved in exporting these products is unsatisfactory. Such an application will either be returned as incomplete, require a drawn-out series of supplemental information requests,

Craig W. Conrath, Assistant Chief of the Foreign Commerce Section, Antitrust Division, Department of Justice, Remarks before the International Committee and the Antitrust Committee of the Business Law Section of the Bar Association of Metropolitan St. Louis, at 6 (Oct. 13, 1983) (available from the Department of Justice).

The ETC Act's scheme of antitrust immunity is not like some other antitrust immunity provisions, such as those in trucking and shipping. In those industries antitrust immunity will be given to conduct that would otherwise be clearly illegal and injurious to the United States. The ETC Act, however, establishes a mechanism by which firms can be assured in advance that their export conduct will not result in antitrust liability. The certificate of review is not a waiver allowing illegal conduct. Id. at 5-6.

Id. at 7-8.
or lead to a certificate that in the end is relatively ineffective even though it is valid.\textsuperscript{329}

B. \textit{Be Specific}

The certificates that will be issued and have been issued to date list all products and markets that are to be handled by the certified trading company. The certificates will confer their antitrust immunity only over those types of conduct described. Thus, for an applicant to be certain that the certificate he receives actually covers his export conduct, and for the government to be certain that it is protecting the public by only certifying conduct that meets the standards of the ETC Act, the language of certificate applications must be clear and specific.\textsuperscript{330} A simple test, developed by the Antitrust Division of the Department of Justice, asks whether the conduct is sufficiently described in the certificate so that the actual conduct and its effects are foreseeable from the language of the certificate.

A description that is too broad or too narrow can cause difficulties not only with Commerce and Justice, but also with the courts, which do not interpret exemptions from the antitrust laws expansively.\textsuperscript{331} A narrow description of export conduct could inhibit the flexibility that an exporting firm needs to operate. A description that is too broad will hinder an analysis of the conduct’s effects. Again, one should utilize the Office of Export Trading Company Affairs to eliminate any possible problems that may develop in understanding the type of export conduct that is being considered.\textsuperscript{332}

C. \textit{Expect the Application to be Taken Seriously}

If an application succinctly states that an ETC will represent only non-competing firms, that information will obviously make the approval of the application an easy task. If, however, an appli-
cation simply states that there will be no injurious effect on the domestic market due to cooperation of non-competitive firms, approval will only be granted because that bare assertion was taken seriously. One should not anticipate that the later introduction of directly competing firms into the structure will allow the original application and certificate of review to cover this subsequent export conduct. Instead, a certificate must either be modified to account for such an addition, or a new review must be obtained. In most circumstances, a certificate will protect against such a problem arising by limiting its immunity for conduct where the ETC represents non-competing firms by specific language.\textsuperscript{333} One should not assume that an ETC certificate of review automatically changes with the circumstances, for it does not. Instead, it only covers the specific export conduct for which it was originally developed.

D. Related Issues

As noted earlier, one of the key considerations that arises in almost every application to date is the exchange of information problem between competing firms.\textsuperscript{334} This difficulty exists when a certified ETC is in a position to exchange valuable information between domestic competitors. Such exchanges of price and production information present serious antitrust issues.

Companies for the most part will not need to engage in activities where they can become a conduit for such information. Yet, if an ETC does find that there is a possibility of becoming involved in a situation where information exchange is a question, the ETC should explain in its application why it is necessary that it involve itself in these exchanges of information, and the application should discuss the safeguards the company will develop to ensure that there will be no anticompetitive effects on the United States market. Should the ETC find that it will have access to this vital information but not find it indispensable to the ETC's operations on behalf of these competing firms, it may include in its certificate a condition that prohibits exchanges of price and related information among supplier firms of the ETC. If no information exchange is needed at all, an ETC should indicate that finding in its application and propose a condition to that effect in its certificate.\textsuperscript{335}

\begin{flushright}
\textsuperscript{333} Id. at 11.  \\
\textsuperscript{334} Id. at 13.  \\
\textsuperscript{335} Id. at 13-14.
\end{flushright}
Another issue that is important to the drafter of an application for a certificate of review is that of United States government participation in purchases of goods and services that are to be consumed overseas. Such transactions have been determined by Commerce and Justice to be uncertifiable because the burden of any anticompetitive conduct would be borne by the United States Treasury. There are a few government export financing programs, however, such as the Export-Import Bank, where the United States Treasury will not bear the primary burden of the transaction. Export conduct that is covered by financing from these programs is eligible for certification.

Applicants should be aware that the limitations and language of past applications and grants of certificates are not to be considered as restrictive provisions or as set guides for what Commerce and Justice will accept as certifiable conduct. The language of these certificates, including any restrictions and conditions, may well come from the applicant’s own plans and goals for the ETC. The language may also be the result of concerted antitrust counseling between applicants and the Office of Export Trading Company Affairs to produce a certificate application with the fewest antitrust issues. Drafting language, therefore, should only be considered as a pattern for applicants to follow, and a potential exporter should recognize that restrictions and conditions in certificates are the product of individual consultations based on particular proposed conduct of particular firms in particular markets.

A final important recommendation for an applicant is to realize that the United States has been successful in exporting its antitrust theories and laws, if not its manufactured products. The United States’ major trading partners, including Germany, Japan, and the European Economic Community, have active antitrust authorities that apply antitrust principles similar to those of this country. An export trade certificate of review issued by the United States Department of Commerce will provide no protection from enforcement of antitrust laws of foreign nations but will only protect against United States antitrust threats. An export plan should include an understanding of this fact and encourage an

356 An example of such a transaction is a sale pursuant to a United States foreign assistance program, such as A.I.D., in which the costs are borne by the United States government through its generous loan conditions.
357 Id. at 16.
358 Id. at 16-18.
359 Id. at 19.
awareness of the antitrust principles of foreign purchasing nations.

VI. Conclusion

The ETC Act takes two major steps. It reduces the traditional inclination to separate banking from commerce and it attempts to clarify antitrust law while promoting export trade through antitrust exemptions. Though inspired by the Japanese foreign trading company model, the sogo shosha, the United States ETC prototype in fact only begins to emulate the pattern.\textsuperscript{340} The restrictions on banking institutions and their investment in ETCs under Title II and the antitrust certification process under Title III prove that the United States is still clinging to traditional regulatory policy. It would be idealistic to expect overnight change.

The choices given potential exporters by the ETC Act will keep trading companies competitive and efficient.\textsuperscript{341} The pro-trade attitude of the Commerce Department will instill confidence in United States business that the government is serious about promoting export trade. The approval/certification process in either Title II or Title III does not, from the response rate to date, appear to be a deterrent to the organization of ETCs. Furthermore, the diversity of applicants and their composition shows that the ETC Act is having beneficial effects on small and medium-sized United States businesses. Though there are points of uncertainty in the ETC Act, as with all new legislation, interpretation will lead to greater certainty for successive applicants.

The ETC Act is both a psychological and practical addition to United States export policy. If properly administered, funded, and interpreted, the ETC Act can provide a valuable tool to penetrate traditional export markets and develop new markets in under-supplied trade areas abroad. If aggressively utilized and supported by more pro-export United States trade legislation, the ETC Act can be a significant step toward building United States export sales and a more favorable trade balance.

Mark Gramberg

\textsuperscript{340} It is ironic that the ETC Act is promoting the very activity that the United States after World War II dismantled in Japan through antitrust regulations. Rigler and Lottman, \textit{supra} note 38, at 1-18.

\textsuperscript{341} Development, \textit{supra} note 14, at 121.