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The Export Trading Company Act of 1982: An American Response to Foreign Competition

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On October 8, 1982, President Reagan signed into law the Export Trading Company Act of 1982 (ETCA).[1] Designed to create jobs and to reduce U.S. balance-of-payments deficits by encouraging new export ventures, ETCA was the product of nearly four years of congressional consideration.[2] Although the Administration's expectation that this legislation will create at least $11 billion in increased sales and more than 300,000 new jobs over the next five years may be overly optimistic,[3] ETCA is nonetheless potentially significant to

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1 Pub. L. No. 97-290, 96 Stat. 1233 (1982) (to be codified at 15 U.S.C. §§ 4001-4003 (Title I), 12 U.S.C. §§ 372, 635a-4, 1841, 1843 (Title II), 15 U.S.C. §§ 4011-4021 (Title III), 15 U.S.C. § 7 (Title IV)).

2 Export trading company legislation was first introduced by Senator Adlai E. Stevenson in 1978. *See* notes 43-46 *infra* and accompanying text. An abridged version of the legislative history may be found at the following locations: (1) Conference Reports: S. REP. NO. 644, 97th Cong., 2d Sess. (1982); H.R. REP. NO. 924, 97th Cong., 2d Sess. (1982); (2) Senate Report: S. REP. NO. 27, 97th Cong., 2d Sess. (1982); (3) House Reports: H.R. REP. NOS. 629 & 637 (pts. 1 & 2), 97th Cong., 2d Sess. (1982); and H.R. REP. NO. 686, 96th Cong., 2d Sess. (1981); (4) Debates: 127 CONG. REC. S3652-72 (daily ed. Apr. 8, 1981), 128 CONG. REC. H4624-58 (daily ed. July 27, 1982), and 128 CONG. REC. S13,114-16 & H8341-50 (daily ed. Oct. 1, 1982); (5) Remarks on Signing S. 734 into Law: 18 WEEKLY COMP. OF PRES. DOC. 1283 (Oct. 18, 1982).

3 According to one of ETCA's initial sponsors, each one billion dollars of exports lost means a corresponding loss of some 40,000-50,000 domestic jobs. *Hearings on S. 144 Before the Subcomm. on International Finance and Monetary Policy of the Senate Comm. on Banking, Housing, and Urban Affairs*, 97th Cong., 1st Sess. 9-10 (1981) (testimony of former Senator Adlai E. Stevenson) [hereinafter cited as *1981 Hearings*]. The Commerce Department press release published simultaneously with the signing of the legislation cited the Department's own study showing that export trading companies created pursuant to the legislation would increase U.S. exports by at least 5% over the next five years, resulting in over $11 billion in increased sales and 350,000 new jobs, based on Census Bureau statistics that each one billion dollars in exports

U.S. and foreign businesses for at least two reasons. First, U.S. businesses and U.S. banking organizations will enjoy new export opportunities created by a clarification of applicable antitrust restrictions and by a relaxation of the general prohibition against banking organizations participating in the ownership and management of nonbanking commercial ventures. Second, foreign companies and their counsel will need to understand the applicable legal standards in order to determine under what circumstances a challenge might be brought against practices contravening ETCA. Although ETCA may have modified U.S. antitrust standards, foreign competitors of U.S. export trading companies (ETCs) still may be able to challenge ETC activities in their own countries by invoking their own domestic antitrust provisions, and thus will need to understand the nature of these potential entrants into international markets.

ETCA consists of four titles. Title I provides a series of definitions which, curiously, applies only to that title and to none other.[4] Title II contains banking law amendments permitting greater banking involvement, including ownership and control, in export trading companies. Title III sets forth the Commerce Department's certification process under which persons engaged in qualifying export activities can receive antitrust immunity for conduct within the scope of validly issued certificates of review. Finally, Title IV, the "Foreign Trade Antitrust Improvements Act of 1982," makes the Sherman Act inapplicable to export trading activities unless the conduct in question has a "direct, substantial and reasonably foreseeable effect" on domestic U.S. markets, import trade, or the export trade of another U.S. person.

In passing ETCA, Congress was responding to a growing national perception that by combining their resources to realize economies of scale, U.S. companies could more effectively sell American goods and services abroad. Concern over what many perceive to be excessive or unfair intrusion by foreign producers, particularly the Japanese, into U.S. markets for items ranging from automobiles to high-technology goods has prompted lawmakers and businessmen to seek ways to encourage a positive U.S. response. ETCA presents an alternative to protectionist approaches characterized by import re-

creates 31,000 jobs. Other factors, such as currency exchange rates, interest rates, and federal regulations, could also affect the number of jobs created by the legislation.

4 Drafted by the House Foreign Affairs Committee, Title I stands by itself although its definitional provisions initially were intended to be consistent with those appearing in ETCA's substantive provisions, which were drafted by the Judiciary and Banking Committees.

strictions, quotas, more stringent anti-dumping rules, added duties, direct export subsidies, or similar measures.[5]

Although ETCA has been heralded as a boon to free-trade principles, it has not been without its critics, even among proponents of free trade generally. For some, ETCA represents an increased "export consciousness" of American businessmen coupled with an encouragement of export cartelization. To these critics, ETCA only exacerbates international trade tensions by pitting one set of cartels against another.[6] Other commentators have tended to downplay ETCA's effect on export activity, citing relative exchange rates, interest rates, and the extent of economic growth generally among the Western industrialized economies as having a far greater influence on the prospective volume of U.S. exports.[7]

The truth no doubt lies somewhere between the claims of ETCA's proponents and its detractors. This article will examine the legislation's history as well as its procedures in order to explain what the act is intended to do, to assess its strengths, weaknesses, and am-

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5 *See generally Search and Destroy: An In-Depth Look at the Trading Company Legislation*, American Banker, Feb. 17, 1983, at 18. The 97th Congress considered a number of bills that would have affected import restrictions of one form or another. One such measure was the so-called "domestic content" bill which would have fixed mandatory quotas on the percentage of parts used in foreign automobiles that must be provided by U.S. manufacturers. While Martin Feldstein, Chairman of the President's Council of Economic Advisors, was "very much opposed to the domestic content bill," he nonetheless has observed that "temporary movements away from free trade by the United States may be helpful" in combatting the projected $75 billion foreign trade deficit for 1983. DAILY REPORT FOR EXECUTIVES (BNA) No. 239, at 1 (Dec. 13, 1982). A number of similar measures have been or are expected to be reintroduced in the 98th Congress, which convened in January 1983.

6 Some critics have viewed ETCA as a neo-protectionist version of the Webb-Pomerene Act, 15 U.S.C. §§ 61-65 (1976), which provided limited antitrust immunity for certain non-service-oriented export activities. *See* notes 8-41 *infra* and accompanying text. Professor James A. Rahl opposed an earlier version of ETCA on the ground that it

> would encourage American firms not only to form cartels among themselves but to participate in foreign and international cartels. An agreement between Americans and foreign firms dividing markets throughout the world except for the U.S. market would be exempt under this provision. Past experience indicates that a serious risk would then arise of a secret agreement to include the United States in the market allocation to round things out.

International Application of U.S. Antitrust Laws: Hearings on H.R. 2326, H.R. 1648, and H.R. 2459, Before the Subcomm. on Monopolies and Commercial Law of the House Comm. on the Judiciary, 96th Cong., 1st Sess. 11 (March 26, 1981) (testimony of James A. Rahl).

7 Several leading U.S. money center banks have also expressed reservations about ETCA's potential effects, ranging from whether the anticipated profit margins of ETCs would be high enough to attract bank investment to concern over whether a bank-related ETC might be regarded as unduly competitive with certain of a bank's existing customers. On the other hand, some major banks have already announced an intention to form ETCs, and others are considering the possibility of doing so. *See* DAILY REPORT FOR EXECUTIVES (BNA) No. 5, at C-1 (Jan. 7, 1983).

biguities, and to determine whether it is likely to stimulate the U.S. economy.

I. ETCA's Origins and Purpose

A. *ETCA's Unabolished Predecessor: The Webb-Pomerene Act*

Congressional appreciation of the need to stimulate export sales and to develop foreign markets is by no means a recent phenomenon. For example, consider the following congressional testimony on the subject submitted by the Federal Trade Commission:

> In seeking business abroad, American manufacturers and producers must meet aggressive competition from powerful foreign combinations, often international in character. In Germany, England, France, Italy, Austria-Hungary, Switzerland, Holland, Sweden, Belgium, Japan, and other countries businessmen are much freer to cooperate and combine than in the United States. They have developed numerous comprehensive combinations, often aided by their governments, which effectually unite their activities both in domestic and foreign trade. . . . If Americans are to enter the markets of the world on equal terms with their organized competitors and their organized customers; if they are to expand the foreign trade of the U.S. as they should; and if our small producers and manufacturers are to obtain their rightful share of foreign business on profitable terms they must be free to unite their efforts.[8]

This statement, made over 65 years ago, reflects considerations virtually identical to those that prompted the recent ETC legislation.

U.S. companies engaged in overseas trade today face strong competition from, among others, foreign government-assisted enterprises and multinational, multi-dimensional trading companies such as Japan's *sogo shosha*.[9] In some markets, U.S. exporters encounter common trading arrangements such as subsidies or government-sponsored export policies which reflect both an aggressive posture to promote export trade and, occasionally, an equally aggressive posture to impede foreign imports. Massive and growing trade deficits among major Western countries, including the United States, have contributed to a growing concern that governments will look for solutions by frustrating their competitors' market opportunities

8 Summary of Federal Trade Commission Report read on the floor of the House of Representatives by Congressman Webb on June 13, 1917, *reprinted in Hearings on Foreign Trade and the Antitrust Laws Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary*, 88th Cong., 2d Sess., pt. 1, at 248, 250 (1964).

9 For a discussion of the Japanese *sogo shosha* and other overseas trading companies, see notes 53-61 *infra* and accompanying text.

through tariff and, more commonly, non-tariff barriers, instead of by bolstering their own exporting performance.[10]

The congressional testimony cited above evidenced both fear of an organized group of competitors who were "much freer" to cooperate and combine than their U.S. counterparts, and concern that small- and medium-sized U.S. producers and manufacturers needed a greater ability to unite in order to realize "their rightful share of foreign business." The legislative response of that era took the form of the Webb-Pomerene Act of 1918,[11] which exempts export trade associations from the Sherman Act's[12] antitrust prohibitions. Under this legislation, a "Webb-Pomerene association" was defined as:

> [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 association, provided such association, agreement, or act is not in restraint of trade within the United States, and is not in restraint of the export trade of any domestic competitor of such association. . . .[13]

The legislation provided that a Webb-Pomerene association could not

> either in the United States or elsewhere enter into any agreement, understanding, or conspiracy, or do any act which artificially or intentionally enhances or depresses prices within the United States

10 For example, in September 1982, the French government announced that France was facing a $1.7 billion trade deficit. To help reduce the deficit, the government imposed a requirement that all import documents must now be in French. Two years previously, 37% of such documents were in English and German. This non-tariff barrier presumably will slow down the pace of imports, at least in the short run.

Similarly, the French government moved to impede the importation of Japanese video recorders, which it perceived to have captured an excessive share of the French market. During the first half of 1982, some 270,000 recorders were shipped to France. Now, these machines must enter France only through the customs station at Poitiers, where there are only four customs officials and no computer.

A similar situation exists in Japan concerning the importation of baseball bats. Without the appropriate safety marks, baseball bats cannot be sold in Japan. For Japanese manufacturers, safety approval usually is given after a simple factory inspection. Foreign producers, however, must uncrate their products on the docks for individual inspection. *See* Lehner, *U.S. Battle to Sell Baseball Bats in Japan Illustrates Difficulty of Opening Market*, Wall St. J., Jan. 19, 1983, at 34, col. 3.

The United States government has imposed its own form of non-tariff barrier by asking Japan to renew for a third year its "voluntary" restrictions on automobile exports to the United States. *See Protectionism Throws Gatt's Free-Trade Band Out of Tune*, THE ECONOMIST, Nov. 13, 1982, at 79, 80.

11 15 U.S.C. §§ 61-65 (1976).

12 15 U.S.C. §§ 1-7 (1976).

13 15 U.S.C. § 62 (1976).

> of commodities of the class exported by such association, or which substantially lessens competition within the United States or otherwise restrains trade therein.[14]

In short, a Webb-Pomerene association was sheltered from antitrust liability for price fixing and market division so long as it did so in a foreign market without any effect on U.S. markets, U.S. prices, or U.S. competitors. One hundred sixty-two Webb-Pomerene associations were created between 1918 and 1955.[15]

The Webb-Pomerene Act failed to stimulate the long-term, sustained export development expected. During one relatively brief period, from 1930 through 1935, Webb-Pomerene associations accounted for approximately 19 percent of U.S. exports. In recent years, that figure has dropped to as low as 1.5 percent in 1976.[16] One reason why Webb-Pomerene associations account for such a small proportion of U.S. exports may be that the act applies only to the export of goods and does not include services. During the last two decades, the U.S. economy has become increasingly service-oriented, with a far smaller portion of gross national product attributable to heavy industry and manufacturing than in earlier decades.[17] Thus,

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14 *Id.* Oversight responsibility for Webb-Pomerene associations resides with the Federal Trade Commission. A qualifying association had to

> file with the Federal Trade Commission a verified written statement setting forth the location of its . . . places of business and the names and addresses of all its officers and of all its stockholders or members, and if a corporation, a copy of its certificate or . . . bylaws . . . . It shall also furnish to the Commission such information as the Commission may require . . . .

15 U.S.C. § 65 (1976).

15 For a comprehensive history of Webb-Pomerene associations, see Diamond, *The Webb-Pomerene Act and Export Trade Associations*, 44 COLUM. L. REV. 805 (1944); Larson, *An Economic Analysis of the Webb-Pomerene Act*, 13 J.L. & ECON. 461 (1970); Simmons, *The Webb-Pomerene Act and Antitrust Policy*, 1963 WIS. L. REV. 426; Note, *The Webb-Pomerene Act: Some New Developments in a Quiescent History*, 37 GEO. WASH. L. REV. 341 (1968); Comment, *Export Combinations and the Antitrust Laws: The Dilemma of the Webb-Pomerene Act*, 17 U. CHI. L. REV. 654 (1950). *See also* J. ATWOOD & K. BREWSTER, ANTITRUST AND AMERICAN BUSINESS ABROAD §§ 9.35-9.47 (2d ed. 1981); W. FUGATE, FOREIGN COMMERCE AND THE ANTITRUST LAWS (2d ed. 1973); R. AHEARN & W. JACKSON, BACKGROUND INFORMATION ON U.S. EXPORT TRADE ASSOCIATIONS AND THE SEPARATION OF BANKING AND COMMERCE (Congressional Research Service June 30, 1980).

16 *See 1981 Hearings*, *supra* note 3, at 232 (testimony of W. Paul Cooper, Chairman of the Board, Acme-Cleveland Corp.); R. AHEARN & W. JACKSON, *supra* note 15, at 4. See also STAFF REPORT TO THE FEDERAL TRADE COMMISSION, WEBB-POMERENE ASSOCIATIONS: A 50-YEAR REVIEW 113 (1967), which concluded that the Webb-Pomerene Act played only a minor role in expanding overall exports during its first 50 years of existence. One witness at the 1981 Hearings testified that in its present form, the Webb-Pomerene Act could be detrimental to certain businesses. *1981 Hearings*, *supra* note 3, at 237-41 (testimony of H. Peter Guttmann, President, HPG Associates).

17 *See* note 49 *infra* and accompanying text.

the advantages of the Webb-Pomerene Act simply may not have been available to a substantial and growing sector of the U.S. economy. Moreover, the Webb-Pomerene Act's antitrust immunity is often perceived to be either useless or, at best, sufficiently vague as to make qualifying as a Webb-Pomerene association an uncertain venture.[18] Some commentators have alluded to outright hostility to the Webb-Pomerene Act by antitrust enforcement officials at both the Department of Justice and the Federal Trade Commission.[19] Most joint U.S. export activity is conducted by consortia working outside the United States which have undoubtedly been counseled as to the relevant antitrust considerations of their exporting operations.

In 1977, the Department of Justice issued its *Antitrust Guide for International Operations*,[20] which concluded that the Webb-Pomerene Act was unnecessary since the protections it offered were "broadly consistent" with the basic principles of the Sherman Act when applied to the transactions of joint export associations.[21] The *Antitrust Guide* stated that "we do not anticipate that transactions outside the coverage of the Webb-Pomerene Act will be subject to substantially different rules under the Sherman Act."[22] In other words, conduct satisfying the Sherman Act's criteria would also satisfy those of the Webb-Pomerene Act.[23] This position fails to recognize that the Webb-Pomerene Act may well express congressional intent that certain joint export behavior, including collusive extraterritorial re-

18 *See 1981 Hearings, supra* note 3, at 311-13 (citing SUBCOMM. ON INTERNATIONAL FINANCE OF THE SENATE COMM. ON BANKING, HOUSING AND URBAN AFFAIRS, U.S. EXPORT TRADE POLICY, 96th Cong., 1st Sess. 18 (1979)). In light of these circumstances, proponents of a new legislative initiative ultimately decided against amending the Webb-Pomerene Act and instead elected to draft new legislation to address directly the antitrust uncertainty and to encourage exports by the nation's growing service industries.

19 *1981 Hearings*, *supra* note 3, at 34.

20 ANTITRUST DIVISION, U.S. DEP'T OF JUSTICE, ANTITRUST GUIDE FOR INTERNATIONAL OPERATIONS (Jan. 26, 1977). For a critical summary and analysis of the Guide, see Fugate, *The Department of Justice's Antitrust Guide for International Operations*, 17 VA. J. INT'L L. 645 (1977).

21 ANTITRUST GUIDE, *supra* note 20, at 4. *See also* Turner, *United States Antitrust Policy and American Foreign Commerce*, in PRIVATE INVESTORS ABROAD: PROBLEMS AND SOLUTIONS IN INTERNATIONAL BUSINESS IN 1967, at 205 (V. Cameron ed. 1967).

22 ANTITRUST GUIDE, *supra* note 20, at 4.

23 The Guide explains, however, that Webb-Pomerene associations are precluded from "(i) artificially or intentionally restrain[ing] U.S. domestic trade or affect[ing] U.S. domestic prices, or (ii) restrain[ing] the export trade of any U.S. competitor of the association." *Id.* This language must be reconciled with the variation in language appearing in the Sherman Act and the Webb-Pomerene Act. The certification standards under ETCA's Title III are, arguably, more lenient, as is Title IV's requirement that the precluded effect on U.S. commerce be "direct, substantial, and reasonably foreseeable." *See* notes 130-36 *infra* and accompanying text.

straints, that may otherwise violate the Sherman Act should nonetheless be allowed in order to promote the statutory policy of fostering U.S. exports.[24]

The potential for confusion in reconciling apparently different statutory standards and administrative interpretations[25] has been compounded by the few instances of judicial decisionmaking concerning the Webb-Pomerene Act, as well as the body of case law interpreting the scope of the Sherman Act. Few cases interpret the Webb-Pomerene Act. Furthermore, it is unclear whether such lawsuits would be brought today by the Department of Justice either under ETCA's Title IV or the less expansionist extraterritorial approach apparently favored by the 1977 *Antitrust Guide*.

The leading case interpreting the Webb-Pomerene Act is *United States v. Minnesota Mining & Manufacturing Co.*[26] In *Minnesota Mining*, the Justice Department charged that U.S. manufacturers of coated abrasives and their related export association had established an alleged combination in restraint of trade based on joint action they took to preserve and expand their foreign markets which were declining due to foreign countries' tariffs, quotas, import controls, dollar shortages, foreign exchange restrictions, local preference campaigns, and similar nationalistic measures.[27] The Justice Department chal-

24 *See* notes 8-15 *supra* and accompanying text.

25 The conflict has also existed between agencies. For example, the Justice Department has said the following about the Webb-Pomerene Act:

> To be actionable, joint activity must have a substantial and foreseeable effect on United States domestic or foreign commerce. Joint activity intended to impact outside the territory of the U.S. and carried on so as not to affect competition between the parties in the United States is unlikely to raise any question under American antitrust law. Accordingly, it has been the consistent position of the Department of Justice that the antitrust exemption found in the Webb-Pomerene Act of 1918 is unnecessary to provide protection for export trade associations since the normal activities undertaken by such associations have as their exclusive focus markets abroad.

1981 Hearings, *supra* note 3, at 310. At the same time, a Federal Trade Commission official adopted a fundamentally different perspective:

> The Export Trade Act, also known as the Webb-Pomerene Act, was adopted in 1918 during a period of resurgent interest in foreign trade. The basic purpose of the Act is to increase exports by granting antitrust immunity to domestic competitors for joint activities in export trade that might otherwise be illegal. For example, the Webb-Pomerene Act allows firms that are competitors in domestic markets to jointly fix export prices and allocate foreign markets—activities that could in some circumstances violate the antitrust laws in the absence of an exemption.

1981 Hearings, *supra* note 3, at 310-11.

26 92 F. Supp. 947 (D. Mass. 1950).

27 *Id.* at 958.

lenged the association's behavior under sections 1 and 2 of the Sherman Act on the ground that

> [i]t is unlawful for four-fifths of the American export trade to combine to export exclusively through one corporation, not available to others and from which they cannot withdraw at will, and for that corporation to fix the quotas within which and prices at which it will buy from its members and the prices at which foreign distributors sell its members' products, to require its distributors to refrain from handling abrasives made by foreign . . . distributors, and to charge higher prices to American exporters than to foreign distributors.[28]

The court expressly rejected the government's contentions and approved the association's export activities. The court stated that Webb-Pomerene associations could be established by the majority of enterprises in an industry, could serve as the members' sole foreign outlet, could agree to purchase goods only from member producers, could fix resale prices for its foreign distributors, could fix prices and quotas for members, and could insist that its foreign distributors handle only members' products.[29] At the same time, the *Minnesota Mining* court acknowledged the paradox lying at the heart of the Webb-Pomerene Act:

> Now it may very well be that every successful export company does inevitably affect adversely the foreign commerce of those not in the joint enterprise and does bring the members of the enterprise so closely together as to affect adversely the members' competition in domestic commerce. Thus every export company may be a restraint. But if there are only these inevitable consequences an export association is not an unlawful restraint. The Webb-Pomerene Act is an expression of Congressional will that such a restraint shall be permitted. And the courts are required to give as ungrudging support to the policy of the Webb-Pomerene as to the policy of the Sherman Act. Statutory eclecticism is not a proper judicial function.[30]

Comparing the result in *Minnesota Mining* with the decision in *United States v. United States Alkali Export Association*[31] more clearly reveals how parties considering establishing Webb-Pomerene associations might become confused about the applicable legal standards. In *Alkali Export Association*, the government challenged the export activities of the United States Alkali Export Association, specifically

28 *Id.* at 964-65.
29 *Id.* at 965.
30 *Id.*
31 86 F. Supp. 59 (S.D.N.Y. 1949).

alleging, inter alia, the illegality of the association's entry into a series of agreements and participation in other concerted practices that restricted the export of alkalis from the United States to many world markets. The association claimed protection under the Webb-Pomerene Act, contending that U.S. antitrust laws "have no applicability to worldwide apportionment of territory, establishment of exclusive markets, and the fixing and maintenance of prices between foreign competitors and export associations organized in the United States under the terms of the [Webb-Pomerene] Act."[32]

The court concluded that the association's activities were not protected under the Webb-Pomerene Act and noted that section 5 of the Federal Trade Commission Act,[33] which prohibits "unfair methods of competition," enjoyed "world-wide operation."[34] As a result, the court appeared to be enforcing U.S. competitive standards around the world regardless of the presence of any direct, substantial, or reasonably foreseeable effect on the U.S. domestic market:

> [T]he conclusion is irresistible that the Webb-Pomerene Act affords no right to export associations to engage on a world-wide scale in practices so antithetical to the American philosophy of free competition. The international agreements between defendants allocating exclusive markets, assigning quotas in sundry markets, fixing prices on an international scale, and selling through joint agents are not those "agreements in the course of export trade" which the Webb Act places beyond the reach of the Sherman Law.[35]

This broad assertion of the extraterritorial application of U.S. antitrust laws is difficult to reconcile with the *Minnesota Mining* result. The resulting enforcement unpredictability has discouraged reliance on the Webb-Pomerene Act.

In addition to the Webb-Pomerene Act's basic vagueness, the act has lacked success in stimulating the creation of export associations for reasons unrelated to the act itself. Although the few cases construing the Webb-Pomerene Act have tended to uphold the narrow exemption from antitrust liability, at least some lower federal courts have recently interpreted the Sherman Act so broadly as to create additional uncertainty as to whether exempt Webb-Pomerene activities would be legal under the Sherman Act. While the Justice

32 *Id.* at 69.

33 15 U.S.C. § 45(a)(1) (1976): "Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful."

34 86 F. Supp. at 67.

35 *Id.* at 70.

Department stated in its 1977 *Antitrust Guide* that "[n]ormally, [it] would not challenge a joint venture whose only effect was to reduce competition among the parties in foreign markets, even where goods or services were being exported from the United States,"[36] some federal courts have reached different conclusions. At least four cases, *Todhunter-Mitchell & Co. v. Anheuser-Busch, Inc.*,[37] *Industria Siciliana Asfalti, Bitumi, S.p.A. v. Exxon Research & Engineering Co.*,[38] *United States v. Lerner Co.*,[39] and *Pacific Seafarers, Inc. v. Pacific Far East Line, Inc.*,[40] have still found the Sherman Act to apply in situations where the principal negative effect falls on a non-U.S. entity outside the United States. In recent years, the heightened controversy over the extraterritorial application of U.S. antitrust laws has only furthered the confusion in this area of the law.[41]

B. *ETCA's Legislative Background*

In light of the Webb-Pomerene Act's history of uncertain en-

36 ANTITRUST GUIDE, *supra* note 20, at 21.

37 375 F. Supp. 610, *modified in part*, 383 F. Supp. 586 (E.D. Pa. 1974).

38 1977-1 Trade Cas. (CCH) ¶ 61,256 (S.D.N.Y. 1977).

39 215 F. Supp. 603 (D. Hawaii 1963).

40 404 F.2d 804 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1093 (1969).

41 The criteria for applying the Sherman Act, whose provisions do reach some restraints of trade which do not necessarily have a direct and substantial effect on United States foreign commerce, remain unclear. *See* Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287 (3d Cir. 1979); Timberlane Lumber Co. v. Bank of America, 549 F.2d 597, 613 (9th Cir. 1976) (in applying Sherman Act to conduct abroad, considerations such as comity, fairness, and other "balancing factors" should be examined in assessing jurisdiction). Consideration of balancing factors is consistent with the 1965 Restatement of Foreign Relations Law. RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 40 (1965). The proposed new Restatement would establish "reasonableness" as the basic principle governing the propriety of extraterritorial jurisdiction. RESTATEMENT OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 403 (Tent. Draft No. 2, 1981). The drafters of ETCA's Title IV were probably well aware of the increasing use of the "reasonableness" principle in premising jurisdiction on conduct having a "direct, substantial, and reasonably foreseeable effect" on U.S. trade or commerce. *See generally* Cira, *The Challenge of Foreign Laws to Block American Antitrust Actions*, 18 STAN. J. INT'L L. 247, 272-78 (1982) (approving *Timberlane/Mannington Mills* factors); Davidow, *Extraterritorial Antitrust and the Concept of Comity*, 15 J. WORLD TRADE L. 500 (1981); Haight, *International Law and the Extraterritorial Application of the Antitrust Laws*, 63 YALE L.J. 643 (1954); Jones, *Extraterritoriality in U.S. Antitrust: An International "Hot Potato"*, 11 INT'L LAW. 415 (1977); Maier, *Extraterritorial Jurisdiction at a Crossroads: An Intersection Between Public and Private International Law*, 76 AM. J. INT'L L. 280 (1982); Note, Timberlane: *Three Steps Forward, One Step Backwards*, 15 INT'L LAW. 419 (1981) (criticizing *Timberlane*'s "balancing" test while favoring *Alcoa*'s "effects" test); Comment, *Recent Developments—Antitrust: Extraterritorial Jurisdiction under the Effects Doctrine—A Conflicts Approach*, 46 FORD. L. REV. 354 (1977). *See also* Griffin, *Should U.S. Limit Extraterritorial Reach of Its Law?*, LEGAL TIMES, Nov. 22, 1982, at 14; J. Shenefield, *Extraterritoriality and Antitrust—New Variations on a Familiar Theme*, Remarks Before the International Law Institute and the ABA Section of International Law (Dec. 10, 1980), *reprinted in* 5 TRADE REG. REP. (CCH) ¶ 50,424, at 55,962.

forcement and its limited effectiveness in stimulating export sales, legislation was introduced in 1978 to encourage the formation of export trading companies through amending the Webb-Pomerene Act. As already noted, however, the legislation which was ultimately passed left the Webb-Pomerene Act untouched.[42] During 1979 and 1980, the Senate's Subcommittee on International Finance of the Committee on Banking, Housing and Urban Affairs held hearings on legislation introduced by Senator Adlai E. Stevenson.[43] The legislation was ultimately revised by Senator John Heinz in the Senate Banking Committee's markup, and a new bill, S. 2718, was reported out and passed by the Senate by a vote of 77-0 on September 3, 1980.

Although subcommittee hearings were held in May and June of 1980 before the Subcommittee on International Economic Policy and Trade of the Committee on Foreign Affairs, the House of Representatives failed to consider the legislation. The legislation was presented and passed again by the Senate by a vote of 93-0 during the 97th Congress on April 8, 1981.[44] The Subcommittee on the Judiciary held hearings on legislation submitted to amend the Sherman and Clayton Acts to exclude various types of export activities from their jurisdiction.[45] Related bills were also introduced in the House throughout 1981, but no final action was taken by the House of Representatives that year.

Throughout 1982, several House committees conducted more hearings into the need for export trading companies. Finally, in late summer, the House of Representatives passed a bill that was substantially the same as the Senate-passed bill. Discrepancies were ultimately resolved on October 1, 1982, when the Senate and the House of Representatives approved the Conference Report.[46] The President signed the act a week later.

One rather unusual feature of the legislation ultimately passed is the comprehensive list of congressional "findings" which comprises much of Title I of the Export Trading Company Act of 1982. Section 102(a) lists eleven findings as to why export trading companies

42 *See* note 18 *supra*.

43 *Hearings on S. 2379, S. 864 Before the Subcomm. on International Finance of the Senate Comm. on Banking, Housing, and Urban Affairs*, 96th Cong., 2d Sess. (1980); *Hearings on S. 864, S. 1499, S. 1663, and S. 1744 Before the Subcomm. on International Finance of the Senate Comm. on Banking, Housing, and Urban Affairs*, 96th Cong., 1st Sess. (1979).

44 127 CONG. REC. S3667 (daily ed. Apr. 8, 1981).

45 *Hearings on H.R. 2326 Before the Subcomm. on Monopolies and Commercial Law of the House Comm. on the Judiciary*, 97th Cong., 1st Sess. (1981).

46 H.R. REP. NO. 924, 97th Cong., 2d Sess. (1982); S. REP. NO. 644, 97th Cong., 2d Sess. (1982).

are necessary to stimulate export activities in particular and the U.S. economy in general.[47] This section is principally responsible for characterizing the legislation as designed to increase the "export consciousness" of American manufacturing and service companies. For example, the findings in section 102(a) assert that U.S. exports create and maintain one out of every nine U.S. manufacturing jobs and generate one out of every seven dollars in value of all U.S. goods produced. They further acknowledge that "tens of thousands of small- and medium-sized United States businesses produce exportable goods or services but do not engage in exporting."[48] The act also recognizes the extent to which service-related industries, as distinguished from manufacturing, have become an important characteristic of the U.S. economy:

> [T]he rapidly growing service-related industries are vital to the well-being of the United States economy inasmuch as they create jobs for seven out of every ten Americans, provide 65 per centum of the Nation's gross national product, and offer the greatest potential for significantly increased industrial trade involving finished products.[49]

In what can only be considered a fairly blunt statement about why the United States has failed to develop export competitiveness, the act further observes that "the development of export trading companies in the United States has been hampered by business attitudes and by Government regulations."[50]

C. *ETCA's Objectives*

In recognizing the need to stimulate and promote additional U.S. exports, the Export Trading Company Act's declaration of purpose states an intent

> to increase . . . exports of products and services by encouraging more efficient provision of export trade services to United States producers and suppliers by establishing an office within the Department of Commerce to promote the formation of export trade associations and export trading companies, by permitting bank holding companies, bankers' banks, and Edge Act corporations and agreement corporations that are subsidiaries of bank holding companies to invest in export trading companies, by reducing restrictions on trade financing provided by financial institutions, and by

47 Pub. L. No. 97-290, § 102(a), 96 Stat. 1233 (1982)(to be codified at 15 U.S.C. § 4001).
48 *Id.* § 102(a)(4).
49 *Id.* § 102(a)(2).
50 *Id.* § 102(a)(8).

> modifying the application of the antitrust laws to certain export trade.[51]

In addressing the twin problems of inadequate financing and perceived antitrust uncertainty, Congress did not call for substantially increased federal regulation or major new federal spending. Although the Federal Reserve Board and the Department of Commerce have issued appropriate proposed implementing regulations,[52] ETCA's focus is permissive rather than mandatory; individuals, corporations, and banking organizations wanting to take advantage of the act's opportunities are free to do so with what was designed as a *de minimis* regulatory compliance burden. Through this approach, the bill's sponsors intended to create a more favorable economic and regulatory environment for promoting and financing U.S. exports.

ETCA's primary objective, as set forth in the legislative findings, is to improve U.S. export performance by facilitating the creation of U.S.-based export trading companies. In particular, the legislation is intended to stimulate exports by the tens of thousands of small- to medium-sized U.S. manufacturing and service firms which either do not presently export at all or which could increase exports given a more conducive regulatory environment. Recognizing that the transactional aspects of export activity, such as additional economic cost and required business know-how, may present barriers to increased exports by such firms, the legislation is intended to foster the growth of intermediary firms capable of performing the full range of export services.

To a certain extent, the models for the intermediary export trading companies whose development would be encouraged by ETCA are the diversified trading companies existing in many European countries and in East Asian countries, particularly Japan.[53] Presently a variety of U.S. enterprises provide export services, such as

51 *Id.* § 102(b), 96 Stat. at 1234.

52 The Commerce Department, in conjunction with the Justice Department, issued proposed regulations on December 21, 1982. 47 Fed. Reg. 56,972 (1982). The Federal Reserve Board issued its proposed regulations on January 25, 1983. 48 Fed. Reg. 3375 (1983).

53 A review by the Congressional Research Service concluded that "[t]he exporting success of European and Japanese trading companies provides a model upon which the U.S. Government could encourage and support the formation and expansion of somewhat similar entities in the United States." R. AHEARN, EXPORT TRADING COMPANIES, Issue Brief No. IB80044, at 2 (Congressional Research Service Sept. 17, 1982). Adding that U.S. export manufacturers faced both financing and antitrust impediments not encountered by their overseas counterparts, the study characterized the proposed ETC legislation as "just one aspect of a broader review of U.S. policy and regulations that affect the competitiveness of U.S. exports" that is designed to "eliminate or lessen U.S. Government disincentives and provide greater incentives for U.S. exports." *Id.* at 5.

freight forwarding, brokerage, shipping, insurance, export financing, legal advice, and foreign marketing and distribution. However, such enterprises typically offer only one or a few of the services required to complete an export transaction. By contrast, the overseas trading companies generally possess substantially greater financial resources than these U.S. export-related firms as well as sophisticated multi-dimensional capabilities which enable them to perform all of the functions required to engage in export trade. Those few U.S.-based firms that have developed a large-scale export capability have tended to deal in raw materials, such as minerals or grain, or in specialized segments of manufacturing, such as the aircraft industry.[54]

Japan's general trading companies, or *sogo shosha*, are perhaps the most outstanding examples of the kinds of international trading conglomerates against which U.S. exporters must today compete. The success of the Japanese trading houses has both reflected and substantially contributed to the rapid growth of the Japanese economy since the end of World War II. Most of these companies began a century ago or less, following the opening of trade routes between Japan and the West in the 1850's and 1860's. Since that time, the largest of the *sogo shosha* have grown from small shipping and mercantile firms into giant conglomerates that have dominated Japan's post-World War II domestic economy and exceed in scope virtually all other export trading firms on the international scene.[55] Certain of

54 *See generally* D. MORGAN, THE MERCHANTS OF GRAIN (1979); A. YOUNG, THE SOGO SHOSHA: JAPAN'S MULTINATIONAL TRADING COMPANIES 17 (1979). Several U.S. manufacturers, such as International Business Machines Corporation and the Boeing Company, have, of course, developed extensive sales, servicing, and, to some extent, manufacturing operations abroad that have enabled them to penetrate foreign markets effectively. However, these companies' foreign networks are used largely, if not exclusively, to promote the parent entity's products and therefore do not act as trading companies in the sense of dealing in the merchandise and services of a variety of providers, as do, for example, the major Japanese trading houses.

In anticipation of ETCA's passage, several major U.S. companies have announced plans to establish export trading subsidiaries. Sears Roebuck & Co. announced a plan to set up its Sears World Trade Inc. subsidiary in the spring of 1982, intended to promote sales of various consumer products, including some manufactured by current Sears suppliers. General Electric Trading Co., also established in the spring of 1982, has announced plans to represent abroad several U.S. manufacturers of industrial and technical products. Other U.S. companies such as Burlington Northern Inc. and Control Data Corporation have realigned existing international marketing divisions to create trading capabilities suited to promote additional products and suppliers. *See* DAILY REPORT FOR EXECUTIVES (BNA) No. 205, at P-2 to P-4 (Oct. 22, 1982). *See also An Overview of Export Trading in the United States*, American Banker, Feb. 17, 1983, at 26.

55 *See generally* A. YOUNG, *supra* note 54; *Sogo Shosha: The Japanese Example*, American Banker, Feb. 17, 1983, at 30. There is ample evidence in ETCA's legislative history that the major international trading firms, and particularly the Japanese *sogo shosha*, were perceived

these firms are, in fact, among the leading exporters from the United States.[56]

A brief description of the operations of the *sogo shosha* trading companies may illustrate the nature of this formidable competition. The general trading companies' principal business is, of course, trading, both as principals in purchase or sale transactions and as intermediaries for other deals. Single-product sales represent the most basic kind of transaction engaged in, although the *sogo shosha* commonly engage in multi-product sales to individual customers as well. More significantly, perhaps, these firms are increasingly involved in highly complex transactions, such as the sale of a major industrial facility's components or even the export of an entire plant on a turnkey basis whereby the necessary equipment, technology, and consulting services of numerous manufacturers and suppliers are coordinated and packaged to the customer. The firms frequently en-

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by Congress as substantial contributors to the success of their home countries' economic well-being in general and their export performance in particular. For example, the Report of the Senate Committee on Banking, Housing and Urban Affairs in S. 734, the Senate version of ETCA, noted that "most European countries, as well as Japan and Korea, possess sophisticated, large-scale general purpose trading companies which perform the full range of requisite functions for potential exporters; the success of such companies has contributed significantly to the export earnings of all of our major trade competitors." S. REP. NO. 27, 97th Cong., 2d Sess. 5 (1982). Senator John Glenn submitted a written statement to the Subcommittee on International Finance and Monetary Policy of this Senate committee which noted that "[i]n Japan, for example, the top ten trading organizations, the *Sogo Shoshas*, account for approximately 60 percent of Japan's imports and 50 percent of its exports" and that "[t]rading companies have also played an important role in the economic growth of many European countries. Yet, despite their historical and international success, trading companies have not flourished in the United States." *1981 Hearings*, *supra* note 3, at 170.

Similarly, John M. Boles, president of Boles & Co., a U.S.-based international trading company described as being organized along the lines of the large overseas trading companies, testified at the Senate subcommittee hearings:

> As U.S. trading companies will compete with foreign trading companies and various consortia, the issue of credibility becomes important. A small U.S. trading company is at a great disadvantage when compared to a Mitsubishi, Mitsui, Jardine Matheson, or Inchcape. However, a U.S. trading company affiliated with, or partially owned by, a major U.S. commercial bank becomes quite a different reality in the eyes of a foreign customer. International trade is predominantly controlled by extremely large enterprises, and small unparented U.S. export companies are likely to become nonevents.

Id. at 215.

56 According to testimony given by Senator Adlai Stevenson before the Subcommittee on International Finance and Monetary Policy of the Senate Committee on Banking, Housing and Urban Affairs, the sixth largest U.S. exporter in 1980 was the American subsidiary of Mitsui & Co. *See 1981 Hearings*, *supra* note 3, at 14. Additionally, Nissho-Iwai Co., the sixth largest Japanese trading company, has claimed that its U.S. subsidiary is responsible for 1% of U.S. exports. *Id.*; Gordon, *Exporters Look Enviously at Japan in Pressing for New U.S. Export Laws*, Nat'l Journal, June 21, 1980, at 1021.

gage in two-way or barter trade, where one commodity is traded for another and no cash consideration is paid, and multi-party trades, including the negotiation and settlement of transactions entirely outside of Japan and involving non-Japanese products. Barter transactions as well as "switch trade," involving the importing of goods from one country and payment through use of a third country's currency as the currency of settlement, are increasingly common means of avoiding problems of currency convertibility and unstable exchange rates, yet require highly skilled understanding of diverse markets and other countries' economic and monetary conditions.[57]

In addition to conducting actual trading activity, the giant Japanese firms, with their extensive financial and industrial resources and connections, are able to engage in a range of other trade-related services. These include handling all the necessary paperwork and documentation related to an export transaction, obtaining insurance coverage, and providing warehousing and transportation services. These services may be arranged on a contract basis; often, they are performed by an arm of the trading company itself. The *sogo shosha* also engage in certain kinds of manufacturing, generally through subsidiaries or joint ventures, although the purpose of such manufacturing is usually more to generate trading opportunities than to develop an independent manufacturing capability. Through their access to (and, in some cases, ownership affiliation with) major banks, the *sogo shosha* are able to facilitate or extend credit, loans, and loan guarantees to small- and medium-sized buyers, sellers and suppliers. The system is mutually beneficial because by using the *sogo shosha* as financial intermediaries, the banks avoid the higher costs and greater risk that may be associated in dealing directly with small borrowers, and can indirectly use the *sogo shosha*'s assessment of the small firms' creditworthiness. Conversely, borrowing through the *sogo shosha* gives the small manufacturer, exporter, or purchaser more ready access to capital than might otherwise be available by going directly to

57 According to the Commerce Department, in 1976 approximately 28% of East-West trade involved some form of barter arrangement, with 40% of such trade expected to be in barter form by 1981. A number of major U.S. firms have begun to develop barter expertise, but much learning remains to be done. According to one U.S. international trade executive, "Barter is an idea whose time has come, and that means that a lot of companies are finding themselves in novel situations." He added, "If Rockwell sells a $100 million product in a barter transaction, what the hell is Rockwell going to do with $100 million worth of rice?" Gordon, *supra* note 56, at 1021. Countertrade is being recognized as increasingly important in transactions with developing countries that are chronically short on foreign currency reserves.

the commercial banks.[58]

Through their evolution, the *sogo shosha* have developed extensive worldwide staffing and communications networks.[59] These networks have enabled them to gather and process efficiently information about such subjects as the size of potential markets, competitive manufacturers in the export target country, foreign exchange controls and currency fluctuations, distribution channels, commodity prices, tariff and non-tariff barriers, technology-licensing requirements, and other factors directly affecting potential export transactions. This vast storehouse of information, and the ability to communicate it rapidly from one country to another, can invaluably assist the *sogo shosha* and their customers in seeking to take rapid advantage of new trading opportunities.[60]

The major *sogo shosha* are not the only international trading firms with which the newly organized U.S. ETCs will have to compete. The large general trading companies constitute only the top

58 The equity and debt affiliations between the largest *sogo shosha* and the major Japanese banks (often bearing the same name as the giant trading houses) are highly complex and reflect a lengthy historical evolution. None of the large trading companies appears to control a major bank. However, they do hold substantial minority interests, often in several financial institutions. For example, in 1973 Nissho-Iwai Co. owned 7.47% of the shares of Sanwa Bank, 7.31% of Daiichi Kangyo Bank, 3.78% of Daiwa Bank, and 3.13% of the Bank of Tokyo. Similarly, in the same year C. Itoh & Co. owned 8.72% of Sumitomo Bank, 8.72% of Daiichi Kangyo Bank, 5.23% of the Bank of Tokyo, and 3.43% of Fuji Bank. Conversely, the financial institutions have substantial equity interests in the trading companies, owning nearly 50% or more of the shares of the ten largest *sogo shosha*. For example, as of March 31, 1975, over 48% of the shares of Mitsubishi Corporation were owned by 72 financial institutions. A. YOUNG, *supra* note 54, at 51-55. The *sogo shosha* obtain a substantial portion of their considerable loan financing from affiliated institutions as well. For example, as of March 31, 1973, Mitsubishi Bank had obtained 14.8% of its debt from Mitsubishi Bank and 25.3% of its debt from Mitsubishi Bank group financial institutions. *Id.* at 43. *See also* A. SAMPSON, THE MONEY LENDERS 208-11 (1981); *Sogo Shosha: The Japanese Example*, American Banker, Feb. 17, 1983, at 30.

59 As an example, Mitsubishi Corporation had approximatley 3,500 foreign representatives in 120 offices around the world in 1980. Gordon, *supra* note 56, at 1020. The effectiveness of this overseas corps is magnified by the presence of substantial numbers of Japanese foreign service commercial officers, who may number more in one country than the entire contingent of commercial officers in the U.S. foreign service, according to a senior Commerce Department official. *Id.*

60 Young recounts an example where such rapid communication of information was valuable with respect to a prospective lowering of copper production quotas by the Zambian government in 1974. The Mitsubishi Corporation's local information source in that country alerted a joint venture in which Mitsubishi was participating of the quota reduction only a half hour before it was officially announced. Mitsubishi, in return, notified its customers and officials at once, enabling them to take the necessary compensatory actions before the world copper price rose by $70 a ton. Such actions were completed only twenty minutes after the official announcement of the Zambian action and avoided considerable losses for the firms affected. A. YOUNG, *supra* note 54, at 63.

echelon of Japanese trading entities, below which are hundreds of smaller firms actively engaged in export activity. In addition, large multi-dimensional trading companies exist in various Western European countries as well as Canada, Hong Kong, and Singapore. However, these non-Japanese firms are individually far smaller, in terms of their annual sales volumes, than the major *sogo shosha*. Because of their sales dominance, the giant Japanese firms are likely to become the benchmark from which the success of new U.S. export trading companies will be measured.[61]

Admittedly, there are several factors peculiar to Japan which in part may account for the success of the *sogo shosha*, including their close working relationship with Japanese banks, the Japanese government's pro-export trade and tariff policies, and the close interlocking directorates of many of Japan's 8,000 trading companies. However, U.S. trading companies will nevertheless be able to emulate several Japanese practices in the development of a distinctly American form of export company. Although the U.S. regulatory environment no doubt will shape the ultimate evolution of the U.S. trading company, there are several structural features of the Japanese *sogo shosha*, such as their ability to provide comprehensive one-stop export services for a variety of products, that their U.S. counterparts can use as models.

II. The Participation of Banking Institutions In U.S. Export Trading Companies

One of ETCA's most important features is the provision allowing for the involvement of U.S. banks in export trading activities.[62] Traditionally, U.S. banks have been prohibited from engaging in activities that are commercial in nature. The "business of banking" has, to a large extent, been considered as "banking" and not as "commerce."[63] In contrast to the attitude in most foreign countries,

61 As of the year ended March 31, 1977, the ten largest Japanese general trading companies ranked by sales were Mitsubishi Corporation; Mitsui & Co., Ltd.; Marubeni Corporation; C. Itoh Co., Ltd.; Sumimoto Corp.; Nissho-Iwai Co., Ltd.; Toyomenka Kaisha, Ltd.; Kanematsu Gosho Ltd.; Nichimen Co., Ltd.; and Ataka & Co., Ltd. *See* A. YOUNG, *supra* note 54, at 23. The dominance of these firms can be measured in a number of ways. For example, in fiscal year 1973 the ten largest *sogo shosha* accounted for 53% of Japan's export total and 64% of Japan's import total on a customs clearance basis. These firms are not exclusively export, import, and third-country-trade oriented, of course; a substantial proportion of their business also comes from domestic commerce within Japan.

62 Pub. L. No. 97-290, §§ 202-203, 96 Stat. 1233, 1235-38 (1982)(to be codified at 12 U.S.C. § 1843).

63 *See generally* Waxman, *1982 Act Delineates Role of Banks in Export Trading*, LEGAL TIMES,

American banks have long been restricted from participating in the risks inherent in commercial and industrial ventures. The power of commercial banks to engage in most types of investment banking activities was sharply circumscribed through enactment of the Banking Act of 1933,[64] but national banks have been prohibited, with limited exceptions, from operating or investing in commercial and industrial enterprises dating from the National Bank Acts of 1863 and 1864.[65]

Over the years, banking institutions have gradually been able to expand their authority to enter non-banking activities. Certain of these activities have been permitted through administrative rulings by the Comptroller of the Currency, under the provision of the National Banking Act allowing banks to "exercise . . . all such incidental power as shall be necessary to carry on the business of banking."[66] Similarly, banks have acquired authority to underwrite limited types of revenue bonds.[67]

Through the creation of bank holding companies (BHCs), banking organizations, although not banks themselves, have been able to diversify further into non-banking activities. Under the Bank Holding Company Act of 1956, as amended,[68] BHCs may presently engage in a number of activities not permitted to banks, including owning up to 5 percent of the outstanding shares of any company, and investing in the shares of any company, in any amount, the activities of which the Federal Reserve Board has determined "to be so closely related to banking or managing or controlling banks as to be a proper incident thereto."[69] In exercising its discretionary authority under this provision, the Federal Reserve Board has permitted BHCs to provide certain financial, fiduciary, and insurance services. More recently, BHCs have been permitted to acquire savings and loan associations and brokerage firms, although they have not been permitted to enter areas traditionally regarded as more speculative, such as commodity trading. BHCs also are less restricted than are banks in

Nov. 15, 1982, at 14; Gordon, *supra* note 56, at 1018; R. AHEARN & W. JACKSON, *supra* note 15, at 16-19.

64 48 Stat. 162 (1933) (codified as amended in scattered sections of 26 U.S.C.). Passage of the Banking Act, otherwise known as the Glass-Steagall Act, was a reaction to the widely perceived belief that undue concentrations of financial power, and abuses of such power, contributed directly to the stock market collapse of 1929-32 and the resulting Great Depression.

65 12 U.S.C. § 24 (1976).

66 *Id.*

67 *Id.*

68 12 U.S.C. §§ 1841-1850 (1976, Supp. I 1977 & Supp. II 1980).

69 12 U.S.C. § 1843(c)(6)-(8) (1976).

engaging in various business activities overseas, and can engage in conduct in other countries that would be unlawful in the United States. This involvement can take place through branches of U.S. banks operating abroad, through Edge Act and Agreement Act corporations, and through direct investments in foreign banks and other foreign enterprises.[70]

ETCA expresses congressional intent to encourage U.S. banking institutions to participate in the ownership and management of ETCs, thus continuing the trend toward expanding banking institutions' authority. U.S. banking institutions' investment in ETCs was believed to constitute a potent stimulus for the export expansion sought by the legislation's sponsors. For example, the Report of the Senate Committee on Banking, Housing and Urban Affairs accompanying S. 734, the Senate version of ETCA, stated:

> Banks with international offices, experience in trade financing, business contacts abroad, international marketing knowledge, and familiarity with domestic U.S. producers are the most likely source of leadership in forming export trading companies. Their skills are important to the organization and management of trading companies. A number of large non-Japanese trading companies are owned by banks in other countries. For example, Hongkong and Shanghai Banking Corp. owns a 33 percent controlling interest in Hutchinson Whampoa Limited; Midland Bank Limited owns controlling interests in at least three trading companies; Barclay's Bank International owns 24.5 percent of Tozer, Kernsley and Millbourn; Credit Lyonnais owns 80 percent of Essor PME; and Banco de Brazil owns 100 percent of Beke Company.[71]

Congress considered the absence of close ties with financial institutions to be a major hindrance to the growth of existing U.S. export management companies. Such firms are frequently small, thinly capitalized, and restricted in their ability to pursue aggressively the expansion of U.S. exports. Congress further recognized that while many U.S. banks presently provide export-related financing services, they do so on a reactive, rather than an active, basis. For example, many U.S. banks use their export-related skills only at their customers' request, much as they would for any borrower or other bank cus-

70 An Edge Act corporation 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 operations. An Agreement Act corporation is a federal 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. *See* 12 U.S.C. §§ 601-603, 611-631 (1976).

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

tomer, rather than initiating or helping to initiate export transactions. By permitting banking institutions to participate directly in trading companies through investment and management, Congress has assumed that they will have strong incentives to seek out export markets and facilitate exports.

In addition to possessing financing capabilities, U.S. banking organizations possess two principal attributes of use to ETCs. First, through their domestic banking operations, banking organizations have direct relationships with many small- and medium-sized companies who may produce exportable products but are not presently in the export business. Second, through their international branches or correspondent banks, banking institutions are in a position to identify potential foreign markets and customers. Congress thus envisioned banking institutions as functioning both as financial intermediaries in export trade and also as active promoters of such trade.[72]

Title II, designated the "Bank Export Services Act," is the portion of ETCA that authorizes banking institutions' participation in ETCs. In section 202 of the act, Congress declared its purpose as providing for the "meaningful and effective" participation of certain kinds of banking institutions in the financing and development of U.S. export trading companies. In addition, section 202 directs the Federal Reserve Board, which will exercise jurisdiction over bank investments in ETCs, to

> (1) provide for the establishment of export trading companies with power sufficiently broad to enable them to compete with similar foreign-owned institutions in the United States and abroad;
> (2) afford to United States commerce, industry, and agriculture, especially small-and-medium size firms, a means of exporting at all times;

72 Foreign banks having extensive branching networks in their home countries, some of which also already have agency or representative offices in the U.S., would seem to be particularly well-suited to provide interactive relationships with prospective export customers. In recent years, moreover, the number of U.S. banks owned by foreign banking organizations has substantially increased. For example, in 1980 British-based Midland Bank acquired a controlling interest in Crocker Bank, a major California bank. Barclays Bank has also acquired considerable banking operations in New York and California. Several leading Japanese banks have also acquired banking operations in California.

Congress may have had the possibility of substantial ETC participation by foreign-based banks in mind when it directed the Federal Reserve Board to report within two years of the date of enactment of ETCA its recommendations "on the effects of ownership of United States banks by foreign banking organizations affiliated with trading companies doing business in the United States." Pub. L. No. 97-290, § 205, 96 Stat. 1233, 1238 (1982) (to be codified at 12 U.S.C. § 1843).

> (3) foster the participation by regional and smaller banks in the development of export trading companies; and
> (4) facilitate the formation of joint venture export trading companies between bank holding companies and non-bank firms that provide for the efficient combination of complementary trade and financing services designed to create export trading companies that can handle all of an exporting company's needs.[73]

According to the Conference Report, these objectives, along with the purposes set forth in Title I of the act, if properly pursued, will result in development of "effective, 'full-service' trading companies with bank holding company involvement that will effectively and aggressively market American products and will not be disadvantaged or limited" in competing with foreign trading companies or U.S.-based ETCs owned by non-bank firms.[74]

Section 203 of the act allows bank holding companies to participate in ETCs subject to Federal Reserve Board oversight. Section 203 amends section 4(c) of the Bank Holding Company Act[75] to provide a new section 4(c)(14), which allows BHCs to acquire shares of any export trading company whose acquisition or formation by a BHC has not been disapproved by the Federal Reserve, subject to an overall limitation of such investments to no more than 5 percent of a BHC's consolidated capital and surplus. ETCA requires BHCs to provide the Federal Reserve with sixty days prior written notice of a proposed investment in an ETC.[76] This disapproval period may be extended by the Federal Reserve for an additional thirty days if the applicant has not submitted all required information or the Federal Reserve believes that any material information submitted is substantially inaccurate. During this period, the Federal Reserve may disapprove a proposed investment only if it makes one of the following three findings:

> (1) such disapproval is necessary to prevent unsafe or unsound banking practices, undue concentration of resources, decreased or unfair competition, or conflicts of interests;

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73 *Id.* § 202.

74 H.R. REP. NO. 924, 97th Cong., 2d Sess. (1982), *reprinted in* 128 CONG. REC. H8347 (daily ed. Oct. 1, 1982).

75 12 U.S.C. § 1843(c) (1976).

76 Under the Federal Reserve Board's proposed regulations issued January 25, 1983, the notification would be required to include a description of the nature and extent of, and the managerial resources related to, each activity which the ETC proposes to engage in, classified by four-digit Standard Industrial Classification. If the ETC desires to expand its activities beyond those described in its initial notification, it would be required to file an additional notification giving the Board 60 days' prior notice of such additional activities. *See* 48 Fed. Reg. 3379 (1983)(to be codified at 12 C.F.R. § 211.34) (proposed Jan. 25, 1983).

> (2) the Board finds that such investment would affect the financial or managerial resources of a bank holding company to an extent which is likely to have a materially adverse effect on the safety and soundness of any subsidiary bank of such bank holding company; or
> (3) the bank holding company fails to furnish the information required [by the Board to be submitted by an applicant].[77]

The Board is required to inform applicants of the basis for disapproval, in writing, within three days after it decides to disapprove a prospective investment. Absent the Board's disapproval within the applicable time period, a BHC is free to invest in an ETC.

Besides limiting the amount of the BHC's investment in ETCs, ETCA also limits the amount of credit that may be extended to an ETC in which the BHC invests. The total amount of credit extended by the BHC and by all its subsidiaries may not exceed at any one time 10 percent of the BHC's consolidated capital and surplus (excluding for purposes of calculating the aggregate extensions of credit the amount of the BHC's equity investment in the ETC). In addition, in an effort to prevent favoritism or undue influence, BHCs and their subsidiaries may not extend credit to an ETC in which it has made an investment, or to customers of the ETC, on terms more favorable than those afforded to similar homeowners under similar circumstances. Such extensions of credit may not involve more than the normal terms of repayment or present other unusual features.[78]

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77 Pub. L. No. 97-290, § 203(3), 96 Stat. 1233, 1236-38 (1982) (adding 12 U.S.C. § 1843(c)(14)(A)(iv)).

78 *Id.* (adding 12 U.S.C. § 1843(c)(14)(B)). The Federal Reserve Board's proposed regulations also would extend the non-preference requirement with respect to extensions of credit to investors holding 10% or more of the shares of the ETC and affiliates of the investor or customer of the ETC. *See* 48 Fed. Reg. 3379 (1983) (to be codified at 12 C.F.R. § 211.33(b)(2)) (proposed Jan. 25, 1983).

Section 203 of ETCA also adds to the Bank Holding Company Act, 12 U.S.C. § 1843(c)(14)(B)(ii), which provides: "No provision of any other Federal law in effect on October 1, 1982, relating specifically to collateral requirements shall apply with respect to any such extension of credit [by a BHC to the ETC in which it invests]." The Conference Report states that this language was intended to exempt bank-affiliated ETCs from existing collateral requirements on the grounds that the other restrictions imposed by ETCA with respect to the amount of investment by BHCs in ETCs and the restrictions on extensions of credit would adequately protect affiliated banks from excessive risks. The Conference Report further stated that "the exemption from the collateral requirement of existing law is necessary in view of the type of assets most ETCs would have," i.e., inventory and receivables. 128 CONG. REC. H8348 (daily ed. Oct. 1, 1982).

Eight days after the enactment of ETCA, President Reagan signed the Garn-St. Germain Depository Institutions Act of 1982, which altered the collateral requirements for transactions between banks and their affiliates under § 23A of the Federal Reserve Act, 12 U.S.C. § 371(c). Under this act, a loan or extension of credit to a bank's affiliate secured by

In addition to direct investment by BHCs, Edge Act corporations and agreement corporations which are subsidiaries of BHCs also may invest in ETCs. These equity investments are limited in the aggregate to no more than 5 percent of the Edge Act or agreement corporation's consolidated capital and surplus, or 25 percent in the case of a corporation not engaged in banking.[79] In addition to these entities, the term "bank holding company" is defined to include bankers' banks, or banks owned and organized primarily to do business with other banks and not to serve the general public.[80]

Export trading companies in which banking institutions may invest are defined somewhat more narrowly for purposes of Title II than for other portions of the act. Title II defines "export trading company" as being

> a company which does business under the laws of the United States or any State, which is exclusively engaged in activities related to international trade, and which is organized and operated principally for purposes of exporting goods or services produced in the United States or for purposes of facilitating the exportation of goods or services produced in the United States by unaffiliated persons by providing one or more export trade services.[81]

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certain debt instruments including receivables would be required to be collateralized to the extent of 120% of the amount of the credit extended. Since this change in collateral requirements was imposed in an unrelated piece of legislation passed almost simultaneously with ETCA, it can be argued, based on the above-cited statements in the ETCA Conference Report, that it was not intended to apply, even though the 120% collateral requirement was, in fact, not "in effect on October 1, 1982" as provided by ETCA. However, the Federal Reserve Board has contended that since the 120% collateral requirement was imposed subsequent to ETCA it should apply. The Board is expected to receive considerable comment on this point during the comment period on its proposed regulations. *See* DAILY REPORT FOR EXECUTIVES (BNA) No. 8, at A-9, A-10 (Jan. 12, 1983).

Some persons believe that the collateral requirement will deter many smaller banks, which may need to borrow from money center banks in order to collateralize an ETC, from investing in a trading company. Accordingly, there has been recent pressure for Congress to delete this collateral requirement. *See* DAILY REPORT FOR EXECUTIVES (BNA) No. 5, at C-1 (Jan. 7, 1983). *See also Search and Destroy: An In-Depth Look at the Trading Company Legislation*, American Banker, Feb. 17, 1983, at 18. The proposed Federal Reserve regulations, however, retain the requirement that loans to ETCs affiliated with BHCs comply with the § 23A collateral provisions. *See* Federal Reserve Board press release, Jan. 25, 1983, 48 Fed. Reg. 3377 (1983) (supplementary information to regulation to be codified at 12 C.F.R. § 211).

79 Pub. L. No. 97-290, § 203(3), 96 Stat. 1233, 1236-38 (1982) (adding 12 U.S.C. § 1843(c)(14)(E)).

80 *Id.* (adding 12 U.S.C. § 1843(c)(14)(F)(iii)). Small banks form bankers' banks to offer a variety of services they could not independently offer. Inclusion of bankers' banks in § 203 presumably was intended to encourage such banks to participate in ETCs.

81 *Id.* (adding 12 U.S.C. § 1843(c)(14)(F)(i)). The elaborate definition of "export trading company" and the list of services to be provided by such entities was a deliberate attempt by Congress to limit the activities and potential risk exposure of ETCs by having bank holding

For purposes of this definition, the "export trade services" in which an ETC can engage are defined to include, but are not limited to, consulting, international market research, advertising, marketing, insurance (limited to insurance of risks resident or located outside the United States or insurance covering the transportation of cargo from any point in the United States to a destination outside the country), product research and design, legal assistance, and transportation (including trade documentation, freight forwarding, communication and processing of foreign orders, warehousing, foreign exchange, financing, and taking title to goods), provided that such services are offered "in order to facilitate the export of goods or services produced in the United States."[82]

ETCA expressly prohibits a bank-related ETC from engaging in agricultural production or manufacturing, except for incidental product modification such as repackaging, reassembling, or extracting byproducts as is necessary to conform the goods or services to the requirements of the foreign destination and to facilitate their

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company ownership. The definition of ETCs in Title II applies only to export trading companies in which banking organizations participate pursuant to that title. Export companies not having bank participation are not so restricted, and, in fact, the term "export trading company" is not used in Title III, which sets forth the Commerce Department's certificate of review process. That process is available to any "person," whether or not such person qualifies as an "export trading company" under Title II.

Bank-related ETCs formed under Title II must be "exclusively engaged in activities related to international trade" and organized and operated "principally" to engage in export trade. The House version of ETCA would have required that such companies be organized and operated "exclusively" for the purpose of export trade. Substitution of the requirement that ETCs be "principally" operated for export activities was accepted by the House-Senate Conference Committee with the understanding that bank-related ETCs would be able to engage to some extent in importing, barter, third-party trade, and related activities. The act does not specify the degree that such non-export activity will be permitted, but the conferees made clear that the Federal Reserve Board will be expected to exercise oversight in this area, stating that

> [i]t is the intent of the managers that the regulatory authority, in addition to facilitating bank-related investments in ETCs, examine, supervise, and regulate ETCs in such a way as to assure that bank-affiliated ETCs operate in a manner consistent with the Congressional intent: that ETCs promote, increase, and maximize U.S. exports.

128 CONG. REC. H8347 (daily ed. Oct. 1, 1982).

The Federal Reserve Board's proposed regulations issued January 25, 1983 would define "Export Trading Company" as a company "exclusively" engaged in international trade activities and which "derives more than one-half its annual revenues from the export of, or from facilitating the export of, goods and services produced in the United States by persons other than" that company or its subsidiaries. 48 Fed. Reg. 3378, 3379 (1983) (to be codified at 12 C.F.R. § 211.32(a)) (proposed Jan. 25, 1983).

82 Pub. L. No. 97-290, § 203, 96 Stat. 1233, 1236-38 (1982) (adding 12 U.S.C. § 1843(c)(14)(F)(ii)).

sale at such destination. In addition, bank-related ETCs may engage in or hold an interest in companies engaged in the business of underwriting, selling, or distributing securities only to the extent that the BHC investing in the ETC may do so under applicable federal and state banking regulations.[83] The Federal Reserve Board has express authority to require a BHC to terminate its investment in an ETC or impose other conditions if the Board determines that the ETC has taken positions in commodities, commodity futures, securities, or foreign exchange "other than as may be necessary in the course of the export trading company's business operations."[84]

In addition, the new legislation authorizes and directs the Export-Import Bank to provide guarantees for loans extended by financial institutions to ETCs and other exporters when these loans are secured by export accounts receivable or inventories of exportable goods and when, in the judgment of the Export-Import Bank's Board of Directors, inadequate financing is available in the private credit markets and such guarantees will facilitate exports which would otherwise not occur.[85]

Finally, ETCA liberalizes the present limits on the use of bankers' acceptances to permit greater use of such instruments in connection with import and export transactions.[86]

III. Certification Procedures Under The Export Trading Company Act

Companies, individuals, or banks desiring the benefits of the Export Trading Company Act of 1982 may seek certificates of review for their contemplated export trade activities. The act will create a special bureau in the Commerce Department whose sole purpose will be to promote ETC formation. Additionally, the Commerce Department will create a computerized clearinghouse called the "ETC Contact Facilitation Service" to match prospective export trading

83 *Id.* (adding 12 U.S.C. § 1843(c)(14)(C)). *See Search and Destroy: An In-Depth Look at the Trading Company Legislation*, American Banker, Feb. 17, 1983, at 18.

84 Pub. L. No. 97-290, § 203, 96 Stat. 1233, 1236-38 (1982) (adding 12 U.S.C. § 1843(c)(14)(D)).

85 *Id.* § 206, 96 Stat. at 1239.

86 *Id.* § 207, 96 Stat. at 1239-40. This section amends § 13 of the Federal Reserve Act, 12 U.S.C. § 372, to permit member banks and foreign bank branches subject to Federal Reserve Bank reserve requirements to accept bankers' acceptances in an amount up to 150% of the bank's paid up and unimpaired capital stock and surplus or, subject to Federal Reserve approval, up to 200% of such capital and surplus. Acceptances growing out of domestic transactions are limited to 50% of the aggregate of all acceptances.

companies with U.S. firms seeking export services.[87] More than forty-five International Trade Administration District Offices are designated to assist in this process. The government has also taken the unusual step of directly promoting ETC formation by sponsoring a series of conferences in twenty-seven cities nationwide to explain how companies and individuals can establish ETCs.

A. *Commerce Department Certification*

The act vests jurisdiction for granting certificates of review principally in the Commerce Department. Applicants can likely expect substantial Justice Department participation in the process as well, including the potential for an effective right of veto.

1. The Value of a Certificate of Review

Under Title III, qualified applicants may seek export trade certificates of review for specified conduct limited to export trade. Any "person"—not necessarily an ETC as defined in Title II—may seek export certification. "Person" has been interpreted to include an individual who is a U.S. resident, a partnership, a state or local government entity, or a corporation.[88]

Being certified to export goods or services has several advantages. First, as will be explained in more detail below, the certificate

87 Details concerning the ETC Contact Facilitation Service and the registration procedures appeared in a Federal Register Notice, 47 Fed. Reg. 57,311 (Dec. 23, 1982). The Notice explained that ETCs could "utilize this program in order to identify possible clients for their service." Contact Facilitation would proceed by a registration process for which a $25.00 fee is charged. Once 200 applicants have joined the program, the relevant company information, including the details about what products are to be exported or represented, will be entered into a computer data base in Washington, D.C. For an additional fee ($25.00 plus $5.00 for each name provided), a subscribing party can search for matching companies or products. The search will be conducted based on the kind of service provided, the geographic area, the areas of foreign market interest, and the Standard Industrial Classification codes for each product.

88 State governments may be interested in creating a state agency to stimulate export trade. The Port Authority of New York and New Jersey has established a World Trade Department to do just that. It hopes to stimulate exports in certain targeted areas such as processed foods, home furnishings and apparel, fur garments, wood furniture, instrumentation, measuring equipment, and specialty paper. SPECIAL REPORT, ETCs COMING INTO THEIR OWN, INTERNATIONAL BUSINESS REVIEW, INTERNATIONAL DIVISION, CHAMBER OF COMMERCE OF THE UNITED STATES 2 (1982).

ETCs can, of course, have different structures depending on the type of export activities contemplated. Aside from a state-sponsored ETC, there can be regional ETCs, general ETCs, and ETCs oriented towards certain products, foreign areas, projects, or industries. To the extent that a bank is involved in an ETC pursuant to Title II, the ETC's scope of operations and structure may need to be adjusted since bank-related ETCs are precluded from engaging in manufacturing and are in other ways limited under Title II.

recipient will in effect be immunized from antitrust liability for those activities covered by the certificate. Section 306 codifies the protections conferred by a certificate of review and states that no civil or criminal antitrust action may be brought against a certificate holder for conduct "which is specified in, and complies with the terms" of a validly issued certificate which was in effect when the allegedly improper conduct occurred.[89] Additionally, any person claiming injury because of conduct engaged in pursuant to a certificate of review may seek injunctive relief and damages. Section 306 limits the recovery to actual damages and reasonable attorneys' fees. This limitation on damages, when compared with the exposure to treble damages under the Sherman and Clayton Acts, could be a major incentive for establishing an export trading company.

2. Obtaining a Certificate of Review

Under Title III, the Secretary of Commerce is entitled to "issue certificates of review and advise and assist any person with respect to applying for certificates of review."[90] Individuals or companies seeking certificates must file written applications with the Commerce Department, which will ultimately establish a special office for handling the certificate process. Although the Commerce Department's final regulations will provide more precise guidelines as to the level of detail required in an application,[91] the act broadly requires an applicant to specify conduct limited to export trade. Additionally, the information must pertain "to the overall market in which the applicant operates" and must satisfy the applicable rules and regulations.[92]

On December 21, 1982, the Commerce Department's International Trade Administration, after consulting the Justice Department, issued proposed rules concerning export trade certificates of review.[93] The proposed rules require considerable detail about an applicant's present and contemplated business activities. It is entirely likely that smaller companies or individuals will consider the

89 Pub. L. No. 97-290, § 306(a), 96 Stat. 1233, 1243 (1982) (to be codified at 15 U.S.C. § 4016).

90 *Id.* § 301, 96 Stat. at 1240 (to be codified at 15 U.S.C. § 4012).

91 The Act requires the Secretary of Commerce, "with the concurrence of the Attorney General," to promulgate the necessary rules and regulations to implement the act. *Id.* § 310, 96 Stat. at 1245.

92 *Id.* § 302(a)(2), 96 Stat. at 1240.

93 47 Fed. Reg. 56,972 (1982) (to be codified at 15 C.F.R. § 325) (proposed Dec. 21, 1982).

level of required detail too burdensome, whereas larger companies (which may be nonetheless more willing to forego certification and rely on Title IV's general provisions) may find the reporting no greater an inconvenience than complying with the standard premerger notification requirements.

The proposed rules call for nineteen different kinds of information. While some of these items are noncontroversial, such as an applicant's name and address, controlling entities, relevant corporate legal documents, an annual report, and an organizational chart or table depicting the applicant's export-related operations, a number of the requirements call for details that to some may be overly burdensome. Among the requested information are the following items:

> (1) a description showing the "customary industry product or service definitions" of the goods or services to be exported, including where "reasonably ascertainable" the Standard Industrial Classification number to a seven-digit level, or the most detailed level available;
> (2) for each class of goods or service the principal geographic area(s) in the United States where sales are made and, for the last two calendar years, the dollar value of total domestic sales and total foreign sales, including sales for all controlled entities;
> (3) information concerning the total value of sales in the United States for the last two years of the goods, wares, merchandise, or services to be exported;
> (4) a description of the specific export trade activities and methods of operation which the applicant seeks to have certified, such as types of services, the manner for establishing the prices and quantities of the exported goods and services, any exclusive selling arrangements or pooling of resources or territorial or price maintenance restrictions, and the nature of any restrictions for withdrawal by members;
> (5) a statement concerning whether there will be any direct or indirect agreement or information exchange concerning domestic prices, production or sales, or the exchange of other business confidential information; and
> (6) a statement concerning the foreseeability of any exported goods or services reentering the United States in original or modified form.[94]

An applicant must also provide whatever other information the Secretary may deem necessary.

The proposed regulations permit the applicant to draft the proposed Federal Register notice. Allowing the applicant to draft the notice will probably reduce the likelihood that a prospective appli-

94 *Id.* at 56,974-75 (1982) (to be codified at 15 C.F.R. § 325.3(b)).

cant might choose to forego the certification process for fear that too much information may alert his competitors (who themselves may forego the certification process) to a new export opportunity. Denial of a certificate of review will not be held against an applicant or used "in evidence in any administrative or judicial proceeding in support of any claim under the antitrust laws."[95] However, a denial on the merits means that without the Secretary's approval, an applicant will not be entitled to resubmit the application for certification within the twelve-month period following the denial.[96] Information submitted to both the Commerce and Justice Departments in the application process will be treated as confidential, and an unsuccessful applicant may request that the application and all accompanying documentation be returned within thirty days of an adverse determination.[97]

Applicants may well perceive these reporting requirements to be burdensome, and thus be discouraged from using the certification process. While the overall regulatory burden and structure is fairly minimal, the applicant's disclosure obligation appears to be substantial. As an alternative, the Commerce Department could have required fewer details at the outset and have requested more information as needed to explain more elaborately the applicant's export activities, market performance and shares, or industry agreements. Instead, the Commerce Department chose to request all such information from *all* applicants at the outset. The effectiveness of this approach remains to be seen. Several individuals or companies, whose export consciousness has now been raised, may well nonetheless forego certification, relying instead on the guarantees provided under Title IV. Whether relying on Title IV guarantees is riskier than seeking certification will depend on the company, the export activity, and the perceived risk of treble damages.

Since export trading companies may also engage in importing activities, an additional uncertainty arises as to the information that must be disclosed to obtain a certificate of review. The required information relates to "the overall market in which the applicant operates." It can be questioned whether "overall market" encompasses importing as well as exporting activities and whether a certificate holder's reduced antitrust exposure also extends to importing activities which arguably violate applicable antitrust laws. The written application, however, is to specify "conduct limited to export trade."

95 *Id.* at 56,977 (to be codified at 15 C.F.R. § 325.12).

96 *Id.* at 56,975 (to be codified at 15 C.F.R. § 325.4(e)).

97 *Id.* at 56,977 (to be codified at 15 C.F.R. §§ 325.11, .14).

Although a certified export trading company may also engage in importing activities, the accompanying regulations should address the question whether the certificate protections extend to import transactions.

Once an application has been received and "deemed submitted" by the Department of Commerce, the Secretary must publish a notice in the Federal Register within ten days after the application has been submitted.[98] An application will be "deemed submitted" once the Secretary of Commerce has determined whether it "is complete, [and] has been properly prepared."[99] A defective application may be resubmitted once the deficiencies have been corrected. The Federal Register notice must identify each person submitting the application and describe the conduct involved in the application.[100] The proposed regulations provide that the applicant may submit "[a] proposed non-confidential summary of the conduct for which certification is sought for publication in the Federal Register pursuant to section 325.5(a)."[101] This information must be submitted to the Attorney General not later than seven days after submission of the application to the Department of Commerce. The Secretary must also transmit "any other relevant information," including information concerning "the market share of the applicant in the line of commerce to which the conduct specified in the application relates."[102]

98 Pub. L. No. 97-290, § 302(b)(1), 96 Stat. 1233, 1240 (1982) (to be codified at 15 U.S.C. § 4012).

99 47 Fed. Reg. 56,975 (1982) (to be codified at 15 C.F.R. § 325.3(d)) (proposed Dec. 21, 1982).

100 *Id.* at 56,975-76 (to be codified at 15 C.F.R. § 325.5).

101 *Id.* at 56,975 (to be codified at 15 C.F.R. § 325.3(b)(15)). The applicant must also submit a draft proposed certificate for the export conduct which it seeks to have certified. *Id.* (to be codified at 15 C.F.R. § 325.3(b)(16)).

102 Pub. L. No. 97-290, § 302(b)(2)(c), 96 Stat. 1233, 1241 (1982) (to be codified at 15 U.S.C. § 4012). A practical problem could arise for a bank-related export trading company that engages in both import and export activities. For example, in periods when the value of the U.S. dollar is high, exports may be discouraged, and a bank-related export trading company that was initially "organized and operated principally" to export goods or services may, through no fault of its own, suddenly find its import activities exceeding its export activities in terms of dollar volume and profit. It is, therefore, unclear whether such a situation, lasting for a brief or even for a more prolonged period of time, would somehow call into question the entity's status as a valid export trading company. At the same time, the entity could point out, if so challenged, that such business uncertainties did not undermine the fact that it was still "organized and operated principally" for exporting. The outcome in such circumstances may well turn on the nature of the entity's activities as characterized in its written application and the certificate of review.

The Secretary of Commerce is required to issue a certificate if an applicant has established that its export trade activities will

> (1) result in neither a substantial lessening of competition or restraint of trade within the United States nor a substantial restraint of the export trade of any competitor of the applicant;
> (2) not unreasonably enhance, stabilize, or depress prices within the United States of the goods, wares, merchandise, or services of the class exported by the applicant;
> (3) not constitute unfair methods of competition against competitors engaged in the export of goods, wares, merchandise, or services of the class exported by the applicant; and
> (4) not include any act that may reasonably be expected to result in the sale for consumption or resale within the United States of the goods, wares, merchandise, or services exported by the applicant.[103]

While the first standard appears generally consistent with existing antitrust case law, further elaboration and interpretation will certainly be required as ETCA is applied in the future.[104] The second standard marks a significant deviation from the traditional *per se* rule against price-fixing. Under the "reasonableness" standard, exporters would seemingly be immune from antitrust liability for the activity covered by the certificate of review as long as the domestic effects of its enhancing, stabilizing, or depressing of prices were not "unreasonable." The last two standards constitute important new criteria. The third standard provides a wholly new cause of action available against certificate holders. Similarly, the fourth standard conceivably could create substantial difficulties for manufacturing companies which have offshore assemblies and which are also involved in the sale or resale of certain finished products in the United States. The proposed regulations offer no new guidance on these standards but simply restate them in full.

The standards to be applied by the Justice Department will be particularly important, especially in light of the concurrent jurisdiction which the act provides for each department. While the Commerce Department has principal authority for issuing certificates of review, it lacks the Justice Department's international antitrust experience. The Justice Department will clearly exercise a *de facto* veto power in the certification process. For the certification process to work smoothly, the two departments will have to coordinate their

103 *Id.* § 303(a).

104 The Conference Committee's Report notes that "[t]he Conferees intend that the standards set forth in this subsection encompass the full range of the antitrust laws." 128 CONG. REC. H8348 (daily ed. Oct. 1, 1982).

involvement. It therefore would seem preferable for the Commerce Department to administer the act's procedural provisions, while leaving issues of substantive antitrust compliance for the Justice Department.[105]

Application of section 303(a)'s four-part criteria will not be a simple process. Questions of statutory and case law interpretation as well as international comity may well determine the outcome in particular factual situations.[106] Accordingly, counsel advising a client interested in establishing an export trading company should carefully understand the ramifications of these antitrust considerations prior to filing an application for a certificate of review, since the full range of antitrust standards that would otherwise be applicable to the proposed conduct is incorporated in the act's certification standards.

Once an application has been filed, the Commerce Department has ninety days within which to determine whether to issue a certificate of review.[107] If issued, the certificate must also have the Attorney General's concurrence and shall specify the export trade, export trade activities, and methods of operation employed by the applicant trading company.[108] Additionally, the certificate of review must specify the person to whom the certificate has been issued as well as any terms and conditions deemed necessary by either department to assure compliance with section 303(a). Denial of an application must be accompanied by an explanation from the Secretary,[109] and an applicant may request a reconsideration, regardless of whether the denial was in whole or in part, within thirty days after receiving an

105 This possible division of labor was recognized by Senator Heinz in the 1981 Hearings. *1981 Hearings*, *supra* note 3, at 45.

106 The issues to be considered in resolving such questions may be particularly complex. In Timberlane Lumber Co. v. Bank of America, N.T. & S.A., 549 F.2d 597 (9th Cir. 1976), the court formulated the following jurisdictional test for applying the Sherman Act abroad:

> Does the alleged restraint affect, or was it intended to affect, the foreign commerce of the United States? Is it of such a type and magnitude so as to be cognizable as a violation of the Sherman Act? As a matter of international comity and fairness, should the extraterritorial jurisdiction of the United States be asserted to cover it?

Id. at 615. Questions such as these could easily complicate or even delay the certification process while the Commerce and Justice Departments resolve whatever conflicting interpretations might arise.

107 47 Fed. Reg. 56,975 (1982) (to be codified at 15 C.F.R. § 325.4(a)) (proposed Dec. 21, 1982). Where an applicant needs an expedited determination, the act so provides, but with a proviso that no certificate of review may be issued within thirty days of publishing the Federal Register notice. *Id.* at 56,976 (to be codified at 15 C.F.R. § 325.7).

108 Pub. L. No. 97-290, § 303(b), 96 Stat. 1233, 1241 (1982) (to be codified at 15 U.S.C. § 4013).

109 *Id.* § 303(d)(1).

adverse notification.[110]

Once issued, a certificate remains valid for the activities described therein, and the application need not be renewed unless additional export activities not described in the certificate are contemplated. The act further specifies, however, that "[a] certificate shall be void ab initio with respect to any export trade, export trade activities, or methods of operation, for which a certificate was procured by fraud."[111] A certificate holder is also obligated to inform the Secretary of Commerce of "any change relevant to matters specified in the certificate."[112] Should an export trading company intend to engage in conduct not specified in its certificate, it must file an application to amend its certificate. This amendment will be treated as a *de novo* application for a certificate.[113] The Commerce Department may revoke a certificate if a certificate holder fails to supply information demanded by the Secretary of Commerce based upon a belief that the certificate holder no longer complies with section 303(a)'s standards.[114] The Secretary may revoke or modify the certificate as necessary so that it will then apply only to the export trade, export trade activities, or methods of operation that comply with section 303(a)'s criteria. Both the Attorney General and the Assistant Attorney General in charge of the Antitrust Division may investigate an export trading company's activities under section 3 of the Antitrust Civil Procedures Act, with one important difference: no civil investigative demand may be issued against a person who is a target of such investigation.[115] Actions taken by the Secretary of Commerce are reviewable in any appropriate U.S. district court as long as the action is filed within thirty days of the administrative ruling.[116]

Although proposed regulations have now been issued, the scope of certificates of review remains unclear. For example, will a certificate of review be obtainable for relatively broadly described activities or will certificates be necessary on a case-by-case basis? It is doubtful that Congress had contemplated the latter situation, since case-by-case adjudications would be time-consuming and would quite likely discourage use of the certification process altogether.

110 *Id.* § 303(d)(2).
111 *Id.* § 303(f), 96 Stat. at 1242.
112 *Id.* § 304(a)(1)(A) (to be codified at 15 U.S.C. § 4014).
113 *Id.* § 304(a)(2).
114 *Id.* § 304(b)(1).
115 *Id.* § 304(b)(3).
116 *Id.* § 305, 96 Stat. at 1243 (to be codified at 15 U.S.C. § 4015).

Title III provides antitrust immunity for conduct covered by terms of the particular certificate. As explained above, one of the principal benefits from obtaining a certificate of review is that a certificate holder is exempt from treble damages liability for conduct falling within the certificate's terms; treble damages may still be awarded, however, for conduct not covered by the certificate if it constitutes an antitrust violation.[117] At this time, however, it is by no means clear just how far this limited immunity will be extended. Additionally, ETCA and the Conference Report seem to conflict on whether otherwise *ultra vires* conduct[118] falling outside the certificate's scope is subject to both civil and criminal penalties. According to section 306(a) of ETCA, "[e]xcept as provided in subsection (b), no criminal or civil action may be brought under the antitrust laws" against a certificate holder for conduct that is properly covered by an effective certificate. Yet, section 306(b)(1) specifically provides that any person injured because of conduct pursuant to a certificate of review may bring a civil action for "injunctive relief, actual damages, the loss of interest on actual damages, and the cost of suit" for resulting injury. An anomaly is therefore presented because civil or criminal actions may only be commenced pursuant to section 306(b)(1), but that section provides only for civil lawsuits. It remains unclear whether a criminal action may be maintained under section 306 against a certificate holder despite the fact that the Conference Committee Report states that *ultra vires* conduct "would remain fully subject to criminal sanctions as well as both private and governmental civil enforcement suits under the antitrust laws."[119] This confusion is probably the result of a drafting mistake which can easily be corrected by a technical amendment to the legislation.

Lawsuits brought pursuant to Title III must be filed "within two years of the date the plaintiff has notice of the failure to comply" with section 303(a)'s standards "but in any event within four years after the cause of action accrues."[120] ETCA creates a presumption that conduct which is specified in and complies with an issued certificate also complies with section 303(a)'s four standards. When coupled with the provision allowing only for single rather than treble

117 *Id.* § 306(a) (to be codified at 15 U.S.C. § 4016).

118 The Conference Committee's Report states that "[c]onduct which falls outside the scope of, or violates the terms of, the certificate is *ultra vires* and would not be protected." 128 CONG. REC. H8349 (daily ed. Oct. 1, 1982).

119 *Id.*

120 Pub. L. No. 97-290, § 306(b)(2), 96 Stat. 1233, 1246 (1982) (to be codified at 15 U.S.C. § 4016).

damages, this placing of the burden of proof on the plaintiff will substantially reduce the likelihood that frivolous or "strike" suits will be filed in expectation of a large recovery or a generous settlement to avoid litigation expenses. Defendants who prevail in any action brought under section 306(b)(1) are also entitled to the costs incurred in defending against the claim, including reasonable attorneys' fees. This latter provision is a significant departure from traditional U.S. practice and will probably discourage plaintiffs from filing frivolous lawsuits.

Title III also provides that the Secretary of Commerce and the Attorney General may issue guidelines to promote greater certainty in the application of the antitrust laws to export trade.[121] These guidelines would describe particular kinds of conduct that would satisfy the criteria for determinations under sections 303 and 304. The Secretary of Commerce may also require each certificate holder to submit an annual report on its export trading activities.[122]

In addition to the standard certification procedures described above, the proposed Commerce Department regulations permit certificate applications to be amended,[123] and provide for expedited certification where there is a "special need."[124] Certificates may also be reconsidered,[125] modified,[126] or revoked.[127] An applicant may seek judicial review in the appropriate U.S. district court of an adverse determination under sections 325.4, 325.6, and 325.9 of the regulations within thirty days of the determination.[128]

It should be stressed that Title III is intended as an alternative to relying on Title IV's antitrust provisions.[129] For reasons which will be considered below, an individual or company may choose to

121 *Id.* § 307, 96 Stat. at 1244 (to be codified at 15 U.S.C. § 4017).

122 *Id.* § 308 (to be codified at 15 U.S.C. § 4018). The Commerce Department intends to issue a regulation requiring such annual reporting.

123 47 Fed. Reg. 56,976 (1982) (to be codified at 15 C.F.R. § 325.6) (proposed Dec. 21, 1982).

124 *Id.* (to be codified at 15 C.F.R. § 325.7).

125 *Id.* (to be codified at 15 C.F.R. § 325.8).

126 *Id.* at 56,976-77 (to be codified at 15 C.F.R. § 325.9).

127 *Id.*

128 *Id.* at 56,977 (to be codified at 15 C.F.R. § 325.10).

129 For a discussion of Title IV's amendment of the Sherman Act, 15 U.S.C. §§ 1-7 (1976), see notes 130-53 *infra* and accompanying text. *See generally* PRACTICING LAW INSTITUTE, THE EXPORT TRADING COMPANY ACT 57-101 (H.N. Schiffman & W. Weber eds. 1983). A good discussion of the relative advantages and disadvantages of Title III and Title IV from the antitrust perspective is found in an interview with Carl A. Cira, Jr., formerly Assistant Chief, Foreign Commerce Section, of the Antitrust Division of the Department of Justice, who was personally involved in the legislative process that led to ETCA's passage, in *A Lawyer Answers Questions on the Antitrust Provisions*, American Banker, Feb. 17, 1982, at 20.

forego the certification process and rely instead on its appraisal that its export activities satisfy the standard codified in section 401. Counsel should be aware, however, that a decision to forego certification would deprive an exporter of the greater certainty provided by a certificate of review, and could well mean that liability for unlawful activities would result in exposure to treble damages. On the other hand, there are certain conceivable drawbacks in relying on the certification process. First, an ETC would remain liable for behavior not covered by its certificate of review which nonetheless violated the antitrust laws. In fact, by seeking certification, an applicant may well be exposing itself to even more scrutiny than if it simply relied on Title IV. Second, Title III creates what amounts to a new, private cause of action for "unfair methods of competition against competitors engaged in the export of goods, wares, merchandise, or services." Presumably this cause of action would be based on export activity which violates the scope of the certificate of review, since one can conclude that conduct covered by the certificate would not be actionable. In light of these considerations, the decision to rely on Title IV or to seek a certificate of review will depend on a number of factors, such as the size of the business and the contemplated export activities.

IV. Clarified Antitrust Immunity

Title IV modifies the Sherman Act by adding a new section, 15 U.S.C. § 7, providing that antitrust proscriptions will not apply to export trading activities unless the conduct has a

> direct, substantial, and reasonably foreseeable effect . . . on trade or commerce which is not trade or commerce with foreign nations; or on import trade or import commerce with foreign nations; or . . . on export trade or export commerce with foreign nations; of a person engaged in such trade or commerce in the United States . . . .[130]

Thus, Title IV means that foreign companies will lack a federal cause of action against American companies in U.S. courts if an export trading company's business activities cannot be shown to have a "direct, substantial, and reasonably foreseeable effect" on American markets. Enactment of ETCA does not replace or modify the Webb-Pomerene Act. However, the Webb-Pomerene Act is probably now outmoded since the protection it offers is automatically provided by

130 Pub. L. No. 97-290, § 402, 96 Stat. 1233, 1246 (1982) (to be codified at 15 U.S.C. § 7).

the new section 7 of the Sherman Act. Presently existing Webb-Pomerene Act companies are not required by ETCA to change in any way their present status. In fact, such companies may well want to avoid scrutiny and not apply for a certificate of review.

The Conference Committee's Report contains very little discussion concerning the impact of Title IV. Nonetheless, it is clear that the "direct, substantial, and reasonably foreseeable effect" language is intended to codify the prevailing common law, which, as noted above,[131] is apparently evolving jurisdictionally on the basis of the "reasonableness" principle. As Atwood and Brewster have commented,

> An American's conduct in trade among or within foreign nations is not of antitrust concern under United States law, unless it is found to have prohibited consequences for competition in United States export, import, or domestic markets. The Sherman Act is concerned with freedom of American foreign commerce, not with the competitive conduct of Americans abroad solely because they are Americans.[132]

Under the qualified immunity afforded by the Webb-Pomerene Act,[133] however, this "narrow and carefully limited exception"[134] from antitrust liability was not considered to provide the protection that some businessmen felt was necessary in order to undertake cooperative export ventures.[135] Although some members of the U.S. antitrust bar have been quick to suggest that individuals or companies desiring to use the new certification procedures will rely on Title IV's relaxed antitrust standard rather than employ Title III's registration approach,[136] it is by no means clear whether the anticipated regulatory costs of obtaining certification and the reluctance to disclose business plans to the Commerce Department and through the Federal Register will deter exporters from seeking certification. For many exporters, the certainty of the government's blessing plus the absence of treble damages exposure for certain kinds of activities may well offset whatever "costs" are associated with certification.

Application of the common law's "direct, substantial and rea-

131 *See* note 41 *supra*.

132 J. ATWOOD & K. BREWSTER, *supra* note 15, § 7.02, at 183-84. *See also* United States v. Aluminum Co. of America (Alcoa), 148 F.2d 416, 443 (2d Cir. 1945); ANTITRUST GUIDE, *supra* note 20, at 7.

133 *See* note 15 *supra* and accompanying text.

134 Pfizer Inc. v. Government of India, 434 U.S. 308, 314 n.12 (1978).

135 *1981 Hearings*, *supra* note 3, at 297 (testimony of Howard W. Fogt, Jr.).

136 *See* Moore, *Late Addition May Prove To Be Key To Export Act*, LEGAL TIMES, Oct. 11, 1982, at 1.

sonably foreseeable" effects test, however, will not necessarily be a simple or certain process. Both courts and commentators have recently challenged the scope of the so-called "effects" test.[137] In its first formulation by Judge Learned Hand in *United States v. Aluminum Co. of America (Alcoa)*,[138] the test focused principally on the place where particular conduct had its *effects* rather than where the conduct itself occurred. Yet, simply showing that conduct abroad had an effect on U.S. commerce would not settle all the questions that could conceivably arise under the antitrust laws. As Judge Hand observed in *Alcoa*, "[a]lmost any limitation of the supply of goods in Europe, for example, or in South America, may have repercussions in the United States if there is trade between the two."[139] *Alcoa*'s "effects" test focused, in part, on whether the activity involved was intended to affect U.S. commerce and whether such an effect occurred.[140] Based on *Alcoa* and its progeny, the Justice Department's 1977 *Antitrust Guide for International Operations* stated that U.S. antitrust standards would apply to foreign export activities in cases where "there is a substantial and foreseeable effect on the United States commerce."[141] The *Guide* went on to add that "foreign activities which have no direct or intended effect on United States consumers or export opportunities" were not subject to U.S. antitrust laws.[142]

Recent U.S. case law has been less than consistent in its discussion of the "effects" test, and several decisions appear to have formulated tests which may vary substantially as to the relevant factors considered in applying the test. For example, in *Todhunter-Mitchell & Co. v. Anheuser-Busch, Inc.*, the test was whether the activity "directly affect[s] the flow of commerce into or out of" the United States.[143] The court in *Waldbaum v. Worldvision Enterprises, Inc.*, phrased the relevant inquiry as whether the activity created any "anticompetitive effects" in the United States.[144] "[I]mpact upon United States commerce" was the necessary showing according to the district court in *Industria Siciliana Asfalti, Bitumi, S.p.A. v. Exxon Research & Engineering*

137 *See* note 41 *supra*.
138 148 F.2d 416 (2d Cir. 1945).
139 *Id.* at 443.
140 *Id.* at 443-44.
141 ANTITRUST GUIDE, *supra* note 20, at 6.
142 *Id.* at 7.
143 383 F. Supp. 586, 587 (E.D. Pa. 1974).
144 1978-2 Trade Cas. (CCH) ¶ 62,378, at 76,257 (S.D.N.Y. 1978).

Co.[145] An even more confusing standard was adopted in *Dominicus Americana Bohio v. Gulf & Western Industries, Inc.*, where the court held that "it is probably not necessary for the effect on foreign commerce to be both substantial and direct as long as it is not *de minimis*."[146] Other cases, such as *Timberlane Lumber Co. v. Bank of America, N.T. & S.A.*,[147] and *Mannington Mills, Inc. v. Congoleum Corp.*,[148] have held that in applying the Sherman Act to foreign conduct, several "balancing factors," including fairness and comity, should be assessed in determining whether jurisdiction is proper. Whether these formulations, particularly the *Dominicus de minimis* standard, amount to the same test as a "substantial effects" test is doubtful.

Title IV's purpose was to create a uniform standard applicable to export transactions which, by eliminating some of the confusion and uncertainty of recent case law, would provide more concrete guidance to counsel and their clients. Accordingly, Title IV requires that the export activities shall be exempt from antitrust liability unless there is "a direct, substantial, and reasonably foreseeable effect" on U.S. commerce. Addition of the "reasonableness" standard is a crucial change which "connotes not only objectivity, but practicality as well. The 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."[149]

From one perspective, virtually any activity among exporters acting pursuant to ETCA will have some effect on U.S. commerce. Title IV now qualifies the jurisdictional factors by requiring directness, substantiality, and reasonableness. Nonetheless, there will still be situations that will not be readily resolved even under this new standard. For instance, what should be the result if members of an export trading company experience increased exports whereas other companies that are not permitted (for whatever reason, including their own choice) to join a particular export trading company experience reduced business activity? Does the outcome turn on whether there is an overall *net* increase in U.S. export activity for the given business? Would the activities of a vertically integrated export trading company survive an antitrust challenge under Title IV which if conducted by its wholly domestic counterparts would violate U.S.

145 1977-1 Trade Cas. (CCH) ¶ 61,256, at 70,784 (S.D.N.Y. 1977).

146 473 F. Supp. 680, 687 (S.D.N.Y. 1979).

147 549 F.2d 597, 613 (9th Cir. 1976).

148 595 F.2d 1287, 1297-98 (3d Cir. 1979).

149 COMMITTEE ON THE JUDICIARY, REPORT ON H.R. 5235, FOREIGN TRADE ANTITRUST IMPROVEMENTS ACT OF 1982, H.R. REP. NO. 686, 97th Cong., 2d Sess. 9 (1982).

antitrust laws? As Atwood and Brewster have observed, "if the joint effort serves to benefit some American exporters but operates to the competitive detriment of others, an antitrust objection may exist."[150] Future interpretations of Title IV will have to deal with these issues.

Questions such as these will undoubtedly have to await future interpretation by the administrative agencies and the courts, and will also largely depend on the facts of the given situation. Thus, where small- or medium-sized firms combine to designate one export selling agent abroad, the lawfulness of the behavior will depend on factors such as the firms' U.S. market share and the relative presence of entry barriers. The greater the market power and the higher the entry barriers, the more cause for concern, especially if the joint activity were seen as possibly fostering price fixing, market division, output limitations, or anticompetitive activity in the United States. At issue under section 7 will be the *directness* of these effects from the joint activity as well as the *substantiality* of the impact. The appraisal of whether the effect was direct or not will require assessment of foreseeability which, in turn, will involve factors such as market concentration and economic power. New section 7 makes clear that no antitrust violation will be found if the export activity involves solely foreign customers and foreign competitors absent the required effect on U.S. domestic commerce, import trade, or the export trade of a U.S. person. This result would overrule such cases as *Waldbaum v. Worldvision Enterprises, Inc.*,[151] and *Industria Siciliana Asfalti, Bitumi, S.p.A. v. Exxon Research & Engineering Co.*[152] Under these authorities, virtually *any* effect on a U.S. firm from joint export activities would have triggered antitrust liability; now, such an effect must be "direct, substantial, and reasonably foreseeable" within the requisite U.S. target areas—U.S. domestic commerce, import trade, or the export trade of a U.S. person.

Another uncertainty created by Title IV is the extent to which a foreign entity might be able to rely on Title IV to challenge the import activities of a U.S. importer. The foreign competitor could conceivably challenge his U.S. competitor in U.S. courts, at least to the extent that a U.S. importer's activities actually reduce competition with its foreign competitors and limit the availability of a product or service in the U.S. market. U.S. exporters relying on Title IV must remain aware of the impact of foreign antitrust laws on their con-

150 J. ATWOOD & K. BREWSTER, *supra* note 15, § 9.08, at 287.

151 1978-2 Trade Cas. (CCH) ¶ 62,378 (S.D.N.Y. 1978).

152 1977-1 Trade Cas. (CCH) ¶ 61,256 (S.D.N.Y. 1977).

duct, since neither certification nor reliance on Title IV will insulate an exporter from this liability. Because of the recent *Pfizer* bill, however, foreign governments suing under Title IV can no longer recover treble damages but are limited to actual damages only.[153]

ETCA's focus is to encourage U.S. exports and to raise the "export consciousness" of U.S. firms that previously have not exploited their export potential. In one sense, this legislation suggests strongly that the U.S. government and U.S. courts will tolerate some otherwise anticompetitive business behavior in order to promote competitive activity abroad. There is, however, no firm basis in the existing case law for assuming that this outcome will be sustained. While Title IV does not contemplate a substantive lessening of U.S. antitrust laws, it does overrule some district court rulings which would have allowed antitrust jurisdiction to be founded on almost any effect whatsoever on a U.S. firm. This change is a significant one, and adoption of the "reasonableness" standard is fully consistent with recent case law developments attempting to limit or narrow the extraterritorial reach of U.S. antitrust laws. Thus, where the "effect" on the U.S. market is to expand market opportunities and benefit the industry involved, such otherwise anticompetitive export activities may be allowed under Title IV's more flexible standard.

V. Problems and Uncertainties Created by ETCA's Application

Despite ETCA's apparent simplicity, the new legislation nonetheless creates a number of significant problems and uncertainties. Many of these uncertainties, such as the extent of Title IV's exemption from antitrust liability, will require judicial interpretation or further refinement of the accompanying agency regulations. At least seven significant problem areas can be identified: (1) the need to clarify the relevant antitrust standards, (2) the potential for procedural litigation through administrative challenges prior to granting a certificate of review, (3) the scope of disclosure needed to obtain certification, (4) the scope of actual product certifications, (5) the unresolved jurisdictional questions involving the Commerce and Justice Departments and the Federal Reserve Board, (6) the need to develop workable, consistent guidelines in applying the legislation, and (7) the meaning of Title III's provision allowing the Attorney Gen-

153 In Pfizer Inc. v. Government of India, 434 U.S. 308 (1978), foreign nations were recognized as "persons" entitled to recover treble damages under § 4 of the Clayton Act. On December 29, 1982, President Reagan signed the Foreign Sovereign Antitrust Recoveries Act, Pub. L. No. 97-393, limiting foreign governments to recovering actual damages.

eral "to enjoin conduct threatening clear and irreparable harm to the national interest."[154]

A. *Clarifying the Antitrust Standards*

To a certain extent, the future interpretation of ETCA's antitrust provisions—both the standards in Title III and the exemption in Title IV—will depend on how the controversy over the "effects test" and the extraterritorial application of U.S. antitrust law evolves. At the same time, ETCA may well generate considerable challenges in the courts and before the agencies over questions such as what constitutes "a substantial lessening of competition or restraint of trade,"[155] or whether a given export activity will "*unreasonably* enhance, stabilize, or depress prices within the United States"[156] of the goods or services exported. If, in fact, ETCA stimulates U.S. export activity, one can readily anticipate more intense litigation of these antitrust issues.

B. *The Procedural Litigation Potential*

In addition to substantive litigation over the meaning of ETCA's antitrust and competition provisions, additional litigation involving the certification process itself will likely arise. The proposed regulations say very little on this subject. Under section 325.5(b), "[i]nterested parties may, within twenty days from the date of publication in the Federal Register, submit to the Secretary information relevant to the determination of whether to issue a certificate."[157] Presumably, interested or affected parties such as an applicant's competitors in the United States or, for that matter, abroad, can oppose the granting of a certificate within this twenty-day period. It would appear, however, that opposition at this stage is limited to the filing of "comments" with the Commerce Department. Although the proposed regulations governing judicial review allow "[a]ny person aggrieved" by the Secretary's final orders to challenge the action in U.S. district court, challenge may only be made once a certificate of review has been granted.

Numerous other questions regarding challenges to certification

154 Pub. L. No. 97-290, § 306(b)(5), 96 Stat. 1233, 1243 (1982) (to be codified at 15 U.S.C. § 4016).

155 *Id.* § 303(a)(1), 96 Stat. at 1241 (to be codified at 15 U.S.C. § 4013).

156 *Id.* § 303(a)(2) (emphasis added).

157 47 Fed. Reg. 56,976 (1982) (to be codified at 15 C.F.R. § 325.5(b)) (proposed Dec. 21, 1982).

may arise. For example, is there an exhaustion requirement that an "aggrieved party" have first filed opposing comments during the administrative pre-certification stage? What happens to such court challenges should an opposing or "aggrieved party" challenge certification on the basis that the standards have not been satisfied? To defend against such opposition, would a prospective applicant then be obligated to reveal in discovery information submitted to the Commerce and Justice Departments that would otherwise be nondiscoverable under 15 C.F.R. § 325.14's confidentiality provisions? Where the challenging litigant is, for example, a foreign entity such as a government or corporate body, will the district court be permitted to entertain notions of comity in assessing whether a given certification was providently granted?

The prospect of litigation during the administrative pre-certification stage or afterwards in U.S. district court will mean additional costs to an applicant seeking a certificate of review. Reliance on Title IV, in such circumstances, may seem less complicated because it requires no Federal Register notification, thereby reducing the opportunity for an interested competitor to learn of a particular exporter's proposed export activity. These uncertainties, which also raise the legal costs of seeking certification, could act as a significant deterrent to using Title III.

C. *The Scope of Disclosure*

ETCA's proposed regulations contemplate substantial disclosure about an exporter's activities and market performance. Over time these requirements may prove too burdensome, especially for the company that is a novice to international trade. Should this be the case, the Commerce Department may want to consider relaxing some of the reporting requirements for smaller companies that are unlikely to have any substantial anticompetitive domestic effects.

D. *The Scope of Product Certifications*

Some goods or services, or the manner in which they are sold, may not be susceptible to the kind of precise definition called for under the proposed regulations. In such circumstances, applicants may attempt to rely on more generic descriptions that may or may not satisfy the Commerce and Justice Departments. The views of the two departments may not be readily reconcilable on this question. The Commerce Department, on the one hand, may tolerate a more generic statement as part of its basic posture to promote trade; the

Justice Department, on the other hand, because of its preoccupation with antitrust compliance, may be less willing to accept a more relaxed approach.

E. *Concurrent Jurisdiction*

The regulatory framework created by ETCA and the accompanying proposed regulations provide for apparent principal jurisdiction and administrative decisionmaking in the Commerce Department with concurrent authority given to the Attorney General. Additionally, ETCA's banking provisions are to be supervised by the Federal Reserve Board. There is no inherent reason why such overlapping jurisdictions should prove administratively complex. Yet, as noted above, there may arise occasions in which the Justice and Commerce Departments differ in their interpretation of the relevant standards and the proposed conduct. Caught in the middle, an applicant could find certification in jeopardy.

F. *The Need for Guidelines*

Section 307(a) of ETCA states that the Secretary of Commerce, with the Attorney General's concurrence, may issue guidelines "[t]o promote greater certainty regarding the application of the antitrust laws to export trade."[158] The contemplated guidelines are to describe "specific types of conduct" for which determinations as to certificates of review (including reporting requirements, amendment and revocation of certificates) will be made. These guidelines may also "summariz[e] the factual and legal bases in support of the determinations."[159]

It is important at the outset that such guidelines be issued in order to give potential certificate recipients a better idea of the criteria to be used by the Commerce and Justice Departments in making their determinations. Hypothetical cases can be discussed in a fashion similar to the Justice Department's 1977 *Antitrust Guide for International Operations* or in Treasury regulations under the Internal Revenue Code, and can be based on actual cases presented to the agencies involved. Such guidelines might reduce the possibility for conflict between the two departments. Guidelines discussing joint export ventures and joint selling agencies would probably be the

158 Pub. L. No. 97-290, § 307(a), 96 Stat. 1233, 1244 (1982) (to be codified at 15 U.S.C. § 4017).

159 *Id.* § 307(a)(2).

most important, since the most significant antitrust problems are likely to arise in these areas.

G. *The Meaning of "Clear and Irreparable Harm to the National Interest"*

Under section 306(b)(5), "[t]he Attorney General may file suit pursuant to section 15 of the Clayton Act (15 U.S.C. § 25) to enjoin conduct threatening clear and irreparable harm to the national interest."[160] The legislative history does not explain what this provision means, and it is interesting to note that the statute refers to "national interest" rather than "national *security* interest." Guidance is needed as to what kinds of conduct would warrant such intervention by the Attorney General. For example, does section 306(b)(5) extend to exports of critical raw materials that may affect our defense preparedness should they become in short supply, and would it also permit Justice Department intervention in export matters affecting U.S. foreign policy? Did Congress intend the Attorney General to become involved where certain export activities are adversely affecting some of our allies? If so, does section 306(b)(5) contemplate involvement by the Department of State in a fashion similar to that of the time when U.S. courts would defer to an assertion of sovereign immunity made by the Department of State on behalf of a foreign sovereign?[161]

To the extent that section 306(b)(5) contemplates active intervention by the U.S. government, foreign governments and businesses should consider using such action in matters of importance to them. They may well have an opportunity to influence such decisions by filing comments in response to Federal Register notices describing applications for certificates of review.

VI. Conclusion

At a time when the U.S. dollar is a relatively strong and perhaps even overvalued currency, ETCA's critics may ask whether it makes sense for the U.S. government to sponsor legislation promoting ex-

160 *Id.* § 306(b)(5), 96 Stat. at 1243 (to be codified at 15 U.S.C. § 4016).

161 *See* Pugh & McLaughlin, *Jurisdictional Immunities of Foreign States*, 41 N.Y.U. L. REV. 25 (1966). This intervention practice ceased in 1952 with the famous "Tate letter" announcing that the State Department would no longer assert sovereign immunity on behalf of friendly sovereigns where the acts involved in the litigation concerned private or commercial activities. Letter from Jack B. Tate, Department of State Acting Legal Adviser, to Acting Attorney General Philip B. Perlman (May 19, 1952), *reprinted in Changed Policy Concerning the Granting of Sovereign Immunity to Foreign Governments*, 26 DEP'T ST. BULL. 984-85 (1952). One commentator has recently suggested, however, that the Executive Branch at least consider a more active intervention policy in some private antitrust suits. Cira, *supra* note 41, at 264.

ports by American companies. The answer to that criticism is a simple one: with looming foreign trade deficits, a decision not to encourage exports will only exacerbate an already imbalanced trade position. Similarly, U.S. companies should be encouraged to adopt a competitive posture stressing competition on the basis of quality rather than mere price competitiveness. Over the long run, this attitude can only benefit Americans in general and American producers in particular.

The Export Trading Company Act of 1982 was intended as a major step towards greater export competitiveness by U.S. companies. By encouraging exporters to form ETCs with the financial participation of banking institutions, to seek the limited exemption from antitrust liability available through the certificate of review process, or to rely on the clarified antitrust provisions of a new section of the Sherman Act, ETCA represents a bold and unusual step for American manufacturing, producing, and service-industry interests. What is unclear, however, is whether all of these export incentives will be buried under increasing federal regulation from the three federal agencies—the Commerce and Justice Departments and the Federal Reserve Board—having regulatory jurisdiction over ETCs.[162] The proposed regulations already issued by these bodies appear to be at best comprehensive and at worst potentially burdensome, especially to those thousands of small- and medium-sized companies that are the act's intended beneficiaries. If the final regulations have the effect of retarding ETC development, the result would be particularly ironic in light of Title I's findings that export development in the United States has been "hampered . . . by Government regulations."[163]

The U.S. ETCs that do emerge because of this legislation will probably not resemble closely the Japanese *sogo shosha* but, given the

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162 One commentator who remained opposed to the certification procedure was skeptical as to the ability of the Secretary of Commerce to make the necessary and correct antitrust determinations:

> Not only is [certification] cumbersome and complex, but it delegates to the Secretary of Commerce great power to abrogate the antitrust laws insofar as exports are concerned. It seems to me unwise to lodge such power in an authority having no other responsibility for maintaining a coherent antitrust policy and lacking experience and expertise in this area.

International Application of U.S. Antitrust Laws: Hearings on H.R. 2326, H.R. 1648, and H.R. 2459, Before the Subcomm. on Monopolies and Commercial Law of the House Comm. on the Judiciary, 96th Cong., 1st Sess. 14 (March 26, 1981) (statement of James A. Rahl).

163 Pub. L. No. 97-290, § 102(b), 96 Stat. 1233, 1234 (1982) (to be codified at 15 U.S.C. § 4001).

presence of the U.S. government as a regulator rather than as a full-fledged promoter and the restrictions on the involvement of banking institutions, will undoubtedly have a particularly American character. Nevertheless, there exists considerable potential for companies that previously have never exported to take advantage of ETCA's new provisions. Whether a majority of such companies will prefer to rely on Title IV's antitrust exemption or, instead, to pursue the certificate of review process cannot be determined at this early period. Both approaches have benefits and burdens, and any company considering creating an ETC should fully understand the relevant antitrust and business factors, including the applicable domestic law of the targeted export countries.

ETCA provides the prospective exporter with numerous options which will entail careful business and legal planning before any exporting activity begins. Experienced antitrust counsel should advise on the potential antitrust liability and whether, given the contemplated ETC structure and activity, the company should seek certification or instead rely on Title IV. An additional approach might also involve invoking the Department of Justice's Business Review Procedures.[164] Counsel should also advise whether bank participation is feasible, whether qualifying as a Webb-Pomerene association is worthwhile, and whether an established ETC should consider seeking the favorable tax treatment available to domestic international sales corporations.[165]

Whether the Export Trading Company Act of 1982 will generate the export activity contemplated will depend on numerous factors. The most significant aspect of this new legislation is the apparent focus of the U.S. Congress on stimulating new export opportunities for American business. ETCA's overall effectiveness should be evaluated periodically, and particular attention should be devoted to considering whether the administrative regulations are evolving in a fashion to satisfy the legislation's objectives. If they do not, and U.S. companies fail to respond to ETCA's export incentives, then perhaps the Congress and the administrative agencies should

164 On December 6, 1978, the Justice Department announced a policy to expedite business review requests of export-related activities. This Business Review Procedure, codified at 28 C.F.R. § 50.6 (1982), provided that businesses seeking review of their proposed export activities by the Antitrust Division would receive answers within thirty days from the Division's receipt of all relevant data about the proposed transaction. The purpose of the Business Review Procedure was to allow a firm or organization to seek a statement as to whether the Division would challenge the activity as violative of the federal antitrust laws.

165 I.R.C. §§ 991-999 (1976).

consider other, perhaps more ambitious and far-reaching, attempts to stimulate U.S. export activity.