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The Failure of the Export Trading Company Program

Spencer Weber Waller*

Ten years ago, Congress expressed concern over the massive and growing United States trade deficit, the competitiveness of U.S. firms in international markets, and the failure of small and medium sized U.S. firms to take advantage of export markets. The antitrust laws were identified as one of the principal culprits. The antitrust laws were criticized as too uncertain and as imposing a competitive restraint.

* Assistant Professor of Law, Brooklyn Law School. The author would like to thank Jeffrey Aaronson, Craig Conrath, Stuart Chemtob, Leo Raskind, and Jeff Stempel for their comments on aspects of this Article, and Andre Fiebig, Mark Whitney, and David Kim for their research assistance. The research for this Article was supported by a summer research grant from Brooklyn Law School.

1 Congress identified restrictions on bank participation and investment in export ventures as the other principal culprit. The 1982 legislation which is the focus of this Article also permitted limited bank participation and ownership of export trading companies. See 12 U.S.C. §§ 1841-1850 (1988).

disadvantage on U.S. firms competing against foreign firms not subject to similarly stringent national regulation. The antitrust laws were also believed to inhibit the formation of export joint ventures and the type of export trading companies successfully used in other countries.

Congress responded to these concerns by proposing two modifications to the antitrust laws with respect to export conduct. Congress proposed restricting jurisdiction in antitrust cases alleging a violation solely with respect to exports. Congress also proposed a more complex system where United States firms could apply in advance for certification that their export conduct was not a violation of antitrust laws. Ultimately, both proposals were enacted into law in the Foreign Trade Antitrust Improvements Act ("FTAIA")\(^5\) and the Export Trading Company Act of 1982 ("ETC Act").\(^6\)

Congress had numerous conflicting goals in enacting this legislative package. Congress hoped to benefit from all of the alternative export promotion bills being considered at the time, rather than having to pick and choose among them. Congress hoped that the resulting legislation would: 1) encourage the formation of well financed vertically integrated general trading companies along the line of Japanese general trading companies ("sogoshosas") to assist United States exporters with all aspects of the exporting process; 2) allow competitors to jointly exploit market power abroad to offset the power of private cartels and foreign government enterprises; and 3) unleash a wave of export activity by small and medium sized firms previously restrained by uncertainty over the application of U.S. antitrust laws.

After ten years, it is time to reexamine the Export Trading Company program ("ETC program") and assess its success or failure. This Article suggests that Congress relied on empirical predictions and industry arguments of dubious validity in attempting to restructure the export segment of the industry by altering antitrust princi-

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States exports was one of the persistent themes raised by supporters of the Export Trading Company Act ("ETC Act"). The comments of the witnesses and legislators are reflected in the voluminous legislative history of the ETC Act which is collected in a nine volume work, B. Reams & M. Nelson, The Export Trading Company Act Of 1982: A Legislative History (1989). In the interest of not restating all nine volumes of that legislative history, the footnotes to this Article will provide only illustrative examples of the common themes expressed in the consideration of the ETC Act and its predecessors.


4 See, e.g., 1981 Senate Subcommittee Hearings, supra note 2, at 219-21 (statement of H. Peter Guttman, President, HPC Associates) (disbanding of service joint venture because of fear of private antitrust litigation despite receipt of Justice Department opinion of no antitrust liability).


6 Id. §§ 4001-4003.
bles which were never a substantial impediment in the first place. This Article further suggests that Congress was unable to clarify what it wanted to accomplish in the export sector and enacted legislation incapable of achieving any of its mutually contradictory goals. This Article concludes that in implementing all of the competing proposals, instead of choosing among them, Congress created a program which created little incentive to export. Rather, the program affirmatively injured the state of competition policy in both foreign and domestic markets and the effectiveness of traditional antitrust enforcement.

Part I of this Article sets forth the modifications of the antitrust laws enacted in the name of promoting exports and reducing uncertainty. Part II examines the negligible impact of the ETC Act on the competitiveness of U.S. firms in the international market and on the structure of the export sector of the U.S. economy. Part III examines whether the ETC program has succeeded in reducing any actual or perceived risks which the antitrust laws inject into the export decisions of U.S. firms. Part IV explores the negative effects of the ETC program on the substance and enforcement of U.S. antitrust policy. Finally, Part V of this Article proposes the outright elimination or modification of the ETC program to enhance U.S. export competitiveness and lessen the damage to the U.S. enforcement of its antitrust law.

I. The Export Trading Act of 1982

Beginning in the 1970s, Congress began to focus its attention on export promotion and the perception that the antitrust laws were hindering U.S. export performance. Congress proposed a series of measures which would have established a commission to study the international application of U.S. antitrust law, broadened the dor-

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8 See generally B. REAMS & M. NELSON, supra note 2. The first such effort appears to be S. 2754, 93rd Cong., 1st Sess. (1971).

mamt Webb-Pomerene antitrust export exemption,\textsuperscript{10} permitted bank ownership of export trading companies,\textsuperscript{11} provided exporters with a preclearance procedure to determine their antitrust liability in advance,\textsuperscript{12} promoted the formation of American export trading companies along the lines of Japanese sogoshosas,\textsuperscript{13} and amended the jurisdictional provisions of the antitrust laws regarding exports from the U.S.\textsuperscript{14}

\textbf{A. Expectations and Legislative Choices}

The ideas culminating in the ETC Act were initially proposed in 1979. The momentum for the ultimate passage of an ETC Act was provided by a 1981 study conducted by Chase Econometrics. The Chase Econometrics' study indicated that the passage of such legislation would, by 1985, (1) increase Gross National Product between $27 billion and $55 billion, (2) increase domestic employment between 320,000 and 640,000, and (3) reduce the federal deficit to $22 billion.\textsuperscript{15} An ETC Act was thus politically appealing as a painless export promotion vehicle narrowing the trade deficit, while at the same time, increasing domestic employment.\textsuperscript{16}

The Webb-Pomerene Act permits exporters to form export associations which are exempt from the Sherman Act. In order to qualify for Webb-Pomerene immunity, the association must be engaged solely in export trade and may not interfere with domestic competition or the export trade of a domestic competitor. The Webb-Pomerene Act does not cover services. Webb-Pomerene Associations must register with the Federal Trade Commission and file periodic reports. Webb-Pomerene Associations remain subject to section 5 of the Federal Trade Commission Act, but are immune from the Sherman Act for activities in compliance with the Act. Activities outside the scope of immunity remain subject to challenge under the full range of antitrust laws. 15 U.S.C. §§ 61-65 (1988).


\textsuperscript{12}See, e.g., H.R. 7436, 96th Cong., 2d Sess. (1980); H.R. 7463, supra note 10.

\textsuperscript{13}See, e.g., H.R. 7364, supra note 11; H.R. 7436, supra note 12; H.R. 7463, supra note 10; 1980 Senate Hearings, supra note 2, at 104-05.


\textsuperscript{16}The grandiose expectations of Congress are set forth in section 102 of the Act which states:

(a) The Congress finds that—

(1) United States exports are responsible for creating and maintaining one out of every nine manufacturing jobs in the United States and for generating one out of every seven dollars of total United States goods produced;

(2) the 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;

(3) trade deficits contribute to the decline of the dollar on international currency markets and have an inflationary impact on the United States economy;

(4) tens of thousands of small- and medium-sized United States
thusiasm for the Act is reflected by its unanimous passage.

Congress chose to combine many of the features of the prior draft legislation in this area. With powerful and persistent legislators backing efforts in several different committees to amend the jurisdictional provisions of the Sherman Act to allow bank participation in export trading activities, and to allow exporters to get government certification and immunity for proposed export conduct, Congress concluded its three year legislative effort by incorporating all major proposals in the ETC Act. As a result, the ETC Act of 1982 includes jurisdictional changes to the antitrust laws, new procedures allowing bank ownership of ETCs, and antitrust immunity for certified activities.

(b) It is the purpose of this Chapter to increase United States exports of products and services by encouraging more efficient provision of export trade services to United States producers and suppliers, in particular 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 modifying the application of the antitrust laws to certain export trade. 15 U.S.C. § 4001.

17 Only the proposal for an international antitrust commission was not enacted. Other unimplemented proposals focused on the amendment and expansion of the Webb-Pomerene Act and the transfer of the administration of the Webb-Pomerene Act from the Federal Trade Commission to the Department of Commerce. The ETC Act ultimately created an entirely new mechanism for antitrust immunity administered by the Department of Commerce with the concurrence of the Department of Justice.
B. The Antitrust Certification Provisions of the ETC Act

The ETC Act established a new procedure which permits persons engaged in export trade to receive a certificate that sets the limits of their antitrust liability before they engage in such conduct. Under Title III of the ETC Act, an exporter, group of exporters, or export intermediary may apply to the Department of Commerce for a certificate of review stating that specified export trade activity does not violate the antitrust laws. The Department of Justice must concur in the issuance of the certificate.

The applicant must establish that its specified export trade, export trade activities, and methods of operations 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.

Unlike the prior antitrust export immunity provisions contained in the Webb-Pomerene Act, the ETC Act applies to the export of both services and commodities. Eligible export trade services are expansively defined in the regulations to include:

1) business, repair, and amusement services;
2) management, legal, engineering, architectural, and other professional services;
3) financial, insurance, transportation, informational and any other data-based services, and communication services.

The certificate of review must specify the export trade, export trade activities, and methods of operations to which the certificate applies; the entity to whom the certificate is issued, and its members, if any; and any conditions imposed by the Department of Commerce (DOC) or the Department of Justice (DOJ) to assure compliance with the statutory requirements of the Act. Certificate holders must file annual reports of export activities and promptly report any changes

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20 Id. §§ 61-65. See supra note 10.
in certified activities. The Commerce and Justice Departments may investigate or revoke certificates which no longer meet the requirements of the Act. The Act further specifies that certificates obtained by fraud are void ab initio.

The government is barred from bringing criminal or civil actions against conduct covered by a certificate of review. A private plaintiff is limited to actual damages in challenging conduct alleged to violate a certificate of review. The ETC Act shortens the statute of limitations so that any such action must be brought within two years of notice of the alleged violation, and in any event within four years after the accrual of the cause of action. The certificate holder enjoys a presumption that certified conduct is lawful. If the certificate holder prevails in private litigation regarding certified conduct, the plaintiff must pay the reasonable attorney fees and the costs of the certificate holder.

II. Impact of the ETC Act

The ETC Act has failed to satisfy any of the inflated expectations of Congress. The Department of Commerce has issued only 124 certificates of review through December 31, 1990. Twenty one of these certificates of review have been relinquished, two were revoked, and two expired.

Congress appeared sincerely shocked by the virtual indifference of the business community, which had lobbied so vociferously for the ETC Act, to the purported benefits of the Act. A minuscule fraction of existing exporting trading companies and export management firms have sought certification under either the banking or antitrust

23 Id. § 4014 (a)(1)(A).
26 Id. § 4016(a). The Justice Department is permitted to seek to enjoin certified conduct which threatens "clear and irreparable harm to the national interest." Id. § 4016(b)(5).
27 Id. § 4016(b)(1).
28 Id. § 4016(b)(2).
29 Id. § 4016(b)(3).
30 Id. § 4016(b)(4).
31 If anything, interest is declining in the ETC program. The number of certificates issued by the Commerce Department each year follows:

<table>
<thead>
<tr>
<th>Year</th>
<th>Certificates</th>
</tr>
</thead>
<tbody>
<tr>
<td>1983</td>
<td>11</td>
</tr>
<tr>
<td>1984</td>
<td>33</td>
</tr>
<tr>
<td>1985</td>
<td>17</td>
</tr>
<tr>
<td>1986</td>
<td>9</td>
</tr>
<tr>
<td>1987</td>
<td>16</td>
</tr>
<tr>
<td>1988</td>
<td>14</td>
</tr>
<tr>
<td>1989</td>
<td>14</td>
</tr>
<tr>
<td>1990</td>
<td>10</td>
</tr>
</tbody>
</table>

These figures were compiled by the author from the summaries of certificates of review in the Federal Register.
provisions of the ETC Act. As one witness told a House oversight committee: "It is our impression that the Reagan Administration and the Congress believed that the 1982 Act was important legislation and we believe that they wasted several years developing it." Several explanations help explain the mediocre response of the business community to the ETC program. These include the dramatic appreciation of the dollar relative to other currencies in the 1980s, the widening trade deficit, the fear of disclosure of confidential business information to the government in order to receive certification, and the lack of a definitive precedent interpreting the scope of the protection provided by antitrust certification. The fundamental problems overlooked or ignored by Congress were the inability of antitrust certification to promote either exports or jobs, the logical inconsistency of promoting both large and small export ventures through the same instrument, and the inability of American export cartels to significantly aid U.S. export performance.

A. Impact on U.S. Exports and Employment

Certified export activity has produced a negligible effect on U.S. exports. The best claim that even proponents of the ETC program can muster is the one that "it is conceivable that the [ETC] Act has accounted for over one billion dollars in exports." However, even this modest impact seems exaggerated. The $1 billion figure is an extrapolation from reported exports totaling $300 million from export trading companies holding certificates of review, $100 million from export trading companies receiving Export-Import Bank loan guarantees, and a total of $85 million invested in export trading

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companies by banks. The $1 billion figure is reached by estimating export trade from companies with bank investment eight times the size of the equity invested by financial institutions.\textsuperscript{36}

The $1 billion figure means that the ETC program accounts for an even smaller percentage of U.S. exports than the Webb-Pomerene program whose failure was part of the impetus for the ETC Act in the first place.\textsuperscript{37} This figure further fails to account for the certification of certain conduct previously covered by the Webb-Pomerene Act and for the exports which would have occurred regardless of any formal antitrust immunity.\textsuperscript{38}

Since the publication of the $1 billion estimate, the amount of total exports by Export Trading Companies (ETCs) has grown due to the issuance of new certificates and the continuing exports of goods by existing ETCs. However, the percentage of U.S. exports by ETCs has likely decreased given the dramatic growth in the export sector\textsuperscript{39} and the limited number of new ETCs.\textsuperscript{40} The continued growth of total exports by ETCs since the creation of the program still provides no information regarding the extent to which the program generated exports which otherwise would not have taken place.

The results of the ETC program are equally unimpressive when compared to the number of participating firms. Congress apparently believed that the reforms implemented by the ETC Act would eventually encompass twenty to thirty thousand firms which had not previously exported from the United States.\textsuperscript{41} The most recent statistics indicate that slightly more than 4,200 firms are covered by ETC certificates of review.\textsuperscript{42} The vast majority of these firms are covered by

\textsuperscript{36} Id. Actual export totals are unavailable since the export sales data reported to the Commerce Department is non-public information exempt from disclosure under the Freedom of Information Act. Mr. Lacy, as the former head of the Office of Export Trading Company Trading Affairs, was familiar with the actual data so his estimates are probably accurate.


\textsuperscript{38} See 1986 Oversight Hearings, supra note 33, at 35-38 (statement of Allan I. Mendelowitz, Associate Director National Security and International Affairs Division, General Accounting Office, discussing the limited number of firms receiving certification that had never exported).


\textsuperscript{40} See supra note 31.


virtue of their membership in trade associations.43 Prior to the active solicitation of trade associations, the number of certified firms was shockingly low as evidenced by the fact that in 1987, the DOC had issued certificates covering only 307 firms.44

There is no evidence that certification has changed the export performance of firms passively benefiting from certification by reason of membership in a trade association holding an ETC certificate of review. Such firms do not necessarily export as a result of the ETC program, or do not necessarily export at all.

B. ETCs and Sogoshosas

The ETC program is incapable of promoting the development of American general trading companies along the lines of the Japanese sogoshosas which captivated the attention of Congress. The sogoshosas have been recognized as a historical accident derived from Japan’s prior isolation from world markets, its dependence on foreign raw materials, its desire to avoid foreign economic dominance, and the need to rebuild its economy following World War II.45 Such firms did not develop in the west because “there was no need for them.”46

The Japanese sogoshosas are highly leveraged multibillion dollar corporations with gross profit margins of 2%-5%, and profit-to-capital ratios of well under 1%.47 While the sogoshosas are typically highly profitable on the basis of profit-to-equity ratios, this is a function of the extreme leverage and the high degree of debt in the capital structure of the sogoshosas.48 This leverage is, in turn, a function of the support and ownership interests of key Japanese financial institutions which own as much as 60% of the equity of the trading companies.49 To create the legal environment for true sogoshosas,

44 Title II Hearings, supra note 34, at 3 (statement of Malcolm Baldridge). But see Eleanor R. Lewis, Title III of the Export Trading Company Act: A Case Study in Interagency Coordination to Promote Exports, 5 J. L. & Comm. 451, 476 (1985)[hereinafter Title III][indicating issuance of certificates to 220 entities or individual proprietors by fall of 1985).
46 International Trading Companies, supra note 45, at 438.
48 International Trading Companies, supra note 45, at 456-58.
49 Id. at 463-66.
the U.S. would be forced to amend or repeal key segments of the antitrust, securities, and banking laws in a manner which would be both unwise and politically impossible.\textsuperscript{50} Not even the most ardent supporters of American trading companies have proposed anything so radical in connection with the ETC Act.\textsuperscript{51}

Congress appeared to adopt the sogoshosa as a model at a time when the sogoshosa was increasingly being criticized as an inappropriate vehicle for continued profitable international trade. The need, in Japan, for general trading companies has diminished as former sogoshosa clients have developed long-term relationships with foreign buyers and increased their knowledge of foreign markets.\textsuperscript{52} Such firms increasingly resent paying commissions on predictable sales involving little risk or creativity on the part of the trading company.\textsuperscript{53} Even the extensive business which the sogoshosas have been able to retain has become less profitable due to the increased fixed costs of maintaining the extensive global networks of employees distinctive to the sogoshosas.\textsuperscript{54}

The sogoshosas have sought to counter these trends through product diversification, vertical integration, and direct foreign investment. The sogoshosas have sought to enter businesses beyond the trading of commodity items and raw materials. The results have been mixed.\textsuperscript{55} The sogoshosas can be stodgy, inflexible bureaucracies ill-suited to trade, sell, or manage high technology products, consumer goods, retail operations, or goods requiring significant after-sale service and support.\textsuperscript{56}

Congress may have admired the sogoshosas and their role in the

\textsuperscript{50} Nor is it likely that the United States would desire a situation where less than ten trading companies control half of the nation’s imports and exports as in the case of Japan. Id. at 423. See also Harold R. Williams & Gurudutt M. Balisa, The U.S. Export Trading Company Act of 1982: Nature and Evaluation, 17 J.WORLD TRADE L. 224, 230-31 (1983)(nine sogoshosas accounted for 60% of Japanese imports, 50% of exports, and 50% of the gross national product in 1981).

\textsuperscript{51} See International Trading Companies, supra note 45, at 423. In addition, the United States has sought the modification and elimination of the system of interlocking ownership within the Japanese manufacturing sector and between the Japanese manufacturing and financial sectors which have made Japanese general trading companies possible. See Joint Report of the U.S.-Japan Working Group on the Structural Impediments Initiative, Tokyo, Japan, June 28, 1990.


\textsuperscript{53} See ARAI SHINYA, SHOSAMAN: A TALE OF CORPORATE JAPAN, 46-50 (1991)(Japanese business novel written by director of Sumitomo Corporation criticizing bureaucratic mentality of sogoshosas, inability to grow beyond traditional functions, and distinguishing true spirit of entrepreneurship as beyond skills of trading companies).

\textsuperscript{54} Invitation to Aggressive Export Promotion, supra note 45, at 241-42.


\textsuperscript{56} Id.; International Trading Companies, supra note 45, at 472-76; The General Trading Companies of Japan, supra note 47, at 28, 32.
economic development of Japan as a world power, but it sought first and foremost to help small and medium sized firms which did not previously export.\textsuperscript{57} In this respect, the rhetoric regarding the creation of American style sogoshosas appears inappropriate given the almost complete lack of interest of sogoshosas in handling the products of small exporters, because of the high fixed costs and the limited profit potential of such orders.\textsuperscript{58}

The ETC program appears destined to create the precise opposite of the general trading company.\textsuperscript{59} The ETC Act itself contains significant restrictions which prevent the accumulation of market power and the formation of links between banking and commerce, which are precisely the tools that permitted the sogoshosas to dominate Japanese international trade.\textsuperscript{60} The ETC program has been used almost exclusively by small export intermediaries and by trade associations focusing on a small group of products, industries, or markets.\textsuperscript{61} Those ETCs receiving certification beyond a single industry or type of product typically have been small export intermediaries or service providers which lack the resources to perform the full functions of the sogoshosas. There is little in the data to suggest that the ETC Act has caused any fundamental change in the role of the small narrowly focused and specialized export intermediaries which Congress identified for treatment under the Act.

### Table 1

<table>
<thead>
<tr>
<th>ETCS by Scope of Operations</th>
<th>1983-86</th>
<th>1986-90</th>
<th>TOTAL</th>
</tr>
</thead>
<tbody>
<tr>
<td>SINGLE INDUSTRY OR PRODUCT GROUP</td>
<td>40</td>
<td>33</td>
<td>73</td>
</tr>
<tr>
<td>MULTIPLE PRODUCT GROUPS</td>
<td>10</td>
<td>2</td>
<td>12</td>
</tr>
<tr>
<td>GENERAL TRADERS</td>
<td>20</td>
<td>19</td>
<td>39</td>
</tr>
</tbody>
</table>

\textsuperscript{57} See, e.g., 1979 Senate Hearings, supra note 2, at 41, 150, 171, 259; 1980 Markup, supra note 41, at 263. At least one Congressman thought that the ETC Act would promote the consolidation and combination of small firms to form sogoshosa like enterprises. See 128 CONG. REC. 26,864 (1982).

\textsuperscript{58} See The General Trading Companies, supra note 47, at 31-34. Compare Think Small: The Export Lessons to be Learned from Germany's Midsize Companies, BUS. WK. (Nov. 4 1991) at 58.

\textsuperscript{59} The American Trading Company, supra note 52, at 61.

\textsuperscript{60} Title II of the ETC Act limits bank investment to 5% of bank capital and lending to 10% of bank capital. 12 U.S.C. § 1843(c)(14), (14)(B)(i). Title II also bars banks from lending to a bank owned ETC on terms more favorable than with its other customers. Id. § 1843(c)(14)(B)(iii). The antitrust laws further prohibit the type of extensive cross-ownership which is so prevalent in the sogoshosas. 15 U.S.C. § 19 (1988).


\textsuperscript{62} This table was compiled from the published summaries of ETC certificates of review in the Federal Register. The purpose of the table was to distinguish between firms certified to trade in all products and those which voluntarily sought certification for a narrower groups of products. Firms were classified as trading in a single or product group if the ETC certificates of review listed only a single product group such as catfish, wood
The American subsidiaries of existing sogoshosas have shown no interest in certification under Title III of the ETC Act. Similarly, the existing American grain trading firms and the large multiproduct exporters such as General Electric have not utilized the antitrust certification procedures. At the time of the passage of the ETC Act, American grain trading firms, American mineral trading firms, and American subsidiaries of Japanese sogoshosas accounted for approximately twenty nine percent of all U.S. exports. The absence of such firms from the ETC program is an important indication of the perceived insignificance of the program. Such firms presumably have relied solely on the jurisdictional provisions of the FTAIA to the extent they believe their export conduct has any U.S. antitrust ramifications.

C. ETCs and Export Cartels

There is nothing in the ETC Act which suggests that it could successfully promote export cartels to exploit foreign markets to the advantage of the U.S. The essence of a successful cartel is the existence of sufficient market power and entry barriers to raise price and to restrict output on an ongoing basis. The ETC Act does not create market power, nor does it create or maintain barriers to entry. It merely permits an industry, as a matter of U.S. law, to collusively exploit such market power abroad if it already exists. The history of the Webb-Pomerene Act suggests that few export associations will have sufficient global market power to exploit foreign markets.

The data in Table 2 indicates that the majority of the ETCs have been export intermediaries, export facilitators, or export service providers that do not even function as horizontal agreements between industries.
between competitors, let alone function as export cartels. These type of ETCs typically seek certification to enter exclusive or nonexclusive vertical arrangements to represent or sell one or more of its customers' products in export markets. These type of export intermediaries typically lack the size or prominence to become the focal point for horizontal collusion among its customers.\footnote{68}{See 50 Fed. Reg. 1786, 1793 (1985)(ETC Guidelines).}

\begin{table}
\centering
\caption{Classification of ETC by Nature of Association}
\begin{tabular}{|l|c|c|c|}
\hline
\hline
Export Intermediaries or Other Vertical Arrangement & 47 & 27 & 74 \\
Horizontal Agreement Among Competitors & 21 & 27 & 48 \\
\hline
\end{tabular}
\end{table}

Not not all ETCs consisting of horizontal combinations of competitors have obtained certification to cover the full range of price setting, production restriction, and policing powers normally associated with cartel behavior. As set forth in Table 3, only slightly more than half of the horizontal ETCs have sought certification for such cartel behavior in foreign markets. The remainder of the horizontal ETCs received certification for more limited activity such as export facilitation, licensing, joint bidding, sales activity, and information exchanges which did not necessarily involve the complete control of prices and sales in export markets. For example, a significant number of certificates expressly permit members of horizontal ETCs to deviate from ETC prices at will.

\begin{table}
\centering
\caption{Extent of Certification by Horizontal ETCs}
\begin{tabular}{|l|c|c|c|}
\hline
& 1983-86 & 1987-90 & TOTAL \\
\hline
Full Certification as Export Cartel & 12 & 14 & 26 \\
Certification for Less Than Cartel Behavior & 9 & 13 & 22 \\
\hline
\end{tabular}
\end{table}

\footnote{69}{This table was compiled from the published summaries of ETC certificates of review in the Federal Register. An ETC was classified as a horizontal combination among competitors if it was comprised of members which produced products or services in the same or similar industries. The published summaries provide no information as to the degree the members of an ETC actually or potentially compete in either domestic or export markets.}

\footnote{70}{This table was compiled from the published summaries in the Federal Register where a certificate of review was issued to a horizontal combination of competitors. A certificate was considered to constitute a full export cartel behavior only if the certificate permitted the ETC to fully control the prices and quantities of its members' exports. Such certification means only that the ETC is immune from United States antitrust law if it}
Few of the horizontal ETCs are in industries where there is likely to be significant market power. In fact, a majority of the horizontal ETCs are in the agricultural and forestry industries where the presence of foreign producers, close substitutes, and relatively low entry barriers suggest that significant market power would be difficult to exercise.\footnote{Nineteen of the horizontal ETC certificates occurred in the agricultural, forest, fish, seafood, or ranching industries. Two certificates covered textile and apparel products. Five certificates related to the negotiation of transportation services. The remainder of the certificates covered various types of machinery, tooling and parts, metals, and minerals where the existence of significant horizontal market power is more difficult to evaluate. However, some of these certificates involve ETCs with enormous memberships that suggest either a healthy state of competition both in the United States and abroad, or that the coordination of an effective cartel may well be impossible. See, e.g., supra note 43.}

The amount of any potential remaining monopoly rents will be reduced by the secret or open price reductions implemented by ETC members seeking to increase their own sales at the expense of the export cartel. The ETC process is not an effective mechanism for the detection and policing of this kind of cheating by cartel members which normally results in the demise of the cartel.\footnote{The Antitrust Division has refused to certify fixed export allotments because of the concern that a cartel operatingsecretively in the United States could utilize an ETC as a way to police its domestic cartel and siphon off excess production to dump in export markets in order to maintain supracompetitive prices in the United States. Even if the ETC could "punish" the cartel breaker, the cartel breaker would always have the option of leaving the ETC. The cartel breaker could then pursue its own price cutting strategy unless the ETC controlled some vital aspect of the exporting process. If the ETC did control such a bottleneck it might well be in violation of the provisions of the ETC Act prohibiting substantial restraint of the export trade of a competitor or unfair methods of competition against other United States exporters. See 15 U.S.C. \$ 4013(a)(1), (3) (1988).}

While ETC certificates often establish an ETC as an exclusive joint sales instrument, the certificates do not require the members to commit fixed amounts for export.\footnote{See Treaty Establishing the European Economic Community, \textit{entered into force}, Jan. 1, 1958, arts. 85-90, 298 U.N.T.S. 11 [hereinafter EEC Treaty].} Nor do the certificates contain any penalties for selling outside the ETC, except the possibility of expulsion from the ETC.\footnote{See O\textsc{rg}\textsc{i}\textsc{n}a\textsc{t}ion For E\textsc{c}o\textsc{n}o\textsc{m}ic C\textsc{o}o\textsc{p}e\textsc{r}a\textsc{t}ion and D\textsc{e}ve\textsc{lo}p\textsc{m}ent, \textit{Guide to Legislation on Restrictive Business Practices} (4th ed. 1976).}

The amount of any available monopoly rents would be further reduced by the effectiveness of foreign competition law. The European Economic Community (EEC) vigorously enforces its own competition laws.\footnote{See \textsc{A}rega\textsc{d}a \& T\textsc{urn}er, supra note 66; H\textsc{o}ven\textsc{kamp}, supra note 66.} Virtually every state with a developed market economy enforces some form of national competition law.\footnote{See \textsc{O}rganisation For E\textsc{c}o\textsc{n}o\textsc{m}ic C\textsc{o}o\textsc{p}e\textsc{r}a\textsc{t}ion and D\textsc{e}ve\textsc{lo}p\textsc{m}ent, \textit{Guide to Legislation on Restrictive Business Practices} (4th ed. 1976).}
growing enthusiasm for competition law in developing countries, and the former centrally planned economies suggests that there are few desirable markets where a U.S. export cartel could operate without serious foreign legal consequences.

The public nature of the ETC program also suggests that few American export cartels will go unnoticed by foreign competition authorities. Applications for certificates and summaries of certificates are published in the Federal Register with additional details available in legal periodicals and databases. The full certificates themselves are available in the reading room of the DOC in Washington, D.C. Each certificate lists the entity or association receiving the certificate, its members, its products or services, its method of operations, and the export markets it intends to serve. The degree of disclosure is substantial, and is greater than what is required by most foreign export cartels potentially aimed at the U.S. Such information is easily accessible to foreign competition authorities, and therefore certification would be avoided by any serious cartel.

More importantly, even a program of successful export cartels does nothing to increase U.S. employment or expand export opportunities. A successful cartel would normally raise price and restrict output in order to obtain monopoly profits. This could well decrease export volume and U.S. employment although the cartel members would be earning monopoly returns in the foreign market. Such a strategy could be self-defeating in the long-term even in terms of total revenue and profits. Any price increase and reduction in output to maximize cartel revenues in the short run would make U.S. exports less competitive with foreign alternatives and would attract new entries in the foreign market.

III. The Impact of the ETC Act on Antitrust Risks

A. Reducing Actual Risks

It appears that the business community seriously exaggerated the U.S. antitrust risks associated with exporting. The majority of

82 Conversely, the perceived widespread existence of foreign cartels would normally raise prices and restrict output in foreign markets increasing United States export opportunities.
83 Competitiveness: Public/Private Initiatives in Export Promotion Programs, Hearings Before the Subcomm. on International Economic Policy and Trade, Comm. on Foreign Affairs, House of Represent-
certificates of review have been issued for conduct which never raised any serious antitrust concerns. Only a handful of certificates have been issued to producer groups or associations seeking certification to impose significant price or production restraints in foreign markets and to groups possessing the market power to achieve such goals.\textsuperscript{84}

There are six types of conduct which commonly appear in the certificates of review. First, a majority of the applications from export intermediaries and export facilitators seek certification to enter into exclusive agreements with domestic suppliers and foreign export intermediaries and customers. The terms of the agreements with suppliers are typically that the supplier agrees to use the applicant as an export intermediary for any of the supplier’s products. The terms of the agreements with export intermediaries and other representatives in the export market are typically that the applicant agrees only to deal with that export intermediary and the export intermediary agrees not to represent any of the applicant’s competitors.

Second, the certificates permit the use of restrictions relative to price, territory, quantity, and customer on the condition that the restrictions are limited to the export market. These restrictions may be agreed upon independently or written into the agreements mentioned above.

Third, many applications seek permission to discuss and exchange information among members of the export trading company. This information may relate to sales, marketing strategies, costs of transport, and even prices to be charged. However, such information must relate to the exports and export trade activity only.

Fourth, the certificates also often grant the applicants permission to engage in export facilitation services. The specific conduct varies between certificates but concerns such areas as acting on behalf of suppliers in market research, documenting exports, responding to bids, negotiating with the U.S. and foreign governments over the legal requirements of exporting and importing, negotiating transportation contracts, and matching suppliers with buyers in the export market.

Fifth, the applicants are commonly granted permission to estab-

\textsuperscript{84} See supra note 71 and accompanying text including Table 3. Cf. 125 CONG. REC. 7,123 (1979) (failure of Webb-Pomerene Act because of lack of market power of United States export associations). Compare 1981 Senate Subcommittee Hearings, supra note 2, at 382 (statement of Jack Valenti, President, Motion Picture Export Association of America (“MPEAA”) describing MPEAA activities as Webb-Pomerene Association) with id. at 298 (statement of Howard Fogt describing operations of Phosphate producer’s Webb-Pomerene Association).
lish conditions on the entry and withdrawal of a member from the organization. These conditions vary widely and are listed in detail in each certificate. The most common restriction concerns the transfer of shares by a member wishing to withdraw.

The sixth category concerns refusals to deal. The certificates often allow the applicants to refuse to deal with a company wanting to export goods or services that may compete with one of its members.

Regardless of the specific type of conduct covered in the certificates of review, the vast majority of certified conduct relates to vertical restraints by export intermediaries with market power that is scarcely appreciable. Such conduct, with or without certification, raises few domestic antitrust concerns. Many of the certificates suggest an incomplete understanding of the function of the ETC program and perhaps a desire to somehow become recognized by the federal government as an "official" export trading company for use in marketing.\(^{85}\)

In contrast to the small export intermediaries, which dominated the ETC program at its inception,\(^{86}\) there has been a trend among recent applicants toward the formation of true export joint ventures among competitors and the certification of trade associations.\(^{87}\) These more sophisticated ETCs have used their certificates to protect relatively innovative export promotion conduct. For example, one ETC association uses its certificate to cover the joint policing of intellectual property rights in the motion picture industry to prevent piracy and counterfeiting in foreign markets that would diminish the value of U.S. motion picture exports.\(^{88}\) Another ETC association used its certificate to protect joint research and development to de-

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\(^{87}\) See supra notes 69, 70 and accompanying text.


1) Promulgating voluntary model sales contract forms among AFMA members;

2) Providing services to AFMA Members and others in arbitration of disputes arising over the terms of licensing or sales;

3) Exchange of information among AFMA Members regarding all aspects of foreign market conditions and customers;

4) Development and recommendation among AFMA Members of voluntary model business practices, including methods of reducing foreign trade barriers, improving intellectual property protection, and expanding markets;

5) Collection and dissemination among AFMA Members of foreign market research information;

6) Negotiation and agreement with representatives of foreign governments and orga-
velop packaging for cherries being exported to Japan. Similarly, two different associations of cherry growers obtained certification to jointly engage in fumigation and other activities to meet foreign inspection requirements.

All of these activities may be extremely beneficial to the U.S. and its export competitiveness, but such activities never raised any serious antitrust risks. The type of sophisticated trade association that is being urged to apply for an ETC Certificate already has the legal acumen to engage in such activity if it proves to be beneficial to its members, regardless of certification. While there may be little downside to obtaining an ETC Certificate, it was never necessary in the first place. Not surprisingly, the ETC program has been shunned by the vast majority of exporters and trade associations.

The nature of the certified conduct suggests that few aggressive joint export ventures raising serious antitrust concerns have sought certification. The certification process requires an uncomfortable degree of disclosure to customers, competitors, the U.S. government, and to foreign governments who would become aware that a combination of U.S. exporters may seek to collude in their market. It

organizations toward reducing trade barriers, expanding markets, and improving intellectual property protection; and

7) Certification of AFMA members as to such matters as involvement in transactions, evidence of ownership, and true signatures.

91 But see infra note 105.
92 See supra note 83.
93 Id.
94 One of the first uses of the Export Trading Company Act by domestic competitors contemplating serious anticompetitive conduct in foreign markets resulted in the only litigation testing the procedures for opposing certificates of review. An association of chloralkali producers obtained a certificate of review for a proposed joint venture in the export sale of caustic soda and chlorine. 50 Fed. Reg. 4251 (1985). This application pressed the limits of the ETC program. The industry was highly concentrated and had a history of antitrust violations relating to domestic and international commerce. The joint venture obtained certification for the use of an exclusive sales agent which would determine prices and quantities for export, allocate export markets, and exchange information about homogenous products, identical to those sold in the United States. Id.

Domestic brokers excluded from the joint venture challenged the approval of the certification in Horizons International, Inc. v. Baldrige, 811 F.2d 154 (3d Cir. 1987). The plaintiffs had not objected to the requested certificate or commented during the process of the certificate. The plaintiffs alleged that the certified conduct violated the standards of the ETC Act as part of an ongoing anticompetitive conspiracy within the industry, and sought to vacate the certificate of review as issued. The court examined only the administrative record from the agency and dismissed the complaint, holding that the decision to award the certificate was not arbitrary or capricious. The court refused to vacate the certificate on the basis of minor irregularities in the publication of the certificate for notice and comment. Id. at 168. On substantive grounds, the court refused to second guess the conclusion of the Commerce Department that the export joint venture was not likely to produce anticompetitive effects on domestic commerce or U.S. export opportunities. Id. at 168-69.
would appear that most truly joint horizontal export agreements have relied upon lack of detection and the jurisdictional provisions of the FTAIA rather than the certification provisions of the ETC Act.

B. Reducing Perceived Uncertainty

The other dominant purpose behind the enactment of the ETC Act was to "clarify" the application of U.S. antitrust law to export conduct and to reduce uncertainty and anxiety in the export community believed to restrain exports by small and medium sized firms. If the ETC Act failed to unleash the wave of exports foreseen by its sponsors, it has done somewhat better at reducing whatever uncertainty existed in the minds of the export community regarding the application of the U.S. antitrust laws to export conduct. The provisions of an ETC Certificate of Review confer total immunity from governmental antitrust challenges for conduct specified in the certificate. This includes all criminal and civil actions by the DOJ under the Sherman Act and the Clayton Act, civil actions by the Federal Trade Commission (FTC) under section 5 of the FTC Act, and criminal and civil actions by state attorneys general under state antitrust law.

The ETC Certificate of Review does not eliminate private antitrust litigation but significantly raises the risks and lowers the rewards of a private damage suit. A private litigant with a marginal claim must identify, document, and bring the claim within a shorter statute of limitations. The private plaintiff must then overcome a presumption of legality for conduct covered by the certificate. If wrong, the plaintiff must pay the attorney fees and the costs of the defendant. Even if correct, the plaintiff may only collect actual damages, rather than treble damages, for conduct specified in the certificate.

It is difficult to evaluate empirically the deterrent effect of the ETC program. There have been no antitrust challenges to the legality of behavior covered by an ETC Certificate of Review. There has only been one attempt to challenge the issuance of a certificate.

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95 See supra note 2.
97 Id. § 4002(7).
98 Truly frivolous claims already should be deterred by the many avenues for the imposition of sanctions in federal litigation. See Cooter & Gells v. Hartmarx Corp., 110 S. Ct. 2447 (1990)(affirming award of sanctions for filing of frivolous antitrust claim even though voluntarily dismissed); Badillo v. Central Steel & Wire, 717 F.2d 1160 (7th Cir. 1983)(analyzing range of sanctions available in federal litigation).
100 Id. § 4016(b)(3).
101 Id. § 4016(b)(4).
102 Id. § 4016(b)(1).
There are several equally plausible explanations for this lack of litigation. First, the ETC program may have deterred frivolous litigation as intended. In the alternative, there may have been little likelihood of litigation for the type of conduct certified because it never raised any serious antitrust risks in the first place. Finally, it may be simply that the true export cartels have sought their protection elsewhere outside the scrutiny and publicity of certification.

IV. The Mischief of the ETC Program

Congress generally believed that even if the ETC program did not help the U.S. achieve greater export competitiveness, such legislation could not possibly have any harmful effects. A commentator described the attitude of Congress toward the ETC Act as follows: "They seem to see it as something close to feeding chicken soup to a person suffering from a cold: It can't hurt, might help, and won't cost much."\(^{104}\)

If this had been the case, there would be little reason to worry about the consequences of the ETC Act since, at worst, it would slowly sink into dormancy like its predecessor, the Webb-Pomerene Act. Unfortunately, the ETC program has created a great deal of affirmative mischief by amending the antitrust laws sub rosa, rendering hypocritical the international enforcement of U.S. antitrust law, and altering the traditional law enforcement function of U.S. antitrust policy.

A. Amendment By "Clarification"

The ETC program resulted in the disturbing proliferation of substantive antitrust standards under the guise of clarifying the antitrust laws and reducing uncertainty. These new standards were proposed and approved by huge congressional margins without broad public awareness or debate as to the true nature of the changes being wrought.\(^{105}\)


\(^{105}\) Virtually every witness speaking in favor of the ETC Act referred to the need to "clarify" the antitrust laws. See generally Reams & Nelson, supra note 2.

Ironically, the ETC Act may have created new uncertainties. The ETC Act creates a private right of action for single damages for competitors harmed by violations of the four substantive standards of the Act, including "unfair methods of competition." In this regard, Congress may have inadvertently created a private right of action for violation of the standards of section 5 of the Federal Trade Commission Act where no such right of action had previously existed. 15 U.S.C. § 45 (1988). See generally Stephanie W. Kanwitt, Fed. Trade Comm’n § 1.07 (1991)(no general private of right for § 5 violations). Commentators have noted the possibility that the ETC Act may expand the standing of exporters to challenge certified conduct where standing might not be available under the Clayton Act. Promises Deferred, Hopes Unfulfilled, supra note 64, at 541-42; John F. Bruce & John C. Pierce, Understanding the Export Trading Company Act and Using (or Avoiding) Its Antitrust Exemptions, 38 Bus. Law. 975, 1011-12 (1983); Wilbur L. Fugate, The Export Trade Exemption to the Antitrust
1. Clarification versus Immunity

The changes wrought by the ETC Act cannot be classified as mere clarifications of existing antitrust law. The ETC Act provides for the first time a procedure by which a party can certify in advance that its conduct is not an antitrust violation. While private parties can seek Business Reviews from the Antitrust Division of the Justice Department, or Advisory Opinions from the Federal Trade Commission, such procedures provide only a statement of the present enforcement positions of the federal antitrust agencies and provide no substantive immunity from governmental prosecution or private treble damage litigation. Nor can the ETC Act be viewed as a mere clarification of the immunity already provided under the Webb-Pomerene Act. Congress specifically rejected amending the Webb-Pomerene Act, and instead created a new certification procedure granting increased antitrust immunity to a broader range of export activities that were not exempt under the Webb-Pomerene Act.

Many features of the ETC Act are additions to antitrust jurisprudence and procedure. The ETC program provides complete immunity from governmental prosecution for conduct that is disclosed and certified. Private rights of actions have been curtailed through the preemption of state antitrust claims, a shorter statute of limitations, a presumption of legality, the availability of single rather than treble damages, and the availability of attorney fees and costs to a prevailing defendant. Whether these changes are described as substantive or procedural, the ETC Act has fundamentally changed the nature of antitrust litigation relating to export conduct as compared to other areas of the antitrust law.

Clarification of legal standards and the reduction of uncertainty


The ETC Act also prohibits any conduct which injures a competing United States exporter. 15 U.S.C. § 4019(a)(1), (3) (1988). This language runs counter to the trend in the case law in which the courts have restricted the ability of domestic competitors in domestic antitrust cases to bring private treble damages claims through narrow interpretations of standing and antitrust injury. See Atlantic Richfield Co. v. USA Petroleum Co., 110 S. Ct. 1884 (1990); Cargill, Inc. v. Monfort of Colorado, Inc., 479 U.S. 104 (1986); Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977).

Because of the lack of cases challenging certified conduct, these worst case scenarios have not been considered by the courts. However, the Justice Department and the Commerce Department has rejected the notion that the ETC Act expands the reach of the antitrust laws. See 50 Fed. Reg. 1786, 1791 (1985); 48 Fed. Reg. 15,937, 15,939 (1983). See also John P. Ryan, The Export Trading Company Act of 1982: Antitrust Panacea, Placebo, or Pitfall?, 28 Antitrust Bull. 501, 517 (1983)(no increased antitrust risks from utilizing ETC Act).

110 Id. § 4016(b).
is a worthy goal if socially useful behavior is encouraged through the legal clarification, or if greater certainty allows parties to bargain in an intelligent fashion and price the legal risks involved in a transaction. However, the clarity of the legal rule is separate from the question of whether conduct will ever be unlawful.¹¹¹ Clarification of the law and reducing uncertainty to the export community have come to mean nothing short of total antitrust immunity under U.S. law. As one witness stated:

The primary inhibiting factor to joint activity in export trade is not the uncertainty as to the types of effects on interstate trade that must be shown in order to establish U.S. antitrust jurisdiction over an interstate jurisdiction. Rather, U.S. business enterprises are more concerned with the question of whether any kind of concerted action in export trade will be prosecuted either by the U.S. government or by private parties.¹¹²

The clarification sought by the export community through the certification procedure is nothing more than a conferral of absolute immunity without the searching political inquiry that such a request would normally entail.¹¹³

There is a limit as to the extent that society should be willing to go to accommodate a segment of the business community that is either unwilling or unable to understand that the antitrust laws do not pose a significant risk to export transactions.¹¹⁴ This is particularly true given the fact that most exporters have long since realized that it is foreign law, rather than U.S. antitrust law, that they must consider in an export transaction.¹¹⁵

2. Prior Clarification

It appears that, whether intentionally or not, the business com-

¹¹¹ Imagine the outrage that would ensue if the business community sought legislation that would permit the granting of securities fraud, racketeering, or hazardous waste certificates of reviews with substantive immunity and procedural protection.

¹¹² Foreign Trade Antitrust Improvements Act: Hearings on H.R. 2326 Before the Subcomm. on Monopolies and Commercial law of the House Comm. on the Judiciary 193 (1981) (statement of John McDermid) (emphasis in original). See also 1981 Senate Subcommittee Hearings, supra note 2, at 286. (statement of Milton Schulman that his attorneys had told him that there was very little antitrust risk associated with the export activities, but that he still feared constant lawyer fees and the possible risks that the government or private parties would still challenge his company’s conduct).


munity grossly exaggerated the antitrust risks concerning export conduct at the time of the passage of the ETC Act.\textsuperscript{116} As a result of changes in substantive antitrust law, jurisdictional principles, and government enforcement policy,\textsuperscript{117} it was highly unlikely that courts would impose liability in a case solely involving effects in a foreign market. After 1982, exporters had the additional protection of the FTAIA which limited U.S. jurisdiction to those export restraints which produced a direct, substantial, and foreseeable effect on U.S. commerce, or on the export opportunities of a U.S. exporter.\textsuperscript{118}

Exporters could also take comfort in massive changes in the substantive antitrust laws. In 1977, the U.S. Supreme Court held in \textit{GTE Sylvania, Inc. v. Continental T.V., Inc.}\textsuperscript{119} that vertical non-price restraints should be judged under a full rule of reason inquiry. This holding alone effectively overruled \textit{Todhunter-Mitchell v. Anheuser-Busch},\textsuperscript{120} the principal case imposing antitrust liability for export conduct. The Reagan and Bush administrations seized on \textit{GTE Sylvania} as the cornerstone of its enforcement policies and virtually abandoned enforcement efforts against any vertical distribution restraints imposed by manufacturers either domestically or abroad.\textsuperscript{121}

These ongoing changes and the FTAIA have provided substantial protection for the export community. The Ninth Circuit's decision in \textit{McGlinchy v. Shell Chemical Company}\textsuperscript{122} utilized the FTAIA to affirm the dismissal of antitrust claims of a former salesman who alleged a conspiracy to eliminate him as a source of competition for the sale of resin in foreign markets. The court held that the alleged conspiracy had no effect on U.S. commerce and was beyond the jurisdiction of the Sherman Act.\textsuperscript{123}

The other cases arising under the FTAIA have uniformly held that there is no jurisdiction under the U.S. antitrust laws unless the conduct produces substantial effects on the U.S. market or on the export opportunities of a competitor.\textsuperscript{124} Jurisdiction is lacking absent such an effect even where the conduct occurred physically within the United States.\textsuperscript{125}

\textsuperscript{116} See 1986 Oversight Hearings, supra note 33 (statement of Ralph Chew); Statement of Leslie Stroh, supra note 83.
\textsuperscript{117} See U.S. DEP'T OF JUST., ANTITRUST DIVISION, ANTITRUST GUIDE FOR INTERNATIONAL OPERATIONS (1977).
\textsuperscript{119} 493 U.S. 36 (1977).
\textsuperscript{122} 845 F.2d 802 (9th Cir. 1988).
\textsuperscript{123} Id. at 813-15.
3. The Spread of Repeal by Clarification

The ETC program appears to have spread the concept of amendment by clarification. In response to concerns that the antitrust treatment of joint ventures involved in research and development was deterring procompetitive behavior, Congress passed the National Cooperative Research Act of 1984 ("NCRA") to further clarify the antitrust laws. The Act mandates the application of a full rule of reason analysis to antitrust claims involving joint research and development. The NCRA states:

In any action under the antitrust laws, or under any State law similar to the antitrust laws, the conduct of any person in making or performing a contract to carry out a joint research and development venture shall not be deemed illegal per se; such conduct shall be judged on the basis of its reasonableness, taking into account all relevant facts affecting competition, including, but not limited to, effects on competition in properly defined, relevant research and development markets.

The most extensive discussion of the FTAIA is found in Liamuiga Tours v. Travel Impressions, Ltd., 617 F. Supp. 920 (E.D.N.Y. 1985). In this case, a foreign based tour operator sued a United States wholesale tour operator who terminated plaintiff as its representative in the Caribbean island of St. Kitts. The court held that there was no "jurisdictional nexus" since there were no effects in the United States, and no harm to United States export opportunities. Id. at 924-25. According to the court's interpretation of the Act, "[i]t matters not if there was anti-competitive conduct in the United States or by domestic corporations." Id. at 924 (citing Eurim-Pharm 593 F. Supp. at 1106). See also Akzo N.V. v. U.S. Int'l Trade Comm'n, 808 F.2d 1471 (Fed. Cir. 1986)(using factors in FTAIA in patent infringement and antitrust claims relating to manufacturing fibers in the EEC).

The Act defines joint research and development venture broadly to include:

- any group of activities, including attempting to make, making, or performing a contract by two or more persons for the purpose of:
  - (A) theoretical analysis, experimentation, or systematic study of phenomena or observable facts,
  - (B) the development or testing of basic engineering techniques,
  - (C) the extension of investigative findings or theory of a scientific or technical nature into practical application for experimental and demonstration purposes, including the experimental production and testing of models, prototypes, equipment, materials, and processes,
  - (D) the collection, exchange, and analysis of research information, or
  - (E) any combination of the purposes specified in subparagraphs (A), (B), (C), and (D),

and may include the establishment and operation of facilities for the conducting of research, the conducting of such venture on a protected and proprietary basis, and the prosecuting of applications for patents and the granting of licenses for the results of such venture.

The Act is not applicable to production joint ventures and specifically excludes from its protection the exchange of information not reasonably required for research and development. Id. § 4301(b). The Act further does not apply to any agreements regarding the production or marketing of the results of the joint venture other than the protection of the intellectual rights necessary to protect the research and development itself. Id. § 4301(b)(2).
The Act also permits persons to register a research and development joint venture with the Department of Justice and the Federal Trade Commission in return for reducing the risk of treble damage liability. Conduct properly described in a registration is judged under the rule of reason. If the conduct in a registration is found to violate the rule of reason, the defendant is liable only for actual damages, rather than treble, damages. A prevailing defendant is entitled to an award of attorney fees if the claim is frivolous, unreasonable, without foundation, or in bad faith.

More recently, the Bush Administration has introduced legislation that would extend the protection of the NCRA to all forms of joint ventures, including both production and research and development. The history of the ETC Act and subsequent "clarifications" suggest that this pattern of fragmentation will continue with the antitrust laws being progressively weakened without the full legal and political scrutiny that such changes deserve.

B. Hypocrisy and Antitrust Jurisdiction

The toleration and encouragement of export cartels under the guise of legal clarification also threatens the pioneering efforts of the U.S. to apply its antitrust laws to international and foreign cartels and monopolies which affect the U.S. market. It is ironic that the U.S. has been willing to damage its trade relations with close allies over the application of the effects test to foreign anticompetitive con-

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128 Id. § 4305. A person wishing to notify the Department of Justice and the Federal Trade Commission of such an agreement must do so within ninety days of the formation of the joint venture. The notification must disclose the identities of the parties to the joint venture and the nature and objectives of the joint ventures. The parties must file an additional notification within ninety days if the participants change. The parties may file additional notifications if the nature of the joint venture is enlarged. Id. § 4305(a).

The government remains free to investigate or challenge a joint venture registered pursuant to the Act. A private party may sue for treble damages for unlawful conduct outside the scope of the registration. A private party also may sue for actual damages under the Act for conduct that is covered in the registration. Unlike the ETC program, the Justice Department and the Federal Trade Commission neither approve the joint venture nor certify that the notified conduct is covered by the Act. The protection of the Act are determined only if the joint venture is later challenged on antitrust grounds.

129 Id. § 4302.
130 See id. § 4303.
131 Id. § 4304(a)(2). The attorney fees section is not dependant on notification of the joint venture.

133 The ETC Act also may have unintentionally expanded certain of the statutory antitrust immunities. Certification under Title III of the ETC Act may cover certain activities not specifically immunized under the existing exemptions for agricultural cooperatives, 15 U.S.C. § 17 (1988), 46 U.S.C. § 3306(a)(5) (1988), and the insurance industry, 15 U.S.C. § 1011 (1988). In the export sector, these industries may have achieved costless expansion of immunity unavailable through the normal political process.
duct, while at the same time, encourages and permits U.S. companies to engage in the same conduct under the guise of export promotion.

The continuing tension between the vigorous application of U.S. antitrust law to import transactions and the hands-off attitude towards collusion in U.S. export activity has produced a schizophrenic enforcement policy. Because of its own promotion of export cartels, the U.S. has vacillated in its investigation and prosecution of cartels aimed at the U.S.; which resemble our own ETCs and Webb-Pomerene Associations. Thus, the universal problem that most nations with an antitrust policy patrol the world for conduct which injures their own economy, but refuse to regulate their own export activity, is further perpetuated by the U.S.

There is nothing inconsistent about the vigorous promotion of competition and a sensible recognition of the legal and practical limits of national jurisdiction and enforcement power. The inconsistency arises when jurisdictional limits and the promotion of legal certainty become an excuse for the promotion of cartels aimed abroad. This inconsistency injures both the credibility of our national competition policy and the will to enforce our laws.

C. Administration of the Export Trading Company Program and Antitrust Enforcement

The ETC Act has subtly changed the way the Antitrust Division of the Justice Department enforces the federal antitrust laws. Like the process of amendment by clarification, this change has come about without public discussion and without a true realization of its profound implications.

1. Law Enforcement or Regulation

The ETC program changed the role of the Antitrust Division from that of a law enforcement agency to that of a regulator. Traditionally, firms did not need to register with the federal government, disclose their proposed conduct, or seek permission to proceed with a particular course of action. However, the firms bore the risk of antitrust liability if they engaged in prohibited forms of behavior. Actual immunity was the product of congressional action, or judi-

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cial interpretation, and not the product of individual decisions by the Antitrust Division. Congress vested the power to issue individual antitrust exemptions in administrative agencies with specialized knowledge of specific industries, separated the investigative and adjudicative functions within the agency through the use of Administrative Law Judges, and mandated the use of the Administrative Procedures Act for agency decision making.

The DOJ and the FTC are now increasingly called upon to review, approve, and guide business conduct in advance of a transaction in a manner more in keeping with regulatory rather than law enforcement norms. The Hart-Scott-Rodino Act requires advance notification and review of mergers and acquisitions above certain size thresholds. The Newspaper Preservation Act gives the Justice Department final approval over the merger of the business functions of failing newspapers. Both the DOJ and the FTC actively promoted the disclosure of proposed conduct through their business review and advisory opinion procedures. Both agencies also increasingly relied on the issuance of guidelines which are often published following a notice and comment procedure akin to an administrative rulemaking process. All of these changes are part of an emphasis on the regulatory and economic policy function rather than the traditional law enforcement function of the DOJ.

The registration of cartels and their regulation aimed to achieve social goals deemed more important than fair competition has never been a traditional function of U.S. antitrust enforcement. This has been the traditional approach of European competition authorities which first require the registration of cartels and other restrictive agreements, and then determine whether the resulting restriction on competition is outweighed by the promotion of other social goals.

140 Id. § 1803.
141 See supra notes 106-07 and accompanying text.
143 The Justice Department also was deeply involved in the drafting and revision of regulations and guidelines for export trading companies. See 15 C.F.R. § 325 (1991); 50 Fed. Reg. 1786 (1985).
144 The Justice Department also participates directly in regulatory and economic policy functions through advocacy before other federal agencies and the role of the Economic Policy Office of the Antitrust Division which provides expert advice throughout the Executive Branch on matters of competition and economic policy.
such as market development, increased employment, or the promotion of technical progress.\textsuperscript{144}

The traditional function of the Justice Department has been to investigate and prosecute violations of federal civil and criminal law. The Antitrust Division applied these principles in competition cases to determine if an agreement between competitors unreasonably restricted competition. In the case of price fixing, market allocation, and customer allocation between competitors, such agreements are presumed unreasonable and the Antitrust Division only needs prove the existence of the unlawful agreement.\textsuperscript{145} For other agreements, the Antitrust Division needs prove that the agreement unreasonably restricts competition by examining both the procompetitive and anticompetitive effects of the agreement in an economically relevant market.\textsuperscript{146}

It has not been a defense under U.S. antitrust law that the cartel set reasonable prices or acted fairly.\textsuperscript{147} It is similarly no defense that the cartel served socially worthwhile purposes.\textsuperscript{148} The only question asked in the antitrust context has been whether the agreement in question promoted or injured competition.\textsuperscript{149}

The ETC Act draws the Antitrust Division away from this traditional approach to antitrust enforcement and makes it a partner in an effort focusing on export promotion.\textsuperscript{150} The impact of the decisions that the Antitrust Division is forced to make under the ETC Act is

\textsuperscript{144} See, e.g., EEC Treaty, supra note 75 art. 85(3). See also Restrictive Trade Practices Act of 1976, 1976 c.34 (Great Britain). See generally WILLIAM ALLAN \& GERARD HOGAN, COMPETITION LAWS OF GREAT BRITAIN AND REPUBLIC OF IRELAND § 4 (1990)(discussing registration of restrictive agreements and acceptance on public interest grounds). While the United States appears to be moving toward a notification system based on control of abuses of power, the nations of the European Economic Community, the European Free Trade Association, and the emerging market economies in Eastern Europe appear to be moving away from this system and towards stricter rules of prohibition in both their competition law and enforcement policies. See Kurt Stockmann, Trends and Developments in European Antitrust Laws, presented at the 1992 Fordham Corporate Law Institute.

\textsuperscript{145} United States v. Socony Vacuum, 310 U.S. 150, 225-26 n.59 (1940).

\textsuperscript{146} Broadcast Music, Inc. v. Columbia Broadcasting System, 441 U.S. 1 (1979); Chicago Board of Trade v. United States, 246 U.S. 251 (1918); Standard Oil Co. v. United States, 221 U.S. 1, 58-60 (1911).

\textsuperscript{147} United States v. Trenton Potteries Co., 273 U.S. 392, 397-98 (1927); United States v. Trans-Missouri Freight Association, 166 U.S. 290, 340-41 (1897).


\textsuperscript{149} National Society of Professional Engineers, 435 U.S. at 695. This is not to say that as a matter of prosecutorial discretion that the Antitrust Division could not consider non-competition arguments in choosing to allocate its scarce resources. Similarly, this doctrine of statutory interpretation would not prohibit the President from preventing the Antitrust Division from proceeding with a meritorious case which would otherwise injure the interests of the United States. See 1988 INTERNATIONAL ANTITRUST GUIDELINES, supra note 142, § 5 n.171.

more than just whether it regards the conduct as within the jurisdiction of the U.S. antitrust laws. The concurrence of the Antitrust Division confers a grant of immunity from governmental prosecution, places a limitation on private actions, and puts the imprimatur of the federal government on the proposed export conduct. The continuation and expansion of this approach to the control of collusion requires substantial debate and scrutiny as to the desirability of regulation over prosecution in implementing the competition policy, and as to the wisdom of allowing the Antitrust Division to grant immunity for socially beneficial conduct.

2. Problems of Dual Enforcement

There are additional practical problems associated with the dual enforcement of the ETC program. The involvement of two agencies, the DOJ and the DOC, is the main cause for inefficiencies and delays in the administration of the program. An applicant often gets caught in the middle of a larger struggle between the two agencies over policy questions that go beyond the individual application being considered. While staff of the two agencies do not typically clash as result of personal animosity, they have fundamentally different missions.151 This inherent conflict of interest was left unresolved by Congress in creating the certification process for the ETC program.152

The Antitrust Division, as part of the DOJ, is a law enforcement agency charged with the investigation and prosecution of criminal and civil antitrust violations. It is not a regulatory nor a promotional agency. In contrast, the DOC is the principal cabinet department charged with the promotion of American business in both domestic and foreign markets. The Department is further charged by Congress with the task of promoting export trading companies.153 In this role, the DOC has been a frequent critic of the antitrust laws and of their perceived effect of diminishing the vitality of American competitiveness in international markets.154

151 See generally Title III, supra note 44 (detailing working relationships and areas of disagreement between two agencies in administration of ETC Act); 1984 Oversight Hearings, supra note 54, at 20-28 (testimony of Charles Warner, Office of Export Trading Company Affairs, Department of Commerce)(Commerce Department most aggressive of all ETC related agencies given promotional rather than law enforcement role). In fact, the Justice Department minimized the possibility of personal conflicts by hiring a well respected former Commerce Department attorney to head up the review of ETC Certificates in the Antitrust Division. Title III, supra note 44, at 476.

152 1981 Senate Subcommittee Hearings, supra note 2, at 334, 349.


The dual agency approach has produced considerable friction. The DOC has found itself in the awkward position of promoting the ETC program to a largely indifferent business community. In seeking to drum up business, the DOC is selling the ETC program to export related businesses who have not necessarily thought through the antitrust implications of their conduct, or the need for certification. The resulting applications for certification tend to be vague and unfocused, as the applicant seeks certification for a wide variety of contingencies, rather than for concrete actions that raise antitrust concerns.

The DOC has the incentive to expand its interpretation of the ETC program in order to satisfy its export promotion function and make the program more attractive to the business community. In seeking to expand the scope of certifiable conduct, the DOC plays a role that necessarily conflicts with the Antitrust Division's role as the principal antitrust enforcer. Substantive conflicts over the scope of U.S. antitrust jurisdiction and over the statutory definitions of the ETC Act have arisen in diverse issues such as whether Certificates of

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155 The Commerce Department must undertake such promotional activity to fulfill its mandate under Title I of the ETC Act. The Commerce Department promoted the ETC program through extensive conferences, individualized counseling sessions, and the distribution of tens of thousands of brochures, information kits, Guidebooks, and Manuals for Professionals working in the field. ETC Promotional materials from the Department of Commerce include The Export Trading Company Guidebook (1987); Contact Facilitation Services For Export Trading Companies (1983); Export Digest USA (July 1983); Export Trading Companies, A New Look for American Business, BUSINESS AMERICA (Oct. 18, 1982); ETC: Your Passport to Profits (1982). See generally Oversight of the Export Trading Company Act of 1982, Subcomm. on International Economic Policy and Trade, Comm. on Foreign Affairs, H.R. 98th Cong., 2d Sess. at 2-11 (June 20, 1984) (Testimony of Charles Warner, Director, OETCA, Department of Commerce). These efforts were targeted at existing Webb-Pomerene Associations, accounting and law firms servicing the export community, and trade associations. See also 1986 Oversight Hearings supra note 33, at 35-38 (statement of Allan I. Mendelowitz, General Accounting Office). The former head of the Office of Export Trading Company Affairs has admitted that the Commerce Department would not dissuade an ETC applicant even if the Department believed that certification was unnecessary. Id. at 35. One observer indicated that the Department's promotional activity seemed likely to benefit primarily attorneys and consultants rather than exporters. A. Paul Victor, The Export Trading Company Act of 1982: New Antitrust Protection for Exporters (And New Opportunities for Lawyers), 52 ANTITRUST L.J. 917, 934 (1983).

156 See supra notes 62, 69, 70 and accompanying text.
Review should have automatic expiration dates, 157 whether the sale of goods and services to foreign citizens in the U.S. constitutes an "export," 158 what is the potential protection of a Certificate of Review in connection with exports financed by the U.S. government, 159 what is the degree of acceptable exchange of information among competitors, 160 and whether an ETC can require fixed quantity shipments by its members. 161

The DOC also tends to become the advocate for the applicant in negotiating with the Antitrust Division over the scope of the ETC Certificate of Review. This exacerbates the conflict of interest between the two agencies as each views the other's positions with the suspicion that the program is being schemingly tilted in a particular direction. 162

3. Resource Allocation

The processing of ETC certification applications has practical implications for the Antitrust Division. Each application is time consuming and must be processed within narrow statutory timeframes. 163 These burdens were at one time minimized by the coordination of all ETC certificates by the Foreign Commerce Section of the Antitrust Division. The Foreign Commerce Section of the Antitrust Division was the focal point for the development of a consistent approach to share with the Commerce Department over the many common issues presented by all ETC certificates, and was intimately involved in the drafting of the ETC Guidelines and Regulations issued by the Commerce Department. 164

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157 See Title III, supra note 44, at 469.
158 For example, the ETC program could be substantially expanded if the sale of products or services to foreign citizens travelling in the United States were classified as an export. The case law does not support this classification, especially in relation to practices which may affect United States competitors seeking the same sales opportunities. See, e.g., Harris v. Duty Free Shoppers, Ltd., 940 F.2d 1272 (9th Cir. 1991) (price discrimination challenge to payments to tour companies to steer Japanese tourists to defendant's duty free store); Sakamoto v. Duty Free Shoppers, Ltd., 613 F. Supp. 381 (D.Guam 1983) (challenge to exclusive contract for duty free shop at airport); Dolphin Tours, Inc. v. Pacifico Creative Service, Inc., 1983-2 Trade Cas. (CCH) 665,655 (1983). While ETC certificates have been issued for duty free stores selling to outbound passengers at the borders of the United States, such certificates appear to be the product of the unique customs status of duty free stores, rather than any general definition of exports for ETC Act purposes. See 50 Fed. Reg. 1786, 1797 (1985) (ETC Guidelines regarding certification of duty free merchandise sales).
159 Title III, supra note 44, at 470.
160 Id.
161 See supra note 73.
162 There is anecdotal evidence that each Department has agreed to language in a particular certificate and then sought to reintroduce new and more favorable language in dealing with attorneys of the other Department on later certificates.
163 See Title III, supra note 44, at 457-58, 468-69. (discussing difficulties of coordination of review between Justice and Commerce within statutory time frame).
164 Id. at 456.
More recently, the Antitrust Division has assigned the analysis of ETC applications to the litigating section with overall responsibility for the industry covered by the application. The analysis of a proposed certificate now involves a staff attorney taking the time to understand the intricacies of the ETC Act, the details of the application, the structure of the industry involved, the nature of the proposed conduct, and its likely competitive consequences. The staff attorney's work typically will be reviewed by an economist, a section chief (and possibly an assistant section chief), an attorney in the operations section, an attorney in the Foreign Commerce Section, and a final review by a Deputy Assistant Attorney General (and possibly the Assistant Attorney General in charge of the Antitrust Division). Unless the same staff attorney is assigned another ETC certificate, the entire process must be repeated with each new application. This time consuming endeavor burdens the caseload of staff attorneys who must otherwise conduct grand jury investigations, conduct civil antitrust investigations, prepare cases for trial, and investigate and potentially prosecute complicated merger investigations where time is of the essence.

V. A New ETC Program or No ETC Program?

The question remains as to what should be done with a legislative program whose purposes were unfocused and contradictory, whose foundations were empirically shaky, whose performance has been poor, and which has produced some undesirable side effects. One solution is to do nothing and allow the ETC program to slide into relative obsolescence. The other solution is to confront the core evils of the legislation and eradicate them.

A. Abolishing the ETC Program

In view of the inability of the ETC program to generate exports and the unhealthy side effects that the program has produced, the most effective action would be simply to abolish the ETC Program altogether, and phase out the existing certificates over a period of years. Congress should simply acknowledge that it had been sold an unneeded program on false pretenses and end this unsuccessful experiment. Exporters could still rely on the FTAIA to distinguish matters subject to the U.S. antitrust laws from matters more appropriately the concern of foreign competition authorities.

165 1984 Oversight Hearings, supra note 34, at 92 (testimony of Charles F. Rule, Deputy Assistant Attorney General, Antitrust Division, United States Department of Justice).
166 Title III, supra note 44, at 468.
167 In addition, the review of an ETC certificate is viewed as considerably less interesting, less prestigious, and less likely to lead to advancement within the Antitrust Division than traditional law enforcement activities.
The abolition of the ETC program would once again make U.S. antitrust law simple and consistent. The Antitrust Division could focus on its traditional role of case investigation and prosecution, rather than continue as a reluctant regulator and antagonist to the Commerce Department in the field of export promotion. The Antitrust Division could then target its international enforcement efforts at those international cartels which harm the U.S. domestic economy or U.S. export opportunities.\footnote{Following past vacillation on this point, the Antitrust Division recently has announced its interest in investigating foreign restraints on United States export opportunities which fall within the jurisdiction of the United States antitrust laws. See Dick Thornburgh, Attorney General of the United States, Remarks to the American Stock Exchange Tenth Annual Washington Briefing (Oct. 15, 1990); Michael Boudin, Deputy Assistant Attorney General, Antitrust Division, Remarks before the Southwestern Legal Foundation (June 19, 1990).}

The outright and unilateral abolition of the ETC program is probably unrealistic. The institutional and bureaucratic interests of the Department of Commerce constitute a powerful lobby for the preservation of its central role in the promotion of U.S. exports. The business community that persuaded Congress to enact the ETC Act a decade ago and the existing certificate holders would be reluctant to abandon the procedural advantages of the ETC Act and whatever limited advantages reaped in their export promotion activities.

While unilateral repeal may not be possible, there may be international fora in which the U.S. may be able to bargain away the ETC program in return for valuable concessions which may make repeal of the ETC Act politically advantageous to the U.S. Although there may be few successful export cartels operated under the ETC program, U.S. cartels are still a matter of concern to foreign governments since competition authorities must expend valuable resources monitoring the operations of both American ETCs and Webb-Pomerene Associations.\footnote{See, e.g., supra notes 75-78. See also Ansac Decision 91/301, The Commission of the European Communities (Dec. 19, 1990) (refusing American Webb-Pomerene Association exemption under EEC competition law to jointly sell members’ products in Community).}

The abolition of both the ETC Act and the Webb-Pomerene Act may be most valuable as a bargaining chip in international negotiations regarding the legitimacy and abolition of export cartels as a tool of international trade. The lack of international consensus and the absence of international regulation pertaining to the use of export cartels leaves a conspicuous gap in the enforcement of competition norms.\footnote{See Symposium, An International Antitrust Challenge, 10 Nw. J. Int’l L. & Bus. 1, 149 (1990).} Like the U.S., most nations assert jurisdiction over injurious conduct taking place outside their territory under some version of the ‘effects’ doctrine, but tacitly or openly approve of export agreements which injure only foreign markets.
International negotiations could sharpen the transparency in the use of export cartels and make important information available at the international level to injured nations. More ambitious agreements could include the eventual prohibition and abolition of export cartels or provisions strengthening the cooperation of national governments in the investigation of such cartels, and thereby legitimize the use of countermeasures in markets affected by the export cartel.

The problem of export cartels can also be attacked as an international trade problem under the auspices of the General Agreement on Tariffs and Trade ("GATT"). The close relationship between international trade and antitrust policy suggests that competition issues may well be the next non-tariff barrier addressed in multilateral trade negotiations. The promotion of export cartels to alter the terms of international trade to a country’s mercantilistic advantage is as much a non-tariff barrier to free trade as the use of ‘unfair’ trade practices such as dumping and subsidies. The development of interpretive side agreements under the GATT governing dumping and subsidies could serve as a model for a similar agreements regarding export cartels. Although the GATT Antidumping and Subsidies Codes do not address the abolition of these practices, both Codes define the trade practices deemed unfair, provide detailed procedures for countermeasures by nations injured by the practices, and establish dispute resolution procedures at the international level.

Regardless of the forum for these negotiations, such negotiations could prove beneficial to the U.S. The exposure, regulation, and potential abolition of national export cartels, and the legitimation of measures to counter the actions of foreign export cartels are worthy tradeoffs for the abolition or curtailment of the ETC program which never served the interests of the U.S. in the first place.

B. Revamping the ETC Program

If the unilateral or negotiated abolition of the ETC program is not deemed possible, concrete steps can be implemented to improve

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175 Id.
the ETC program. Both substantive and procedural changes could be implemented to promote U.S. exports, decrease the administrative burden of the program, and preserve the traditional nature of U.S. antitrust enforcement.

Changes should be made to the ETC program to minimize the regulatory burden it imposes on both the Department of Justice and the Department of Commerce. Both agencies should work toward developing a standard certificate of review for the small and medium sized export intermediary which is the typical ETC applicant. There is little that a genuine export intermediary can do with regard to overseas markets which will constitute a violation of U.S. antitrust law. A standard certificate of review could be developed by the agencies for specified export trade activities, methods of operations, and conditions covering the typical vertical restraints granted to export intermediaries. The draft certificate could be placed in the federal register for comments, and then published in final form for use by the business community. Such an approach has the added benefit that it can be implemented without additional congressional action.

The business and legal community could then utilize the standard certificate for applications on behalf of export intermediaries desiring the "usual" protection already granted to most competitors, without having to start each certificate application from the very beginning. The DOJ and the DOC could then approve such applications without the individual scrutiny currently given to applications for certificates. While the Departments would have to assure that the applicant fits the criteria of the standard package, the time and expense for preparing such applications for agency review would be drastically reduced.

Detailed agency review could be reserved for applications requesting certification for novel export trade activities, methods of operations, or true horizontal export joint ventures. Applicants could request any type of certificate, but would remain subject to more individualized scrutiny for any request that does not fall within the purview of the standard certificate.

The costs and burdens to both the applicants and the government could be further lessened through congressional adoption of a notification, rather than a certification, procedure for export activities. Under such an approach, applicants would simply notify the DOC and the DOJ of proposed export conduct and agreements. The notification would not require analysis or approval by either the DOC or the DOJ and would automatically invoke the procedural protection of the current ETC Act unless a private party could establish

176 Such efforts would be a more comprehensive and more formal version of standardization efforts already undertaken by the Commerce and Justice Departments in administering the ETC program. Title III, supra note 44, at 471, 473.
that the registered conduct fails to conform to the substantive requirements of the Act. Applicants desiring full immunity from government prosecution available under the current ETC Act could still apply for a certificate.

The notification procedure would eliminate several defects of the current system. Initial costs and time delays for routine requests involving vertical non-price restraints and export intermediaries with little market power would be greatly reduced. The applicants would probably opt to unilaterally prepare a notification rather than participate in a complex regulatory procedure involving two federal agencies. Such an option would be most attractive for applicants with limited resources who are engaged in export conduct raising little risk of government enforcement actions, but who desire procedural protection in the event of private litigation.

In using the notification process, the only burden on the parties would be to articulate their proposed export trade activities and methods of operations with sufficient clarity so that a reviewing court would be able to ascertain that the challenged conduct was covered by the notification, and therefore complied with the ETC Act. The scope of the notification and the degree of disclosure would be entirely up to the applicant. A summary of non-confidential information could be published in the Federal Register in a manner similar to registrations filed under the NCRA.177 The shorter statute of limitations, single damages, and the availability of attorney fees would discourage frivolous challenges under a notification scheme. If an applicant felt that risk of government antitrust enforcement was high, it could apply for actual certification under the current program or seek the views of DOJ and FTC, pursuant to the Business Review and Advisory Opinion procedures.178 Notification would lessen the administrative burdens on both Departments and allow them to pursue their traditional functions without diverting scarce resources towards analyzing specific export ventures and negotiating individual export ventures.

VI. Conclusion

The ETC Act has failed to significantly increase U.S. exports or to restructure the export sector. The principal problem has been the contradictory goals of the drafters of the legislation. No legislative package could simultaneously promote: 1) the formation of verti-

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177 See supra notes 126-31 and accompanying text.
178 The ETC Act should be amended to require an application fee for any applicant of substantial resources who desires full individualized review and actual certification consuming substantial agency resources. Consistent with the ETC Act's focus on the promotion of exports by small and medium sized firms, a sliding scale of application fees based on size could be adopted with an exemption of application fees for export trade companies below specified thresholds.
cally integrated and heavily capitalized American trading companies along the lines of the Japanese sogoshosas, 2) the formation of joint export ventures among small and medium sized firms, and 3) the formation of American export cartels.

There was little chance that U.S. export activity could be energized by changing antitrust jurisdictional principles or by creating an antitrust certification procedure. The export community and Congress merely seized on U.S. antitrust laws as a strawman, instead of addressing the more fundamental problems that impede U.S. export activity.

The ETC Act has led to the evolution of jurisdictional concepts, substantive antitrust law, and government enforcement policy in a manner that reduces the risk of antitrust prosecution and treble damage liability far below other legal risks faced by exporters. The illusory search for total legal certainty has weakened the fabric of antitrust law and has also obstructed the enforcement mission of the Antitrust Division of DOJ.

By continuing the process of amendment of the antitrust laws by "clarification" to appease the export community, we run the risk of further weakening antitrust enforcement without receiving any corresponding domestic benefit. The greatest advantage to the U.S. will come through the abolition or control of all export cartels, both U.S. and foreign, through international agreements or regulations. If such agreements are not forthcoming, the U.S. should unilaterally revamp the ETC program to minimize the damage done to the substance and enforcement of U.S. antitrust law.