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Export Trade Certificates of Review: Will Efficacy be Permitted?

John A. Maher*
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I. Introduction

The ice-breaking Export Trading Company Act of 1982 is misleadingly captioned. It has five discrete thrusts. Only one is concerned with organization of trading companies and even those companies are not limited to export trade! Explicit congressional

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Ms. LaMont and Prof. Maher are co-authors, together with Dennis Unkovic, Esq., of *International Opportunities & the Export Trading Company Act of 1982* (BNA 1984). The authors acknowledge the many contributions of Linda T. Cox, Esq., J.D. 1984, The Dickinson School of Law and Patricia M. Wilson, cand. J.D. 1985, The Dickinson School of Law.


2. ETCA Title II, given an independent short title of the *Bank Export Services Act* (BESA), serves three purposes: (1) to encourage availability of working capital loans to exporters through an Export-Import Bank guaranty program; (2) to promote availability of bankers' acceptances in finance of exports and imports; and (3) to permit commercial banks' equity investment in trading companies exclusively engaged in international trade but principally oriented to U.S. exports. ETCA Title III provides an administrative mechanism through which certain persons can obtain a Certificate of Review (COR) providing significant personal immunity from prosecution under antitrust and other federal and state laws for export-related activities described in the COR. ETCA Title IV, also given the independent short title of the *Foreign Trade Antitrust Improvements Act of 1982*, erected a steep subject matter jurisdiction test to be met by those prosecuting non-importing conduct in international commerce under either the Sherman Act or the portion of § 5(a)(1) of the Federal Trade Commission Act (FTCA) which proscribes "unfair methods of competition." This Article does not discuss BESA, the procedural aspects of procuring and maintaining a COR, or ETCA Title IV. For greater detail on those topics, see D. Unkovic, J. Maher & N. LaMont, *International Opportunities & The Export Trading Company Act of 1982*, 37 C.P.S. (BNA) (1984).

3. The type of trading company in which banks can have equity investments is defined at BESA § 203(3), 12 U.S.C. § 1843(c)(14)(F)(i) (1982). It is not limited to exporting. Rather, it looks to enterprises "exclusively engaged in activities related to international trade, and which is organized and operated principally for purposes of exporting goods or services produced in the [U.S.A.] or for . . . facilitating the exportation of goods or services produced in the [U.S.A.] by unaffiliated persons by providing one or more services." 12 U.S.C. § 1843(c)(14)(F)(i)(1982) (emphasis supplied). The point of BESA's explicit provisions for banks to own or otherwise to invest in a defined trading company is to undo separations between banking and commerce explicit and implicit in the Edge Act of 1919, 12 U.S.C. § 611 et seq. (1982); the Glass-Steagall Act of 1933, 12 U.S.C. §§ 347a, 347b, 412 (1982); and the Bank Holding Company Act of 1956, 26 U.S.C. § 1101 (1982). As this is written, appropriate congressional committees are considering a bill which, *inter alia*, would permit federally-in-
purposes in enacting ETCA\textsuperscript{4} boil down to an ambition to promote correction of lamentable American trade imbalances by encouraging greater and more organized\textsuperscript{5} exports of goods and services. Reading between the lines, one can detect the harsh realization epitomized nicely in a different but certainly related context by Chairman Peter Rodino of the House Judiciary Committee in stating: "We must confront reality. Most nations with whom we trade either sanction or support the cartel system."

ETCA addresses two broad spheres: finance and unfair competition. Its Title \textsuperscript{i17} addresses both liberalized financing of exports\textsuperscript{8} and commercial banks’ equity participation in specially adapted international trading companies.\textsuperscript{9} ETCA Title IV imposes steep subject matter jurisdiction tests upon those who would challenge conduct “involving” non-importing foreign commerce under either the Sherman Act\textsuperscript{10} or the proscription of “unfair methods of competition” set forth in Section 5(a)(1) of the Federal Trade Commission Act.\textsuperscript{11} Unlike Title IV, ETCA Title III did \textit{not} amend any antitrust or other law. Title III established administrative machinery\textsuperscript{12} through which persons\textsuperscript{13} engaged in export trade activities\textsuperscript{14} can achieve prospective and finely focused immunization from traditional forms of prosecution under various federal and state laws.\textsuperscript{15}

The scope of a successful applicant’s immunity is set forth in a Certificate of Review (COR) issued by the United States Departments of Commerce and Justice. The Departments are to administer the program and issue CORs by reference to standards set forth in Title III.\textsuperscript{16} The COR shields the holder against not only classic fed-
eral antitrust laws but also state antitrust and "unfair competition" laws\(^1\) and "unfair methods of competition" under FTCA. Title III provides *legal* as well as *equitable* remedies for persons injured by otherwise immunized conduct which proves to be violative of the statutory standards that guided administrative discretion in issuance of the relevant COR.\(^2\) However, the *legal* remedy is limited to *single* damages\(^3\) as contrasted with the trebling feature explicit in section 4 of the Clayton Act.\(^4\)

Is it too early to comment on the success or failure of ETCA as a whole? Inevitably, the answer is "yes." Effectiveness of each of its main thrusts resists analysis on a real-time basis.

A preliminary official evaluation of ETCA's *financial initiatives* became available when the Federal Reserve Board (FRB) honored a statutory commitment to report to Congress concerning commercial banks' involvements with trading companies.\(^5\) In a well-written report, FRB concluded that "it will undoubtedly be a number of years before an assessment can be attempted on the impact of . . . [the Act] . . . on U.S. export performance . . . ."\(^6\) It is obvious to the authors, as it was to FRB, that volatile economic and political factors (such as the high relative value currently enjoyed by the United States dollar) make it all but impossible to remark success or failure of ETCA Title II provisions in a generic sense.

Ultimate significance of ETCA Titles III and IV will resist measurement in any scientific sense. While case law will tend to refine (or obscure) the subject matter jurisdiction tests explicit in ETCA Title IV, there will be no reliable index concerning the number of decisions to forego prosecution which are predicated on recognitions that the tests cannot be met. Assuming administrators'
sympathy with (and comprehension of) Congress’ ambition and the provisions of ETCA Title III, the long-range efficacy of the COR mechanism will be as resistant to measurement as the effects of Title IV. While the gross number of CORs will be obvious and the content of each will be subject to analysis, their individual and collective economic significance will not be discernible for years.

Issuance of a COR does not mean either that the specified conduct required a shield or that the actual protection provided by a COR will be put to use immediately. Start-up time is a commercial fact of life. Just as no two organizations will require the same start-up time, no two of them will have identical break-even points or other constraints on decisions concerning continuation of operations. Some of the early CORs seem pointless, save for publicity. It is predictable that some COR holders will fail, that others will abandon objectives implicit in their CORs, and that all surviving holders will reorient their marketing effort from time to time. Neither occasional prosecutions for alleged violations of the Title III eligibility standards nor occasional successes in such prosecutions will provide much evidence as to the efficacy for the United States of the COR mechanism.

In the long run, only significant reduction of trade imbalances can determine the success of this legislative design. Success or failure of the design cannot be gauged for many years. Perversely, failure will not demonstrate that the existence of the COR mechanism has been anticompetitive in any generic sense.

If the legislative design is successful, Congress’ invitation of occasional anticompetitive effects will be at least as tolerable a social cost as the more parochial forty-eight-year-old legislative judgment embodied in sections 2(a) and 2(b) of the Clayton Act, to tolerate effectively anticompetitive price discriminations which are cost-justified or made in the name of meeting competition. Bear in mind that, in the price discrimination equation, either of the statutory affirmative defenses forecloses literally injured plaintiffs, whereas ETCA Title III merely relegates injured parties to single as opposed to treble damages.

The authors’ ruminations concerning ultimate success or failure of ETCA Title III assumes administrators’ informed sympathy with the Congressional design. Unfortunately, there are mixed signals concerning both the comprehension and attitude of persons responsible for implementing Title III. These signals provoke wonderment as to whether Congress’ will is to be thwarted by dedicated but poor DOJ administration to the ultimate effect that the immunization technique will be tested unfairly, found wanting, and relegated to the minor role of the Webb-Pomerene Act.
If the purpose of the ETCA Title III is being thwarted, one level of irony becomes apparent and another becomes conceivable. On the more obvious level, it is clear that various responsible people have been persuaded as to the validity of various ETCA techniques. Thus, an uncontroversial portion of the proposed Financial Services Competitive Equity Act would permit federal savings and loan holding companies to become equity investors in export trading companies. But, more to the point, what of ETCA’s “antitrust” provisions? Look to the Administration’s 1983 proposal for a National Productivity & Innovation Act (NPIA). It, inter alia, would have emulated ETCA Title III by providing an administrative mechanism to equip certain research and development joint ventures with qualified immunity from prosecution under federal and state antitrust laws. Like ETCA Title III, NPIA would have created a carefully crafted single-damage remedy for persons injured by the otherwise immunized joint venture. Antitrust Division personalities were enthusiastic—at least publicly—about NPIA. The Bipartisan National Cooperative Research Act of 1984 embodied much of the 1983 proposal.

On a subtler level, there is speculation that Antitrust Division personalities (some of whom are only inconsistently assigned to ETCA Title III work) cannot sublimate prosecutorial tendencies in order to allow even-handed processing of applications for CORs on the basis Congress intended. It would be doubly ironic if poor administration, or well-meaning but biased persons in responsible positions, neutralize Title III so that the ultimate effect is congressional grant of broader immunities to exporters. Carving DOJ out of the decisional process would be a less socially disturbing consequence.

25. Id. at H.R. 4043, § 3(a) and 10.
28. This speculation seems warranted in that personalities formerly or currently with the Department of Commerce have lamented not only the tendency of unnamed DOJ persons to play prosecutorial games but the failure of DOJ to organize appropriately to process ETCA Title III applications. See, e.g., Zarin interview, supra note 16. Each application forwarded by Commerce is assigned “to a section of the Antitrust Division that has expertise in the products or services involved in the application.” Statement of Charles F. Rule, Deputy Assistant Attorney General, Antitrust Division, before the House Subcommittee on International Policy and Trade (Aug. 1, 1984) (copy on file with the Dickinson Journal of International Law).
There is political precedent for such a deletion.\(^29\) The present congressional mood to let Americans play a hand in international cartels was underscored in early 1984 as the antitrust exemptions applicable to shipping conferences were clarified and liberalized.\(^30\)

The authors are persuaded that the Antitrust Division of the Justice Department, for whatever reason, is prejudicing utility of the Title III mechanism.\(^31\) They are also persuaded that there is no malign disposition to resist Congress' will and that the Justice Department, if properly organized for the task, is a proper participant in the COR process. Consequently, the authors offer a recommendation geared to effecting Congress' will but not requiring further legislation: removal of intradepartmental jurisdiction for Justice Department participation in the Title III administrative process from the

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\(^31\) Compare, e.g., Address by Marguiles, supra note 16, at 12, (recognition that "the Administration fought for and won acceptance of a free-standing Title III—one which was not an amendment to Webb-Pomerene and one which did not adopt an eligibility standard by reference to the antitrust laws—to avoid being bound by the baggage of the construction given specified antitrust language by cases such as Concentrated Phosphate" (citing to U.S. v. Concentrated Phosphate Export Ass'n, 393 U.S. 199 (1968)) with Address by Craig W. Conrath, Assistant Chief, Foreign Commerce Section, Antitrust Division, before the Bar Association of Metropolitan St. Louis, 16 (Oct. 13, 1983) (the "essential reasoning [of Concentrated Phosphates] is surely applicable . . . if export conduct is directed at transactions the primary burden of which is borne by the U.S. government, then that conduct cannot be certified" under ETCA Title III) (copy on file with the Dickinson Journal of International Law). More recently, Mr. Conrath said that "a Title III certificate . . . is granted to a firm for conduct that would otherwise be legal under the antitrust laws. It is because the conduct would be legal . . . that a certificate can be issued." Address by Craig W. Conrath, before the Antitrust Section of the Minnesota Bar Association, 6 (Mar. 28, 1984) (copy on file with the Dickinson Journal of International Law). Another DOJ personality has said that "A certificate is issued only where the conduct would otherwise be lawful under the antitrust laws and meets the requirements of . . . [ETCA]. . . . Because [the four standards set forth in ETCA Title III] are essentially the competition standards of the antitrust laws, our analysis is essentially the same one we apply to other proposed export conduct under the . . . Business Review Procedure or in other typical antitrust analysis." Statement of Charles F. Rule, Deputy Assistant Attorney General, Antitrust Division, before the House subcommittee of International Policy and Trade (Aug. 1, 1984) (copy on file with the Dickinson Journal of International Law).

Such attitudes can proceed only from a conviction that the four eligibility standards ordained by Congress embrace all substantive rules of decision explicit and implicit in at least traditional federal antitrust laws. That the standards do not summarize all substantive rules of federal antitrust, just as they do not summarize all relevant FTC and state rules of substantive decision, should be self-evident. Rather than orienting administrators to pre-existing antitrust rules, Congress provided eligibility standards focused on domestic effects of proposed conduct. Parenthetically, DOJ and Commerce have joined in a minimization of FTC precedent concerning the content of the term "unfair methods of competition" as used in one of the four standards. Guidelines for Issuance of Export Trade Certificates of Review, 48 Fed. Reg. 15,937, 15,939 (1983). Mr. Marguiles, who cannot be described as being in diametric opposition to Mr. Conrath's expression, nonetheless evinces a more open attitude that "neither Commerce nor the Justice Department can decline to certify gray-area conduct without fully justifying that decision." Address by Marguiles, supra note 16, at 9.
Foreign Commerce Section of the Antitrust Division to a newly organized and specialized unit reporting directly to the head of the Civil Division. The new office can and should be charged, by order of the Attorney General, with reviewing applications for CORs in very much the same way that SEC and various state securities commissions review disclosure documentation pertinent to registering corporate equity issues. Thus, initially, responsible DOJ personalities would be challenged to test adequacy of disclosures within the applications and prima facie conformance with Title III standards rather than to speculate about applicants’ unstated motivations, their devotion to hard but fair domestic competition, or spectral potencies for adverse effects. Once a COR is issued, the same office would have the burden of reviewing COR holders’ annual and special reports as well as recommending revocation proceedings in appropriate cases.

II. ETCA Title III

A. Function and Objectives of the COR Mechanism

Alone among the four major divisions of ETCA, Title III lacks its own statutory short title. Its caption within ETCA is simple and to the point: “Export Trade Certificates of Review.” The title deals with availability and maintenance of significant shields against penal and civil consequences for export-related conduct that otherwise would expose COR holders to liabilities under “antitrust laws” as defined for purposes of Title III. This specialized term of art includes not only state and classic federal antitrust laws but also “unfair methods of competition” under FTCA section 5(a) and state “unfair competition” laws.

To achieve a Title III shield, a “person” must apply to the Commerce Department for a COR and thereafter cooperate with those responsible for processing the application and evaluating its conformance to statutory eligibility standards. Commerce has primary responsibility for receipt and processing of applications but

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32. 15 U.S.C. §§ 4014(a), 4018 (1982). While these reports are to be made to Commerce, DOJ will presumably have access.
33. Note that DOJ is not a party necessary to the determination that a COR is to be revoked. 15 U.S.C. § 4014(b)(2) (1982). DOJ seems a necessary participant in the decisional process if proceedings are aimed at or are likely to culminate in modification of a COR. Id.
34. 15 U.S.C. §§ 4012, 4013, 4014, 4016(b)(5), and 4018 (1982).
DOJ has what amounts to a pocket veto concerning ultimate allowance of a COR. Upon issuance of a COR, a holder is well advised to police its activities, not only to guard against straying beyond the terms of the COR and the underlying eligibility standards but to adapt to a reporting regime contemplated by Title III.

For purposes of Title III, "antitrust laws" include the Sherman Act; import-focused provisions of the Wilson Tariff Act; the Clayton Act; FTCA "to the extent [it] prohibits unfair methods of competition;" and, "any State antitrust or unfair competition law." Title III's address to the Sherman Act and FTCA must be understood in context of their amendments by ETCA Title IV.

From the perspective of a potential holder, the virtue implicit in a COR is possession of a shield against the ordinary penal and civil consequences otherwise applicable to export conduct detailed in the COR which violates one or more of the "antitrust laws." Despite well-meant expressions to the contrary, a COR neither precludes nor can preclude commencement of a suit.

Congress provided eligibility standards to be used by Com-

39. 15 U.S.C. § 4013(b) (1982). Note that a COR may be subjected to "any terms and conditions" either Commerce or DOJ "deems necessary to assure compliance" with the competition standards which are to guide administrative discretion. 15 U.S.C. § 4013(b)(3) (1982) (emphasis supplied). Early CORs included such language geared to averting recurrence of the Webb-Pomerene scenario addressed in Concentrated Phosphates. See supra note 31. See also Interview with Donald Zarin (Jan. 25, 1984), reprinted in 46 Antitrust & Trade Reg. Rep. (BNA) 204, 205 (Feb. 2, 1984) in which a former member of the Commerce Department's Office of General Counsel indicates that ETCA Title III was adopted as a "free-standing statute" in order to avoid Webb-Pomerene precedent such as Concentrated Phosphates, supra note 31.

40. The statute requires that:
   (a)(1) Any applicant who receives a certificate of review -
      (A) shall promptly report to the Secretary any change relevant to
      the matters specified in the certificate, and
      (B) may submit to the Secretary an application to amend the certifi-
      cate to reflect the effect of the change on the conduct specified in the
      certificate.
   15 U.S.C. § 4014(a)(1)(A),(B)(1982). In addition, the statute states that:
   Every person to whom a certificate of review is issued shall submit to the Secre-
   tary an annual report, in such form and at such time as the Secretary may
   require, that updates where necessary the information required by section
   4012(a) of this title.


43. See, e.g., Sylvester, Is There a New Tool for Antitrust?, 6 NAT'L L.J. 1 (Dec. 19, 1983), in which a COR was styled as "a guarantee that neither the Justice Department nor any state attorney general will sue." Id. at 7. See also Ryan, The Export Trading Company Act of 1982: Antitrust Panacea, Placebo, or Pitfall?, 28 ANTITRUST BULL. 501, 515 (1983), in which FTC is added to entities which "cannot bring suit based on the certified conduct." Such expressions ignore not only the essentially procedural significance of a COR but also ETCA § 306(b)(5) by which the Attorney General retains a limited right to sue for an injunction against conduct otherwise shielded by a COR and FTC's continuing jurisdiction to address "unfair acts or practices in or affecting commerce."
merce and DOJ when appraising individual applications for CORs. These standards use various concepts implicit and explicit in FTCA and various classic federal antitrust laws. However, these standards do not replicate many, if any, substantive rules of decision embodied in classic antitrust.44 The standards' collective theme is avoidance of particularized domestic effects. To the degree such effects are absent, a certificate "shall" issue even though the conduct in question is ordinarily offensive to substantive rules of decision explicit or implicit in the "antitrust laws" as expansively defined in Title III. Sensitive to a possibility that conduct specified within a given COR may prove to be violative of one or more of the eligibility standards despite the pre-issuance Commerce-DOJ review, Congress explicitly provided civil causes of action for certain somewhat Americanized persons injured by such a violation.45 Thus, on the face of the matter, there is a correspondence with the registration regime of the Securities Act of 193346 and the specialized remedy provided by its section 11.47

There are other similarities between Title III and the '33 Act. The COR application process includes an acceleration feature48 as does the '33 Act.49 Plaintiff's success in achieving a remedy under section 11 of the '33 Act, after SEC allowed the predicate registration to become effective, neither impeaches nor undoes the registration. Similarly, ETCA does not contemplate that successful pleading of a private Title III cause of action will undo the predicate COR. A

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

1) result in neither a substantial lessening of competition or restraint on 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 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.


45. The term "person" means an individual who is a resident of the United States; a partnership that is created under and exists pursuant to the laws of any state or of the United States; a state or local government entity; a corporation, whether organized as a profit or nonprofit corporation, that is created under and exists pursuant to the laws of any state or of the United States; or any association or combination, by contract or other arrangement, between or among such persons. 15 U.S.C. §§ 4016(b)(1)-(4). See also 15 U.S.C. § 4021(3) (1982).


section 11 remedy subsumes effectiveness of a registration. Likewise, a private ETCA Title III remedy subsumes issuance of a COR. Under Title III and assuming effectiveness of a COR, suitably Americanized plaintiffs can obtain either single damages or equitable relief upon satisfying heavy proof burdens, or both. Since successful prosecution of a private cause of action does not invalidate a COR, such a success will establish only that a particular manifestation of an otherwise immunized species of commercial conduct is injurious to a given qualified plaintiff. As in the case of judgment for plaintiff under section 11 of the '33 Act (and quite ignoring the jingoism implicit in the Title III cause of action), the prior administrative judgment to issue a COR is not necessarily impeached by successful prosecution of a civil suit. The COR, like the effective '33 Act registration statement, survives unless responsible bureaucrats successfully seek revocation. While ETCA Title III provides grounds upon (and the mechanism through) which a COR may be revoked, there is no necessary relationship between revocation proceedings and successful suits by private parties under ETCA Title III. Revocation of a COR is prospective and does not impeach the period in which the COR was in effect.

It is entirely predictable that aggrieved private plaintiffs will sue under traditional antitrust theories and that complaints will be amended to include Title III theories when defendants interpose CORs. Since treble damages will be available only for injuries inflicted by conduct beyond the scope of an effective COR, it is equally predictable that private plaintiffs will strive for narrow interpretation of CORs. Further, plaintiff's discovery will be oriented to developing that the CORs were procured by fraud.

Congress anticipated allegations of fraud in procurement of CORs. If plaintiff succeeds on a "fraud on the office" theory, ETCA Title III provides that an implicated COR is void ab initio "with respect to any export trade, export trade activities, or methods of operation for which a certificate was procured by fraud." Lest one doubt that Congress meant such a particularized reaction to fraud, recourse to the ultimate Conference Report is instructive:

53. Id.
55. Apologies to the Patent Bar for adoption of part of its colloquial.
“any aspect of a certificate procured by fraud is void ab initio.” Thus, if a COR covers activities other than those tainted by proven “fraud on the office,” it is quite arguable that untainted parts of the COR will survive successful attack on the tainted portion. Curiously, “fraud on the office” is not among the explicit grounds for administrative revocation in toto. This, of course, is not to say that competent government counsel will be unable to prosecute a revocation case using evidence of “fraud on the office.”

In any event, Congress produced an interestingly crafted mechanism. The parallel to the ‘33 Act is not noted in ETCA’s legislative history. Congress obviously was aware of a potency that COR-shielded conduct could injure third parties. Indeed, it seems that Congress was calculatedly callous. The availability of both CORs and private remedies under Title III was restricted to somewhat Americanized “persons.” This was consistent with a comparably callous attitude evinced in Title IV. In any event, no conscientious civil servant need lament that successful prosecution of a private cause of action under ETCA Title III evidences failure of those charged with reviewing applications for CORs.

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57. H.R. Rep. No. 924, 97th Cong., 2d Sess. 27, reprinted in 1982 U.S. Code Cong. & Ad. News 2501, 2511. Note that administrators may take a more draconian position. See, e.g., Address by Marguiles, supra note 16, at 7. Congress failed to indicate the burden of proof to be carried by one who would seek to prove that a COR was procured through fraud. Obviously, defendants will urge that plaintiffs must prove scienter and that merely negligent misrepresentations do not constitute fraud.

58. The explicit grounds for revocation are that (a) a COR holder has failed to comply with requests by Commerce for data pertinent to determining whether actual conduct continues to comply with the competition standards guiding issuance of CORs or (b) a determination by Commerce that a COR holder’s actual conduct “no longer” complies with the standards. 15 U.S.C. § 4014(b)(2) (1982). If the remedy is modification, DOJ has a role in the refinement. Id.


60. The Foreign Trade Improvements Act of 1982 burdens prosecution for conduct involving non-importing foreign commerce, under either the Sherman Act or the “unfair methods of competition” language of FTCA § 5(a) by requiring satisfaction of a jurisdictional standard to the effect that the conduct in question has a “direct, substantial and reasonably foreseeable effect” on either (a) domestic or import commerce or (b) “export commerce . . . of a person engaged in such . . . commerce in the” U.S.A. 15 U.S.C. §§ 6a, 45(a)(1),(3) (1982). The latter is a most significant political statement since it confounds conventional wisdom to the effect that the substantive norms of the antitrust laws exist to protect competition as opposed to competitors. However, Congress did not go overboard. If the jurisdictional nexus is satisfied by a focus on a person engaged in exporting from the U.S.A., the implicated rules of decision apply “only for injury to export business in the” U.S.A. Id. It must be noted that the holdings of U.S. v. Aluminum Co. of America (ALCOA), 148 F.2d 416, 440-45 (2d Cir. 1945) and Timberlane Lumber Co. v. Bank of America, 549 F.2d 547 (9th Cir. 1976) survive unscathed. ALCOA and Timberlane relate to imports.

61. See, e.g., Address by Marguiles, supra, note 16, at 6 (“A successful private cause of action against certified conduct can be successfully prosecuted only if the certificate was incorrectly issued . . . because . . . [Commerce and DOJ] . . . improperly applied the four . . . [competition standards] . . . or if the certified conduct no longer meets those . . . standards . . . .”) (emphasis supplied). This ignores the history of the ‘33 Act. More importantly, however, it ignores that CORs address a process in an ever-changing trade world rather than in a controlled experiment or model. Nevertheless, a refrain not unlike that of Mr. Marguiles appears in the Guidelines for the Issuance of Export Trade Certificates of Review, 48 Fed.
wise, Congress could have provided and can provide. Surely, personnel of the SEC's Corporate Finance Division are unlikely to lament that occasional recoveries under the '33 Act's section 11 impeach the registration process.

B. Contrast with ETCA Title IV

Titles III and IV of ETCA have largely separate legislative histories. They were married late in the legislative process. The marriage is far more comfortable than, e.g., that between the first and third sections of the Robinson-Patman Act. Titles III and IV are not to be understood as alternatives. Title III applies to the Sherman Act and FTCA as amended by Title IV.

What became ETCA Title IV was structured to counter American industries' perceptions of unpredictability and consequent inequity in enforcement of the Sherman Act and FTCA. This was accomplished by significantly steepening subject matter jurisdictional thresholds to be overcome by private and public prosecutors addressing non-importing foreign commerce otherwise subject to the Sherman Act or FTCA's condemnation of "unfair methods of competition." Since various writers seem to miss the point, it should be stressed that the benefit of Title IV amendments is not limited to exporting activities. Title III is much more finely focused. Title IV directly impedes recourse to substantive rules of decision otherwise applicable to conduct "involving" non-importing foreign commerce that plaintiff could invoke. Title III is not designed to shield any

Reg. 15,937 (1983). "Such a cause of action could arise if the certificate had been incorrectly issued through misapplication of the four eligibility standards or if certified conduct no longer meets the standards because of changed circumstances." Id. Can there not be changed circumstances which impeach a COR only in such peculiar applications as to warrant administrative contentment with having served overall legislative objectives?

62. 15 U.S.C. § 13-13a (1982). The principal thrust of § 2(a) of the Clayton Act is against price discriminations among purchasers of goods for use, consumption or resale within the U.S.A. The goods in question must be of like grade and quality. Plaintiff need not prove defendant's intent to discriminate or anticompetitive purpose. Indeed, defendant's knowledge of the discrimination is not necessarily an issue. Competitive injury is assessed by reference to competition with the seller ("primary level") or the favored customer ("secondary level") or the customers of either such class ("tertiary level"). Section 3 of the Robinson-Patman Act is not concerned with price discrimination alone. It defines three offenses. The first is a price discrimination theory but requires that the prosecutor prove knowing discrimination among customers for goods of like grade, quality, and quantity. The second also is a price discrimination theory but looks to proof of regional differentials for predatory purposes. The third looks to predatory sales at unreasonably low prices rather than to discrimination. Only the second is limited to sales and intended effect within the U.S.A.


65. See supra note 59.

commerce except that oriented to exporting.

ETCA Title III did not amend any other statute. Title III permits administrative action to immunize prospective specified conduct from the usual consequences of prosecutions under not only the Sherman Act and FTCA’s proscription of “unfair methods of competition,” each as amended by ETCA Title IV, but also under the Clayton Act, antitrust provisions of the Wilson Tariff Act, and state antitrust and unfair competition laws. Title III is not self-executing whereas Title IV is. Title III is both broader and narrower than Title IV. Title III is narrower than Title IV in that it does not explicitly contemplate benefiting those engaged in non-importing foreign commerce other than export-related activities described in a public record. Title III is broader than Title IV in that Title IV neither contemplates preemption of state law nor modifies applicability of substantive rules set forth in the Clayton and Wilson Tariff Acts. The Titles are alike in that both affect jurisdiction but, if jurisdiction exists, neither modifies pre-existing substantive rules of decision.

Title IV presents some intricate construction problems. Thus, what did Congress imply in using the word “involving” as opposed to a more restrictive word? There is no doubt that Congress understands the use of the phrase “in commerce” when it intends to be restrictive. From this, it seems fair to infer that Title IV could have been but was not written to impose the steeper jurisdictional thresholds on conduct in rather than conduct involving non-importing trade or commerce. It is not the purpose of this article to predict what courts will do when defendants allege that plaintiff has failed to assert a federal question because defendants’ essentially importing or domestic conduct nevertheless involves non-importing foreign operations or exporting. There seems to be an open invitation for courts to develop another “rule of reason” although, to be sure, at a very different level than that generated for seventy-odd years. The authors do not anticipate liberality equivalent to the Supreme Court’s incredibly open approach to what is comprehended by “in connection with the purchase or sale of securities” in SEC Rule 10b-

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70. See supra note 65.
72. See supra note 63.
In order to plead antitrust or other theories before a federal court, plaintiffs have the affirmative duty to establish the court's jurisdiction. Conversely, defendants in state courts of general jurisdiction usually have the burden of demonstrating lack of jurisdiction. Availability of treble damages in the federal forum tends to orient plaintiffs to federal rather than state courts for vindication of Sherman Act theories. ETCA section 402 effectively burdens plaintiffs in either type of forum to establish jurisdiction over persons by showing conduct involving non-importing foreign commerce having a "direct, substantial, and reasonably foreseeable effect" on domestic commerce, import commerce, or the export trade of a person engaged in export commerce in the United States. Title IV is a political statement that provides a strategic defense for all non-importing foreign operations whether or not they entail exporting. Title III, although it too presents nice questions regarding the nature and quality of export "methods of operation," springs from strategic considerations concerning encouragement of exports but provides a tactical weapon. Although some (incredibly) say a COR prevents prosecutions, it provides only a basis for a motion to dismiss in actions alleging violation of "antitrust laws" as defined in ETCA Title III. However, the COR provides no jurisdictional basis for dismissal of private actions brought under ETCA Title III. Note, incidentally, that the Title III cause of action does not obligate plaintiff to demonstrate "direct, substantial and reasonably foreseeable" effects of the conduct as the price of establishing jurisdiction.

It is inescapable that ETCA Titles III and IV are designed to encourage exports. It is equally inescapable that Title IV may encourage some very interesting foreign initiatives other than importing or exporting. One can conceive of a plaintiff who, having reason to complain of conduct involving foreign commerce otherwise susceptible to characterization as a per se offense, is unable by reason of ETCA Title IV to cause an American court to reach the pertinent substantive rules of decision. This need not surprise. It is of the essence of Title IV.

C. Optimum Effect of ETCA Title III

ETCA section 306(a) is deceptively simple. Excepting two classes of private prosecutions and one of public prosecution, it provides that "no criminal or civil action may be brought under the antitrust
laws against a person to whom a . . . [COR] . . . is issued which is based on conduct . . . specified in, and [complying] with the terms of a [COR] which . . . was in effect when the conduct occurred." As noted earlier, "antitrust laws" is a term of art embracing state and federal laws well beyond those usually captioned "antitrust."

"Person" is also a term of art which looks, in the original analysis, to "individuals" resident in the United States as well as to partnerships or corporations organized under the laws of the United States or any of its states. In addition, the term "person" embraces "any association . . . by contract or other arrangement, between or among" the classes of persons originally comprehended. Definition of "person" identifies those entitled not only to apply for and receive a COR but also private parties entitled to bring a cause of action under Title III. One of the requirements of being a person for purposes of ETCA Title III is some colorable claim to being an American entity.

Persons covered by a COR untainted by fraud achieve a qualified shield only against charges under the broadly-defined "antitrust laws" which are "based on conduct . . . specified in" and complying with the COR. The shield is designed to avoid exposures under the Sherman Act, the (import-oriented) antitrust provisions of the Wilson Tariff Act, the Clayton Act, and FTCA section 5 "to the extent [it] prohibits unfair methods of competition," as well as "any State antitrust or unfair competition law."

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77. 15 U.S.C. § 4016(a) (1982). The exceptions are remarked, infra, notes 91-109 and accompanying text. They do not permit criminal prosecution for conduct comprehended by a valid COR.

78. See supra text accompanying notes 41-42.

79. 15 U.S.C. § 4021(6) (1982) provides as follows:

- The term antitrust laws means the antitrust laws, as such term is defined in the first section of the Clayton Act (citation omitted) and section 5 of the Federal Trade Commission Act (citation omitted) (to the extent that section 5 (citation omitted) prohibits unfair methods of competition), and any State antitrust or unfair competition law, . . .


83. ETCA Title III defines a person to include an individual who is a resident of the U.S.A.; a partnership [or corporation] "that is created under and exists pursuant to the laws of any State or of the United States; . . . or any association or combination, by contract or other arrangement, between or among such persons." 15 U.S.C. § 4021(5) (1982). ETCA Title IV has a similar (and obviously intended) bias in that, addressing anticompetitive effects on persons, it looks only to those engaged in export commerce in the U.S.A. and, even more narrowly, only to injury sustained by "export business in the" U.S.A. 15 U.S.C. §§ 6a, 45(a)(3) (1982).

There is no qualitative or other distinction between conduct ordinarily offensive per se to the Sherman Act and that potentially stigmatized through application of the "rule of reason." There is no excision of section 7 of the Clayton Act from the protection of a COR shield. There are, however, oversights. Thus, there is no insulation against the all but forgotten penal section 3 of the Robinson-Patman Act which has two rules potentially applicable to exporters. Similarly, a COR does not insulate against either the FTCA address to "unfair . . . acts or practices" or the sometimes *effectively* punitive investigatory powers of FTC.

On an ideal rather than a pragmatic level, the principal benefits of a COR are to shield against punitive damage, penal and equitable remedies otherwise available in instances of violations of the Sherman Act and state antitrust laws; treble damage and equitable remedies arising from sections 2(c), 2(d), 2(e), 7 and 8 of the Clayton Act; and, FTC's power to enjoin "unfair methods of competition." On a more pragmatic level, the real value of a COR relates to classic Sherman Act concepts; their analogues in state antitrust schemes; the potential nuisance of sections 7 and 8 of the Clayton Act to exporting joint ventures; and, during the current administration, the power of FTC. The last is qualified by reason of a recognition that a different administration could reinstitute an ideologic

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85. 15 U.S.C. § 13a (1982) provides as follows:

It shall be unlawful for any person engaged in commerce, in the course of such commerce, to be a party to, or assist in, any transaction of sale, or contract to sell, which discriminates to his knowledge against competitors of the purchaser, in that, any discount, rebate, allowance, or advertising service charge available at the time of such transaction to said competitors in respect of a sale of goods of like grade, quality, and quantity; . . . or, to sell, or contract to sell, goods at unreasonably low prices for the purpose of destroying competition or eliminating a competitor. Any person violating any of the provisions of this section shall, upon conviction thereof, be fined not more than $5,000 or imprisoned not more than one year, or both.


87. 15 U.S.C. §§ 13(c), 13(d), 13(e), 18, 19 (1982). Section 2(a) and 3 of the Clayton Act [15 U.S.C. §§ 13a, 14 (1982)] are omitted for the simple reason that they focus on transfers of goods for "use, consumption or resale within the" U.S.A. Thus, they do not read on price discriminations between or among customers for exported commodities, tying via an exported product, exclusive dealing arrangements for exported goods, or exaction of requirements contracts from foreign customers. See Raul Int'l Corp. v. Sealed Power Corp., ___ F. Supp. ___ (D.N.J. 1984), 46 Antitrust & Trade Reg. Rep. (BNA) 725-26 (Apr. 12, 1984).

88. It must be stressed the ETCA did not limit FTC power to prosecute concerning "unfair or deceptive acts or practices in or affecting commerce." 15 U.S.C. § 45(a)(1) (1982). Those who wonder if that is meaningful would do well to consider the neo-antitrust holdings in FTC v. Brown Shoe Co., 384 U.S. 316 (1966) (Brown Shoe II) and FTC v. Sperry & Hutchinson Co., 405 U.S. 233 (1972) (S&H). To those who minimize the meaningfulness of such holdings by reference to the paucity of subsequent decisions squarely relying on Brown Shoe II and/or S&H [see, e.g., Stack, 'Much Ado About Nothing': A Pragmatic View of Section 5, 50 ANTITRUST L.J. 811 (1982)], the authors urge attention to the sheer volume of consent decrees and the inability of anyone to guesstimate the decisional process of consenting respondents and as well as the unreported volume of administrative agreements terminating "informal" investigations.
FTC leadership which, if trade balances were no longer a sore subject, might be tempted to pursue even COR-possessed entities for otherwise shielded conduct which is alleged to involve unfair acts or practices affecting commerce.

Existence of a COR shield contemplates that persons “to whom” it is issued will be significantly insulated against private and public prosecutions under the “antitrust laws” liberally defined in Title III. Congress did not foreclose all prosecutions for conduct comprehended by a COR. As noted earlier, there are “exceptions.” No exception however permits penal consequences.

Despite existence of a COR shielding the conduct in question, DOJ can sue “to enjoin conduct threatening clear and irreparable harm to the national interest.” Just what constitutes the “national interest” is not defined. If this “exception” focused on violations of section 2 of the Sherman Act or pertinent provisions of the Wilson Tariff Act, it might begin to make sense. However, the operative language commits DOJ to “file suit pursuant to Section 15 of the Clayton Act” which contemplates only violations of the Clayton Act itself rather than the “antitrust laws” defined elsewhere in the 1914 Act.

The principal thrust of substantive rules of decision set forth in the Clayton Act is aimed at particularized species of conduct deemed to present a potential for full-blown anticompetitive conduct. Sections 2(a) and 3 of the Clayton Act are oriented to transactions in goods “for use, consumption or resale within” the United States. Thus, these sections are of no consequence in terms of benefit from a COR. It is hard to conceive of sections 2(d) and (e) affecting anything remotely classifiable as the “national interest.” Is the point to encourage DOJ to Monday-morning quarterbacking concerning CORs which effectively sanction kickbacks prohibited by section 2(c), joint ventures falling within section 7, or interlocks banned...

90. See Brown Shoe II and S&H, supra note 88.
93. See supra text accompanying note 77.
95. Id.
by section 8? This seems unlikely. The legislative history is not revealing.

While it is predictable that applicants will seek CORs precluding application of sections 7 and 8 to jointly-owned export trading companies formed by persons who are otherwise domestic competitors, it is difficult to conceive of an applicant publicly avowing an intent to kickback. It is equally difficult to conceive that a COR-shielded joint export venture could eventually threaten the "national interest" unless it ran afoul of rules dealing with contraband. But, other than when a president engages in pure "jaw-boning," such rules usually have their own enforcement mechanisms and violations do not necessarily implicate the Clayton Act. It seems most likely that the limiting of DOJ to section 15 of the Clayton Act is representative of nothing other than legislative oversight.

In any event, ETCA section 306(b)(5) burdens DOJ beyond the explicit terms of section 15 of the Clayton Act (and, should there be a suitable oversight amendment, section 4 of the Sherman Act). Typically, public prosecutors seeking to restrain conduct allegedly violative of substantive norms of the Clayton Act need to show only the probability of injury to some aspect of the competitive process. ETCA adds an explicit demand for proof that the undefined "national interest" is threatened with "clear and irreparable harm." While "national interest" presumably has a meaning relevant in an Act otherwise promoting exports, the meaning is not easy to deduce or even to induce. Can it be that the point was to assist in coercing persons to abandon otherwise shielded conduct to aid long- or short-term Executive agreements which lack the force of domestic law but nonetheless are deemed to be supportive of a given foreign policy goal? Such a Machiavellian purpose is unlikely. The authors have no easy answer and suspect that DOJ is in the same boat.

Other "exceptions" from the shielding effect of a COR are more fairly described as facets of the newly-created right of action. Suitably Americanized private parties "injured as a result of conduct engaged in under a" COR can sue for "injunctive relief, actual damages, the interest on actual damages, and the cost of suit (including a reasonable attorney's fee) for the failure to comply with the standards" pursuant to which the COR issued. Injured plaintiffs are directed to "proceed as if" the action is one "commenced under sec-

tion 4 or section 16 of the Clayton Act." Although the applicable rules of procedure are within the Clayton Act, the only pertinent rules of decision and remedies are those provided by ETCA Title III.\textsuperscript{106} Thus, one is left to infer that the exceptional Title III damage actions must be brought in United States District Courts\textsuperscript{107} and that standing tests\textsuperscript{108} otherwise applicable to private suitors seeking relief under the traditional "antitrust laws"\textsuperscript{109} are equally pertinent to Title III plaintiffs at law and in equity to the degree they are more rigorous than ETCA section 306(b) itself. Note particularly that standing to seek injunctive relief under ETCA section 306(b) is keyed to \textit{actual} injury.

What can plaintiffs hope to gain? Unlike the provisions of treble damages by section 4 of the Clayton Act,\textsuperscript{110} ETCA section 306(b)(1) affords only actual damages.\textsuperscript{111} This disincentive is sharply accentuated by plaintiff's burden to overcome an explicit \textit{presumption} "that conduct which is specified in and complies with a" COR comports with the eligibility standards\textsuperscript{112} and by plaintiff's exposure, if unsuccessful, to liability for defendant's costs including attorney's fees.\textsuperscript{113}

Central to plaintiff's case are the Title III eligibility standards.\textsuperscript{114} While all four \textit{can} be styled as "competitive injury" standards, they need not be so styled. For example, the fourth standard would preclude the COR holder from protection in cases where reimportation of goods or services exported by the holder would occur. In any event, the plaintiff must address itself to violation of one or more of these standards. Thus, even if defendant demonstrably breached a condition imposed on a COR by the issuing authority,\textsuperscript{116} plaintiff's cause of action is not thereby established (although its

\textsuperscript{106} \textit{Id.}


\textsuperscript{114} \textit{See supra} note 44.

prosecution may be aided). Plaintiff must prove defendant's "failure to comply with the" eligibility standards. While a literalist might conclude that defendant is liable only if it breached all of the standards, it seems instead that failure to honor one will suffice.

ETCA sections 303(a)(1), (2) and (4) will prove daunting to plaintiffs.\textsuperscript{116} Plaintiff's case must be proven by establishing substantiability of adverse competitive effects on domestic competition or on exporters competing with defendant; unreasonable effects on domestic pricing of relevant goods or services; or reasonably foreseeable reimports of defendant's exports. These proof burdens are in excess of the per se rules which, \textit{inter alia}, they supplant.

ETCA section 303(a)(3), however, may prove to be a sleeping giant. It contemplates "unfair methods of competition against competitors engaged in the export of goods . . . or services of the class exported by" the COR holder.\textsuperscript{117} While a plaintiff attempting to establish a violation of ETCA Section 303(a)(3) must prove actual injury and causation, he can rely on a considerable body of FTCA precedent characterizing species of conduct. FTCA precedent establishes that an "unfair method of competition" can be recognized without necessary reference either to the state of mind of the actor or to effects coextensive with those associated with antitrust violations.\textsuperscript{118} Such precedent minimizes concern with scienter, foreseeability, and substantiability of untoward effects. While DOJ and Commerce have discounted the worth of FTCA precedent,\textsuperscript{119} it is inescapable that Congress repeatedly used the phrase "unfair methods of competition" in designing reliefs from FTCA explicit in ETCA Titles III and IV. Since courts (and not administrators) will apply the substantive rules of decision pertinent to private causes of action under Title III, administrators who ignore FTCA precedent when issuing CORs may aid potential plaintiffs!

\textsuperscript{118} In a classic case lost by FTC, the Supreme Court taught that methods can be stigmatized as unfair if they are "such as injuriously affect or tend . . . to affect the business of . . . competitors." FTC v. Raladam Co., 283 U.S. 643, 647-49 (1931) (Raladam I).
\textsuperscript{119} See Guidelines for the Issuance of Export Trade Certificates of Review, 48 Fed. Reg. 15,937, 15,939 (1983). An authoritative person has said that the "Guidelines reject the argument that Title III applications or certificates are subject to the broad interpretation of unfair competition under section 5 of the FTC Act." Address by Marguiles, supra note 16, at 14. The Guidelines tender "deliberate and unreasonable restriction of domestic export competitors from their source of supply" as an example of an unfair method of competition cognizable in the administrative process. 48 Fed. Reg. 15,937, 15,939 (1983). Two things occur to the authors. First, despite the quoted rejection, the administrators will not rule on motions to dismiss privately asserted causes of action. Second, Justice Brandeis long ago warned against confusing "unfair competition" with FTC's address to "unfair methods of competition." FTC v. Gratz, 253 U.S. 421, 441-42 (1920) (Brandeis, J., dissenting). It is often remarked that Brandeis was involved in designing the FTC. In any event, his views concerning "unfair methods of competition" became dominant in FTC v. Keppel, 291 U.S. 304, 314 (1934).
It is hard to assess whether courts considering private Title III causes of action will defer to the presumed expertise of ETCA administrators, rather than FTCA administrators. FTCA precedent is provided by quasi-judicial and judicial proceedings, whereas the views of ETCA administrators do not achieve such dignity. On the other hand, there is the explicit statutory presumption that conduct complying with a COR is in compliance with the eligibility standards. It would seem that, if ETCA administrators' tendency to ignore FTCA precedent is affirmed through the appellate process, plaintiffs' chances to rebut the presumption of conformance with ETCA section 303(a)(3) will be considerably improved.

The authors consider that Congress achieved an interesting trade-off. Commerce and DOJ must deal with applications for CORs. While the administrators are to use their accumulated expertise, they are not required to preclude all possibilities that conduct ultimately specified in a COR might inflict competitive injury. On the face of the matter, the eligibility standards are central to the COR issuance process rather than the federal and state rules against which the shield may be invoked. If it is permissible to look beyond the eligibility standards (a proposition not at all clear to the authors), it must be remembered that—at one stage—Congress contemplated that a COR "shall" issue unless conduct described by the applicant "is likely to violate the antitrust laws." The very point of providing a private cause of action is recognition that conduct germane to promoting exports which is unexceptional prima facie may come to transgress one or more of the eligibility standards. Congress neither forced Commerce and DOJ to exclude activities with anticompetitive potencies nor left those actually prejudiced without a remedy. In this context, Congress' first explicit provision of a private cause of action for "unfair methods of competition" made a lot of sense.

The net effect is that, if certified conduct comes to violate an eligibility standard, an injured Americanized party has a right of action whether or not the administrators should or could have foreseen the untoward effect. In the event plaintiff is successful, the COR is not thereby invalidated. ETCA section 306(b) defines the

legal and equitable remedies which are available. While an injunction may issue upon petition of a private party, it appears that normal rules apply and that the decree can address only implicated conduct rather than respondent's ability otherwise to rely on the COR.

On the pragmatic level, the principal benefit of a COR is a shield against penal and punitive damage claims otherwise implicit in openly engaging in export conduct easily characterized as offensive per se to section 1 of the Sherman Act. Prominent but nonetheless incidental benefits are protection of exporting associations or joint ventures from attack under section 7 of the Clayton Act and against (what may be unanticipated) consequences of violating state laws preempted by CORs. While the shield against FTC prosecution of "unfair methods of competition" may be meaningful during the Reagan Administration, Brown Shoe II\textsuperscript{124} and S&H\textsuperscript{125} are still on the books. Therefore, if recent congressional pressures on FTC abate, future commissioners may be tempted to pursue "unfair . . . acts or practices" affecting export commerce despite existence of a pertinent COR. Other than such an "unfair methods" cause of action, exposure of a COR holder to single damages and injunctions for violation of eligibility standards does not seem ominous for those exporters who are willing to police their own conduct.

III. The Early CORS

Through November 30, 1984, forty-six applications had been reported and forty-six CORs had been issued. Title II trading companies are not notable among the COR applicants. This suggests that banks' original approaches to Title II trading companies look purely and simply to expediting regional exports. Most applicants seem to be small entrepreneurs which export others' goods rather than goods produced by the applicants. Surprisingly, relatively few applicants have been groups of competitors, and relatively few applications seem to specify conduct actually requiring protection of a COR.

Published summaries of certified export activities and methods of operations are remarkable for frequent detailing of intended activities which are not ordinarily offensive to antitrust norms, much less offensive per se to the Sherman Act. While some address price stabilization and export market allocations, such projections are not a universal theme. There is much detailing of exclusive purchasing and distribution agreements without necessary reference to foreclosure of market shares. There are some combinations of identified competi-

\textsuperscript{124} 384 U.S. 316 (1966).
\textsuperscript{125} 405 U.S. 233 (1972).
tors. There are some organizational techniques which foreclose non-members from participation. There is some reaching “inshore” to include such activities as consulting, warehousing, insurance, and freight forwarding.

One of the earliest recipients of a COR was U.S. Farm-Raised Fish Trading Company, Inc. (Fish Trading). Its application represented one of the best efforts to take maximum advantage of the COR mechanism. Five “members” who intended to benefit from the COR were identified along with the applicant. The members are either processors or representatives of processors of farm-raised fish, with particular but not exclusive emphasis on catfish. The application contemplated agreements whereby the processors’ export sales would be exclusively through the newly-established trading company. While applicant stated an intention to solicit and receive bids to fill available foreign orders, it reserved the right to rotate solicitations among members. Review of the published summary of application can evoke fond memories of the mechanism scrutinized in Appalachian Coals, Inc. v. United States. The ultimate COR explicitly acknowledged that the applicant trading company not only “will set purchase prices and allocate export orders among its member processors,” using either a “sealed bid procedure or a rotating bid system,” but “will set export prices” in a context in which member processors can agree to restrict their export sales to those accomplished through the trading company. Interestingly, the COR also deals with a first-refusal mechanism attendant upon a member’s withdrawal. In any event, the Fish Trading COR shields a horizontal combination which can fix domestic purchase and export resale prices as well as allocate both suppliers and customers. It would seem that the Fish Trading COR is very much along the lines contemplated by Congress.

The first COR is also of interest. It was obtained by a sporting goods exporter known as International Marketing and Procurement Services, Inc. (IMPS). No additional “members” were named. The COR contemplates that IMPS will negotiate exclusives with unnamed domestic suppliers pursuant to which IMPS may obtain power to set prices and quality limits in defined export markets as

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128. 48 Fed. Reg. 10,596, 10,600 (1983) (to be codified at 15 C.F.R. § 325.2(k)).
129. 288 U.S. 244 (1933). Formed by 137 producers of bituminous coal in an economically distressed four-state area, Appalachian Coals was designated as each of the producers’ substantially exclusive agent to market coal at the best prices obtainable. The “agent” was to set prices in the spot and near-term markets and, assuming an excessive supply, to allocate orders among its “principals.” Sales for delivery sixty or more days after commitment required affected producers’ consent to prices inter alia.
well as to allocate export territories or customers among its competing suppliers. On the face of the matter, the unnamed suppliers are not insulated by the COR. On the other hand, the contractual restraints to which they are likely to become subject are prima facie vertical and, in any event, attack on them probably would flounder in the shoals of Title IV. Essentially, individual suppliers would agree only to restrain themselves as the price of obtaining representation by IMPS which is possessed of expertise lacked by the suppliers.

A curious COR was obtained by a group quite possibly beyond Congress’ contemplation. United Export Trading Association (UETA) applied for itself and eight “members.” The members operate “duty-free” shops on the northside of the United States-Mexico border. Items of export cited in the application are tax-free and duty-free alcoholic beverages and tobacco products. UETA’s COR contemplates that it can act not only as exclusive purchasing agent for its members but also set resale prices, quantity, and hours of operation for the members. While UETA also has the ability to allocate customers and territories, the authors doubt that such authority is essential in the context of a relatively regulated industry. Of greater significance to potential COR applicants is a relatively liberal approach to competitive data exchange among members.

DOJ personalities have indicated great concern about price-sensitive data exchanges among persons otherwise competitors in the context of applications for CORs. It is almost as though they regard United States v. Container Corporation as having characterized such exchanges as offensive per se. While it is easy to point out that perfect competition models presuppose equal access to data, this admittedly is insufficient to exorcise the spectres implicit and

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134. See, e.g., Address by Craig W. Conrath, before a Pa. Bar Institute on ETCA, 7-11 (Nov. 2, 1983) (copy on file with the Dickinson Journal of International Law). This sensitivity translates into clauses qualifying CORs, presumably pursuant to authority explicit in ETCA § 303(b)(3), 15 U.S.C. § 4013(b)(3) (1982). Typical language is as follows: The holder, “in engaging in the certified conduct, will not intentionally disclose, directly or indirectly, to any Supplier or prospective Supplier of similar or substitutable [goods] and [services] any business information obtained from any other Supplier. For purposes of this certificate, business information means costs of goods sold and general selling and administrative expenses, production, capacity, inventories, domestic prices, domestic sales, domestic orders, terms of domestic marketing or sale, U.S. business plans, strategies or methods or any other such business information that is not materially related to the conduct of the export business of the Supplier through [holder] unless such business information has already been made generally available to the trade or public.”
136. Justice Fortas supplied a concurrence essential to the result on the explicit understanding that the Court did not “hold that the exchange of specific information among sellers as to prices charged to individual customers, pursuant to mutual arrangement, is a per se violation of the Sherman Act.” Id. at 338-39.
explicit in Justice Douglas' lead opinion in *Container Corporation*.\(^{137}\) Yet, it surely is interesting to contrast such DOJ expressions of concern with the permission given to a group of retailers (the commercial interface with the ultimate beneficiaries of antitrust) not only to exchange price-related data but also to fix prices for goods sold to consumers.

This relief given UETA links with another irony. DOJ has taken great pains to insert the following language in CORs:

This certificate does not apply to sales to the United States Government or to any sales more than half the cost of which is borne primarily by the United States Government.\(^{138}\)

This puts teeth in DOJ's desire to translate *The Concentrated Phosphate*\(^{139}\) holding from the Webb-Pomerene Act\(^{140}\) to ETCA. The clause places a great burden on marketers possessed of CORs. Arguably, they must inquire as to export customers' sources of funds. Note that the clause does not focus on a COR holder's knowledge that "more than half of the cost" is borne by Uncle Sam.

Congress' ambition was (and, presumably, is) to promote large-scale export of goods and services. This contrasts rather sharply with licensing horizontal price-fixing of cigarettes and liquor sold by duty-free shops which already enjoy an obvious competitive edge over other retailers. Yet, it is duty-free stores to whom data exchange liberality is shown while industries that lack intrinsic competitive advantages are not only intimidated against data exchanges\(^{141}\) (by clauses that may obligate them to refrain from perfectly legal conduct because of a spectre of adverse domestic effect) but arguably are required to probe into their large-scale customers' sources of financing which may prove to be more than somewhat difficult.

IV. Conclusion

A vital concept explicit in ETCA and implicit in its Title III is that the time has come for American export cartelism. This is in response to a world in which international trading does not routinely honor the competition principles to which the United States ordinarily adheres. Despite various successful and unsuccessful attempts, it is not America's job to reform the world. It is foolish to expect American companies to compete in world markets on terms other than those which govern their competitors.

The Title III mechanism is geared to permit various manifesta-

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137. See supra note 135.
139. 393 U.S. 199 (1968).
141. See supra note 134.
tions of cartelism so long as they do not prejudice domestic markets *in any real sense*. The statutory fact is that conduct is eligible for shielding although it is ordinarily offensive to the letter of various substantive rules. That is the very point of CORs. If the COR administrators would confine themselves to examining prima facie compliance with the eligibility standards rather than generating safeguards against spectres, Congress' will and United States trade balances are more likely to be served. DOJ would do well to recall that one of Congress' objectives was efficiency. The United States need not fear prejudicing an unsuspecting world. Nations that enforce anticartelism rules will not be frustrated by an American COR. Nations that lack such enforcement can have no complaint. Congress has spoken concerning American competition policy as it affects exports. Congress' will is thwarted by an administrator who seeks to block or impede issuance of a COR because the specified conduct will offend norms *other than those of the eligibility standards* or because it is merely feared that combatitive export techniques will back-flow into the domestic economy. If such a back-flow occurs, the revocation machinery is in place.

If it is asking too much to have the Foreign Commerce Section of the Antitrust Division satisfy itself with prima facie compliance of applicants, it is not difficult for the Attorney General to create a function relieved from the disability of viewing the world from a prosecutor's perspective. Consider, for example, the "Phosphates Clause." If Congress wished the *Concentrated Phosphates* holding to apply despite a COR, it could have so provided. Provision of the eligibility standards satisfied Congress. It did not assign an oversight role to DOJ. Neither did DOJ acquire rule-making authority analogous to that of FTC. Why, then, should DOJ strive so to insure that the *Concentrated Phosphates* doctrine, properly germane only to Webb-Pomerene associations, is incorporated into CORs? Are there other ground rules that DOJ personnel think Congress should have adopted? While it is easy to understand and even to praise zealous protection of the nation, this cannot go so far as to welcome arrogation of power.

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142. *See supra* note 138 and accompanying text.
143. *See supra* notes 139-40.