CHAPTER 3

JURISDICTION OVER EXPORT CONDUCT

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The focus of the chapter is on U.S. exports and their effect on foreign versus domestic commerce. There are three Acts that deal with the actions of U.S. exporters: the Webb-Pomerene Act of 1918, the Export Trading Company Act of 1982, and the Foreign Trade Antitrust Improvements Act of 1996. Webb-Pomerene provides antitrust immunity for associations which are engaged solely in export trade, and for agreements made by their members for acts done in the course of export trade, provided that the associations do not restrain trade within the United States or restrain the export trade of U.S. competitors. Webb-Pomerene does not extend to services, licensing or foreign investment. As of May 9, 2005, there were only seven export trade associations registered under Webb-Pomerene. See http://www.ftc.gov/os/statutes/webbpomerene/.

The Export Trading Company Act (ETCA) was passed in an effort to encourage export trade associations, and extended coverage to include services. Furthermore, the ETCA provides a certification process, whereby associations obtain prior approval of their activities. The certification, once granted, protects the certificate holder against criminal prosecution, and limits civil liability to single damages under the U.S. antitrust laws for all conduct that is specified in the certificate and which occurred while the certificate was in effect. At last count, there were just over 100 ETCA certificate holders. http://www.ita.doc.gov/td/oetca/list.html

Finally, the Foreign Trade Antitrust Improvements Act (FTAIA), an amendment to the Sherman Act, seeks to address the issues posed in the first two chapters of this text: the jurisdictional reach of U.S. courts over export activity. The FTAIA is not limited to export associations, nor does it require registration or certification to be invoked by U.S. exporters. The passing of the FTAIA also prompts the question of what is meant by the Sherman Act's language "trade…with foreign nations."

As you read through the materials in this chapter, keep in mind that the protections afforded by these acts are limited to legal action in U.S. courts, not from actions by foreign nations.

Todhunter-Mitchell & Co., Ltd. v. Anheuser-Busch, 383 F. Supp. 586 (E.D. Pa. 1974)

Seeking injunctive relief and treble damages, Todhunter-Mitchell & Co., Ltd.,

instituted this private antitrust action against Anheuser-Busch, Inc., this country's largest brewer of beer. The complaint alleged violations of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2. The instant case proceeded to trial and the Court, sitting as the finder of fact, concluded at the close of the evidence that certain marketing practices of the defendant constituted a per se violation of Section 1 of the Sherman Act. The Court's findings of fact and conclusions of law were set forth in a written Opinion filed on February 27, 1974. Presently before the Court is the defendant's motion for amendment of findings and judgment or, in the alternative, for a new trial.

Anheuser-Busch has advanced several arguments in support of the above motion. The Court has carefully considered the factual and legal contentions raised by the defendant and the memorandum of law submitted in support thereof and concludes that the findings of fact and conclusions of law contained in the previous opinion should remain substantially unchanged. It is, therefore, unnecessary to reiterate the operative facts surrounding this litigation or the discussion of what the Court considers to be the relevant law. Nonetheless, the Court believes that an analysis of the question of the applicability of the Sherman Act to those facts is appropriate because of the complexity and legal significance of certain issues.

Todhunter-Mitchell, plaintiff, is a Bahamian corporation engaged in the wholesale distribution of liquor and beer in the Bahama Islands. In direct competition with the plaintiff is Bahama Blenders, Ltd., also a Bahamian corporation principally engaged in the large-scale distribution of alcoholic beverages in the Bahamas. The beer produced by Anheuser-Busch, which includes Budweiser, Michelob and Busch-Bavarian, is distributed primarily through approximately 950 wholesalers. Bahama Blenders is the duly-appointed Anheuser-Busch wholesaler in the Bahama Islands. The complaint alleged and the evidence proves that the plaintiff was unable to import Budweiser beer for resale in the Bahamas due to the restraints imposed by the defendant on its authorized wholesalers located in Miami and New Orleans. The plaintiff established that the above two wholesalers were restrained from selling Budweiser to the plaintiff in order to eliminate any price competition in the sale of Budweiser on the Bahama Islands, thereby insuring the continued monopolistic position of Bahama Blenders, defendant's only wholesaler on the Bahama Islands.

Anheuser-Busch asserts that the Sherman Act does not apply to a refusal to deal which produces only the elimination of competition between two foreign corporations operating completely in a foreign market. The Court is in substantial agreement with the defendant's contention that the ultimate result of the restraint imposed on the Miami and New Orleans wholesalers is the elimination of competition in the Bahama Islands. However, the territorial restraints imposed upon the Miami and New Orleans distributors directly affected the flow of commerce out of this country. Restraints which directly affect the flow of foreign commerce into or out of this country are subject to the provisions of Section 1 of the Sherman Act.

One need look no further than the language of the Sherman Act itself to be convinced that Congress intended the antitrust laws to be applicable in cases such as this. Section 1 of the Act provides expressly that "Every contract, combination . . . in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." The flow of commerce between the United States and the Bahama Islands was directly restrained by the restriction placed on the exportation of Budweiser beer by Anheuser-Busch.

In United States v. Aluminum Co. of America, 148 F.2d 416 (2nd Cir. 1945), the court held that an agreement between foreign corporations to fix production quotas was illegal under the Sherman Act because the unlawful agreement was intended to and did affect imports into the United States. 148 F.2d at 444. The court in the above case focused not upon the geographic location of the responsible parties but upon the consequences of the unlawful agreement. With respect to the facts of this case, one of the major consequences of the illicit agreement between Anheuser-Busch and the Miami wholesaler is the restraint of American trade with the Bahama Islands. The strictures of Section 1 of the Sherman Act are, therefore, applicable to the facts of this case.

Anheuser-Busch places considerable reliance upon the case of American Banana Co. v. United Fruit Co., 213 U.S. 347 (1909), wherein the Supreme Court declared that "A conspiracy in this country to do acts in another jurisdiction does not draw to itself those acts and make them unlawful, if they are permitted by the local law." 213 U.S. at 359. American Banana is not controlling here for two reasons. First, the case at bar involved a conspiracy in this country to do acts in this country and not in a foreign jurisdiction. As this Court discussed in the Opinion of February 27, 1974, the acts which constitute the antitrust violation occurred primarily in this country and involved the commerce of the United States with a foreign nation. Secondly, subsequent cases have held that American Banana is inapplicable to situations where the activities of the defendant have an impact within the United States and upon its foreign trade. Continental Ore Co. v. Union Carbide, 370 U.S. 690 (1962); U.S. v. Sisal Sales Corp., 274 U.S. 268, 275-276 (1927).

The Court is aware that it did not explicitly find as a fact that unlawful restraint imposed by Anheuser-Busch on the Miami and New Orleans wholesalers directly affected the flow of foreign commerce. Accordingly, the record warrants, and the Court will, amend its findings of fact to include the finding that the territorial restraint imposed by Anheuser-Busch in violation of the Sherman Act directly affected the flow of foreign commerce out of this country.

NOTES

1. Montreal Trading Ltd. brought a §1 action against several U.S. potash producers, alleging that defendants were engaged in a concerted refusal to deal. Montreal Trading

was unable to purchase either Canadian or U.S.-produced potash from the defendants, and alleged that the defendants' purpose was to drive up the price of potash by limiting production. (Some of the U.S. producers were also operating in Canada.)
The court held that the refusal "had insufficient contacts with and effects upon commerce within the United States to justify federal court jurisdiction." The court went a step further saying that even if there was an affect on domestic U.S. commerce, comity concerns would prevail. If American commerce is affected, the court may impose liability for extraterritorial conduct, but if "contacts with the U.S. are few, the effects upon American commerce minimal, and the foreign elements overwhelming,…we do not accept jurisdiction."

As a side note, the 10th Circuit found irrelevant, acts committed in the U.S. to restrict production which may have been orchestrated by the Saskatchewan government in its control over production and exportation of Canadian potash. The court was focusing solely on the concerted refusal to deal in finding jurisdiction improper. *Montreal Trading Ltd. v. Amax Inc.*, 661 F.2d 864 (10th Cir. 1981).

2. To clear up any confusion over the application of U.S. antitrust law to export conduct, Congress passed the Foreign Trade Antitrust Improvements Act in 1982. Read that statute carefully and decide if Congress made matters better or worse.

Foreign Trade Antitrust Improvements Act, 15 U.S.C. § 6a (1996)

§ 6a. Conduct involving trade or commerce with foreign nations

Th[e Sherman Act] shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless--

(1) such conduct has a direct, substantial, and reasonably foreseeable effect--

(A) on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; or

(B) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States; and

(2) such effect gives rise to a claim under the provisions of this Act [15 USCS §§ 1 et seq.], other than this section.

If th[e Sherman Act] applies to such conduct only because of the operation of paragraph (1)(B), then th[e Sherman Act] shall apply to such conduct only for injury to

export business in the United States.

NOTES

1. How would you sum up the FTAIA for a client who was not antitrust savvy?

2. How would the FTAIA affect the earlier cases on export trade?

3. Does the FTAIA strengthen or weaken the argument supporting jurisdiction to prescribe export conduct under the Sherman Act?

4. The cases in this next section include initial decisions by district courts addressing the scope of the FTAIA after it was first passed in 1982, as well as a recent decision by the U.S. Supreme Court.

Liamuiga Tours v. Travel Impressions, Ltd., 617 F. Supp. 920 (E.D.N.Y. 1985).

Plaintiff Liamuiga Tours, a division of Caribbean Tourism Consultants, Ltd., (Liamuiga Tours) is incorporated under the laws of St. Kitts and is located solely on St. Kitts. Defendant Travel Impressions, Ltd. (Travel Impressions) is a New York corporation with its principal place of business in New York. Plaintiff is in the travel and tourist business, providing local charters, travel services and tourist information, and tour packages locally on St. Kitts. Defendant is a bulk wholesale tour operator for the Caribbean, including St. Kitts, providing travel and tour packages. Defendant books or charters planes, contracts for ground transport and activities, and books blocks of hotel rooms. These travel packages are sold through retail travel agents. For a period from 1981 to 1983 plaintiff was a "Destination Service Operator" (DSO), or local representative, for defendant on St. Kitts. A third player, not a party to this action, is the Royal St. Kitts Hotel (Hotel), the largest and most modern hotel with the best facilities and amenities on the island. It has over twenty-five percent of the approximately 500 hotel rooms on St. Kitts.

St. Kitts, or St. Christopher, is a Caribbean island formerly part of the British colony of St. Kitts-Nevis-Anguila, and now part of the federation of St. Christopher and Nevis. It is a small island and not one of the most popular Caribbean vacation spots. The "season" for St. Kitts, which is to say the heavy tourist trade period, is from December to the following April, also known as the winter season. Under the terms of a contract entered into on December 29, 1981, plaintiff became defendant's representative, or DSO, on St. Kitts for the 1981-1982 season. Defendant continued to engage plaintiff's services either by an amendment that expired at the end of the next season in April 1983 or by a

superseding contract that was terminated by defendant in October and November of 1983. Plaintiff sues defendant for anti-trust violations (first cause of action), breach of contract (second cause of action), and interference with business relationships (third cause of action), alleging total damages of $1,650,000.00, including treble damages for anti-trust. Defendant now moves to dismiss the anti-trust cause of action for failure to state a claim on which relief can be granted, Rule 12(b) (6), and for summary judgment on the other two causes of action, Rule 56(b), Fed.R.Civ.P.

I.

In December 1981 Travel Impressions engaged Liamuiga Tours as its DSO on St. Kitts for the 1981- 1982 season. Liamuiga Tours was to meet and greet the Travel Impressions clients, arrange transport, arrange activities, and generally be an available and helpful source of information and services. This specifically included running hospitality desks for Travel Impressions customers in the Royal St. Kitts Hotel and several other hotels. It is undisputed that Travel Impressions lodged eighty percent of its clients at the Royal St. Kitts Hotel and that it brings in about eighty percent of the U.S. "package tour passengers" coming to St. Kitts. In addition, plaintiff was allowed to sell local tour packages to defendant's patrons and retain all profits.

Defendant continued plaintiff's services for the 1982-1983 season, either by a one-season term amendment to the original one-season contract or by superseding contract with no set expiration, a factual issue disputed by the parties. In December 1982, however, the Hotel refused to allow plaintiff to operate a hospitality desk on its premises. The reasons are uncertain. Either the Hotel wanted compensation for the use of its premises, did not want tour representatives operating there, took a dislike to the head of Liamuiga Tours, Makeda Mikael, or found Ms. Mikael to be rude and arrogant to both Travel Impressions customers and other guests. In any event, the reasons are not relevant at this point. Another Liamuiga Tours representative was allowed to be of service to Travel Impressions clients without the use of a hospitality desk, and defendant and plaintiff continued to negotiate with the Hotel for reinstatement of the desk.

In February 1983 relations with the Hotel were further strained when a snowstorm in the United States closed airports and stranded departing tourists in St. Kitts for two days. A dispute arose as to whether the vacationers or Travel Impressions would pay for the extra stay at the Hotel, with confusion as to what representations Liamuiga Tours had made. At the end of February a fire at the Hotel caused it to close down until September 1983, thereby suspending the hospitality desk controversy.

During the off-season of 1983 plaintiff apparently continued to perform full DSO duties for Travel Impressions. According to the plaintiff, in November 1983 the Hotel informed Travel Impressions that it wanted nothing more to do with plaintiff and threatened to cancel Travel Impressions' bookings if it continued plaintiff as its representative. In any event, by letter of October 12, 1983 and telex of November 9, 1983

defendant declared that it was ending or not renewing its DSO relationship with plaintiff. Liamuiga Tours instituted a suit against the Hotel in St. Kitts and commenced the action against Travel Impressions in this Court.

II.

Plaintiff's first and third causes of action allege violations of the Sherman Act, 15 U.S.C. §§ 1, 2, and ask damages under the Clayton Act, 15 U.S.C. § 15.

As a first cause of action plaintiff alleges restraint of trade by defendant and an anti-competitive conspiracy with a non-party coconspirator to monopolize the tourist business in St. Kitts and between the United States and St. Kitts. Plaintiff asks for treble damages under § 4 of the Clayton Act. Defendant moves to dismiss the anti-trust claims for failure to state a claim on which relief can be granted. Rule 12(b)(6), Fed.R.Civ.P. In view of the affidavits and exhibits presented the motion may properly be converted to one for summary judgment.

Travel Impressions contends that the anti-trust laws are inapplicable as there is no anti-competitive effect on a United States market. Defendant is correct that a domestic market must be affected in either interstate commerce or commerce between the United States and a foreign country.

The effects test was first articulated in United States v. Aluminum Company of America, 148 F.2d 416 (2d Cir. 1945). In that seminal case Judge Learned Hand concluded that Congress did not intend for the Sherman Act "to punish all whom its courts can catch for conduct which has no consequences within the United States." Id. at 443. Judge Hand discussed the ramifications of an anti-competitive agreement in international commerce and concluded that whatever the intent, such an agreement is not covered by our anti-trust laws "unless its performance is shown actually to have had some effect" on American imports and exports. Id. at 444.

The federal courts have differed in their application of the effects test. Plaintiff would have this Court use the test outlined by the Ninth Circuit in Timberlane Lumber Co. v. Bank of America, N.T. & S.A., 549 F.2d 597 (9th Cir. 1977). Nevertheless, the controlling case in this Circuit is National Bank of Canada v. Interbank Card Association, 666 F.2d 6 (2d Cir. 1981). In that case the Second Circuit Court of Appeals held that there must be an appreciable anti-competitive effect on this country's commerce of a type sufficient to justify assertion of jurisdiction. The Second Circuit explicitly rejected the Ninth Circuit's tripartite test in Timberlane Lumber Co. National Bank of Canada, 666 F.2d at 8. Specifically, the Second Circuit asserted that the first two elements of the test, intended or actual effect on United States foreign trade and cognizable injury to a plaintiff, allowed an unwarranted extension of jurisdiction to cases where the anti-competitive effect was limited to a foreign market. Under the Second Circuit's standard,

anti-competitive agreements formed within or without the United States must cause actual injury to domestic commerce to confer jurisdiction.

Long discussion of the case law, while enlightening, is not necessary. In 1982, the year after the Second Circuit's decision in National Bank of Canada, Congress addressed the issue of extraterritorial application of the Sherman Act. 15 U.S.C. § 6a (1982). There is as yet little case law interpreting § 6a and the Court must resort to the legislative history contained in the House Report on the measure. H. Rep. No. 686, 97th Cong., 2d Sess. 21, reprinted in 1982 U.S. Code Cong. & Ad. News 2487.

The amendment had two stated purposes. First, Congress sought to ease the business community's anxiety caused by their perception that anti-trust laws were a hindrance to export ventures. This aspect of the 1982 amendment is of no concern here. Second, Congress sought to clarify the test for determination of United States anti-trust jurisdiction in international commerce. The House Report listed the subtle variations of the effects test articulated by various courts. Calling for a single, objective standard, Congress chose a test that "makes the Sherman Act inapplicable to conduct involving trade or commerce with foreign nations, other than import transactions, unless there is a 'direct, substantial, and reasonably foreseeable effect' on domestic or import commerce or the export opportunities of a domestic person." Id. at 3, reprinted in U.S. Code Cong. & Ad. News at 2488 (emphasis added). Moreover, the Report explained that the effect required for jurisdictional nexus must be an anti-competitive effect in the domestic market. Id. at 11-12, reprinted in U.S. Code Cong. & Ad. News at 2496-97. In sum, the amendment adopts the stricter effects test of National Bank of Canada.

Analysis of the facts in this case quickly reveals that plaintiff has lost business on St. Kitts. Taking the allegations of the complaint as true, Liamuiga Tours has lost a pool of nearly guaranteed customers for its own charters and tourist packages, as well as the income from the contract with Travel Impressions. Barring Liamuiga Tours from the Royal St. Kitts Hotel makes it a markedly less attractive DSO for every travel agency or tour operator needing such services on St. Kitts. It could effectively exclude plaintiff from the DSO market completely and substantially from the local charter market, albeit indirectly. Nonetheless, the situs of these effects, however considerable, is St. Kitts. It matters not if there was anti-competitive conduct in the United States or by domestic corporations. Eurim-Pharm GmbH v. Pfizer, Inc., 593 F. Supp. 1102 (S.D.N.Y. 1984). The consequences suffered by plaintiff are limited to St. Kitts. Accordingly, these effects do not establish a jurisdictional nexus.

Nevertheless, plaintiff argues that the American market suffers anti-competitive effects from plaintiff's exclusion from the DSO market in St. Kitts. Liamuiga Tours maintains that there is less competition among DSO's and consequent higher costs to American travel agents, and their clients, booking tours to St. Kitts. In short, plaintiff claims that there is an anti-competitive effect on American businesses engaged in the "export" of tourist groups to St. Kitts. The issue is whether this is an anti-competitive

effect on businesses within the United States and whether it is a substantial, direct, and reasonably foreseeable effect. 15 U.S.C. § 6a(1)(B).

The argument that the domestic market affected is tour packages boomerangs in an odd fashion. It is defendant Travel Impressions, not the plaintiff that suffers the anti-competitive consequences. For it is Travel Impressions that will find itself with fewer DSO's competing for its business. The lesser competition supposedly will result in higher DSO costs to defendant, which it must absorb or pass on, making its St. Kitts packages either less profitable or less attractive. In effect, plaintiff's argument is that defendant by excluding plaintiff is causing an anti-competitive effect on defendant. If Liamuiga Tours were suing the Royal St. Kitts Hotel in anti-trust, the domestic market effects argument would not have this absurd twist. Plaintiff seeks to escape it by asserting that the persons suffering the anti-competitive effect are American consumers of Caribbean tour packages. Nevertheless, it remains that the entities suffering any possible direct anti-competitive effect are the travel agencies. Moreover, they all suffer the same effect and none gains a competitive advantage in the St. Kitts travel market. Insofar as St. Kitts becomes less attractive in the larger market encompassing packaged tours to all Caribbean vacation areas, the travel agent most dependent on St. Kitts business is adversely affected.

Once again taking the plaintiff's allegations as true, apparently defendant is the package tour operator most dependent on St. Kitts business. According to Ms. Mikael's affidavit, Travel Impressions is the only wholesale or bulk tour operator to St. Kitts and is the only user of a DSO Defendant brings in about eighty percent of the "bulk and non-bulk" package tour passengers. Defendant's passengers arrive by the "plane-load full," and the remaining twenty percent of the package tour visitors are the clients of a few independent travel agents and non-bulk operators.

The Court will not belabor the factual analysis. It is clear from plaintiff's allegations that defendant is the only "market" for DSO's on St. Kitts and controls the lion's share of the St. Kitts package tour market in the United States. It is equally clear that there is no evidence whatsoever that this is the result of anti-competitive practices. Furthermore, eliminating plaintiff from the DSO market has not been shown to have any direct, substantial, or reasonably foreseeable effect on competition among United States tour operators for the Caribbean or St. Kitts. Plaintiff has surely been cut out of the St. Kitts DSO market, although more likely at the behest of the non-party Hotel than the defendant. While the effects in St. Kitts are substantial, at best domestic consequences are speculative.

Therefore, under 15 U.S.C. § 6a and National Bank of Canada v. Interbank Card Assoc., 666 F.2d 6 (2d Cir. 1981), there is no jurisdictional nexus for this Court to decide the claim under the Sherman Act, and the first cause of action is dismissed.

Eurim-Pharm GmbH v. Pfizer Inc., 593 F. Supp. 1102 (S.D.N.Y. 1984).

Plaintiff Eurim-Pharm GmbH has brought this action against defendants Pfizer, Inc., Pfizer Group Limited, Pfizer GmbH, Pfizer Italiana, S.P.A., Pfizer France, S.A., Laboratories Pfizer S.A.R.L., and Pfizer Corporation, claiming violations of section 1 of the Sherman Act, as amended (15 U.S.C. § 1). Defendants have moved pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure to dismiss the complaint for lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted. For the reasons set forth below, the motion is granted.

Background

Plaintiff is a limited entity organized and existing under the laws of the Federal Republic of Germany with its principal place of business in Piding/Reichenhall, Federal Republic. Plaintiff is engaged in business as a distributor, wholesaler, importer and exporter of brand-name pharmaceutical products produced by multinational pharmaceutical companies. There are six named defendants as well as an undetermined number of unnamed co-conspirators. Of the six named defendants, Pfizer, Inc. is a Delaware corporation with its principal place of business in New York, New York. Pfizer, Inc. is engaged in interstate and foreign commerce in various businesses including the formulation, manufacture and sale of pharmaceutical products. The five remaining named defendants are all wholly-owned foreign subsidiaries of Pfizer, Inc., incorporated in and with their principal places of business throughout Europe and Central America. These foreign subsidiaries are all engaged in the business of manufacturing pharmaceutical products, solely within Europe. The unnamed co-conspirators are foreign manufacturers, distributors, jobbers and wholesalers of Pfizer pharmaceutical products, whose identities presently are not known to the plaintiff.

Facts

The essence of plaintiff's claim is that defendants participated in a price-fixing and market allocation scheme to maintain their stronghold on the world market of the antibiotic Vibramycin after defendants' patent of the drug expired. Plaintiff alleges, and for purposes of this motion we must assume to be true, that under this scheme Pfizer, Inc. granted an exclusive license for producing Vibramycin to a foreign manufacturer in each major foreign market. These foreign manufacturers consisted of either wholly-owned foreign subsidiaries of Pfizer, Inc. or local foreign manufacturing companies. The foreign manufacturers agreed with Pfizer, Inc. to restrict their sales of Vibramycin to distributors, wholesalers and jobbers who in turn agreed to confine their sales to specific geographic areas assigned by Pfizer, Inc. at prices prescribed by Pfizer, Inc. and/or the foreign manufacturer. Any distributor, wholesaler or jobber who failed to honor this agreement with the foreign manufacturer would initially be warned by oral communications and would later be subject to reprisals, such as reduced allocations or delayed shipments. If

these warnings and reprisals were not successful, the distributor, jobber or wholesaler would be terminated. In certain instances, Pfizer, Inc. would institute a trademark infringement action against those who did not comply with established policy.

Plaintiff alleges that as a result of this scheme, Pfizer, Inc. has maintained a substantial share of the world market for antibiotic products, both prior to and after the expiration of defendants' patents. Further, plaintiff claims that the price of Vibramycin has been and continues to be artificially inflated due to defendants' activities.

Plaintiff has sold Vibramycin in the Federal Republic of Germany since 1975. In 1979 plaintiff was able to obtain Vibramycin in the United Kingdom at a price substantially lower than that available from the authorized distributors in the Federal Republic of Germany. Plaintiff repackaged the United Kingdom Vibramycin for direct sale to German retail pharmacies. During this time, Pfizer, Inc. brought a trademark infringement action against plaintiff in the German regional court, contending that plaintiff's repackaging and sale of Vibramycin violated Pfizer's rights as holder of the Vibramycin trademark. The German court granted an injunction barring plaintiff's repackaging and sale of United Kingdom Vibramycin in the Federal Republic. On appeal, the court lifted the injunction and found that the use of a national trademark to exclude competition from the sale of goods acquired in another member state of the European Economic Community violated Articles 30 and 36 of the Treaty of Rome. This decision was affirmed by the Court of Justice of the European Communities.

Defendants base their motion to dismiss the complaint upon plaintiff's failure to allege the requisite effect on United States import or domestic commerce. According to defendants, the applicability of the United States antitrust statutes to foreign business transactions is limited to "conduct" which has a "direct, substantial, and reasonably foreseeable effect" on United States domestic, import or export commerce. 15 U.S.C. § 6a (1982). Defendants urge that the challenged activities fail to have an anticompetitive effect on United States domestic, import or export commerce because the transactions underlying this action and the effect of these transactions occurred solely within Europe, and the primary actors were European companies doing business solely within Europe.

Plaintiff argues that defendants have participated in and continue to participate in a worldwide conspiracy which has affected United States domestic commerce by artificially inflating the price of Vibramycin in the United States.

Discussion

The Foreign Trade Antitrust Improvements Act, was added to the Sherman Act in 1982 when Congress enacted the Export Trading Companies Act. Due to the absence of case law concerning this amendment, we must turn to the legislative history for guidance in reaching our decision.

The legislative history indicates that the amendment was designed to accomplish two main goals. First, the amendment was intended to eliminate the perception among business people that United States antitrust law is a barrier to efficiency-enhancing joint export activities. H.R. Rep. No. 97-686, 97th Cong., 2d Sess. 2, reprinted in 1982 U.S. Code Cong. & Ad. News at 2487 (hereinafter cited as "House Report"). Congress sought to place American-owned companies operating entirely abroad or in United States export trade on equal footing with their foreign-owned competitors by freeing them from the possibility of dual and conflicting antitrust regulation. "No longer is there any possibility that, because of uncertainty growing out of American ownership, such firms will be subject to a different and perhaps stricter regimen of antitrust than their competitors of foreign ownership." House Report at 10, reprinted in 1982 U.S. Code Cong. & Ad. News at 2495.

Second, Congress acted to eliminate the uncertainty that had arisen from the confusing array of standards employed by federal courts for determining when United States antitrust jurisdiction attaches to international business transactions. House Report at 2, reprinted in 1982 U.S. Code Cog. & Ad. News at 2487. [3] Congress adopted a single objective test that would "serve as a simple and straightforward clarification of existing American law and the Department of Justice enforcement standards." House Report at 2, reprinted in 1982 U.S. Code Cong. & Ad. News at 2487-88.[4]

The proscriptions of the Sherman Act apply to trade or commerce with foreign nations, other than import transactions, only when the conduct providing the basis for the claim has a direct, substantial and reasonably foreseeable anticompetitive effect on United States domestic, import or export commerce. The amendment clearly was intended to exempt from United States antitrust law conduct that lacks the requisite domestic effect, even where such conduct originates in the United States or involves American-owned entities operating abroad.

[The FTAIA] does not, however, preclude all persons or entities injured abroad from recovering under United States antitrust laws. When the activity complained of has a demonstrable effect on United States domestic or import commerce, foreign corporations injured abroad may seek recovery under the Sherman Act.[5] As the House Report states, section 7 "preserves antitrust protections in the domestic marketplace for all purchasers, regardless of nationality or the situs of the business. . . ." House Report at 10, reprinted in 1982 U.S. Code Cong. & Ad. News at 2495.

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[3] Even before the enactment of section 7, it was the situs of the effect which determined whether United States antitrust law applied to a particular transaction. United States v. Aluminum Co. of America, 148 F.2d 416, 443-44 (2d Cir. 1945) (Learned Hand, J.). However, in applying this rule, courts had arrived at different formulations for the nature and quantum of "effects" needed. See, e.g., National Bank of Canada v. Interbank Card Association, 666 F.2d 6, 8 (2d Cir. 1981) (any anticompetitive effect on either United States commerce within the United States or export commerce from the United States); Dominicus

America Bohio v. Gulf & Western Industries, Inc., 473 F. Supp. 680, 687 (S.D.N.Y. 1979) (not necessary for the effect on foreign commerce to be both substantial and direct as long as it is not de minimus); Waldbaum v. Worldvision Enterprises, Inc., 1978-2 Trade Case (CCH) P 62,378, at 76,257 (S.D.N.Y. 1978) (anticompetitive effects in the United States); Industria Sciliana Asfalti, Bitumi, S.P.A. v. Exxon Research & Engineering Co., 1977-1 Trade Case (CCH) Par. 61.256 at 70,784 (S.D.N.Y. 1977) (impact upon United States commerce); Todhunter-Mitchell & Co., Ltd. v. Anheuser-Busch, Inc., 383 F. Supp. 586, 587 (E.D. Pa. 1974) (direct effect on the flow of foreign commerce into or out of the United States).

[4] The objective nature of this test is evident from the use of "reasonably" and "foreseeable". The test is whether the effect would have been evident to a reasonable person making practical business judgments, not whether actual knowledge or intent can be shown. House Report at 9, reprinted in 1982 U.S. Code Cong. & Ad. News at 2494.

[5] Where the conduct is solely export oriented, only domestic exporters (injured in the United States) have a remedy under the Sherman Act. "But a foreign firm whose non-domestic operations were injured by the very same export oriented conduct, would have no remedy under our antitrust laws." House Report at 11.

In the case at bar, plaintiff fails to allege in its complaint any effect on United States trade or commerce resulting from defendants' alleged conduct. Plaintiff merely alleges that the effects of defendants' activities have been to: (1) create artificially high and inflated prices for Vibramycin (the complaint does not specify where prices have been inflated); (2) restrict distribution of Vibramycin to defendants and those selected by defendants; (3) prevent pharmaceutical wholesalers, jobbers and distributors from selling to customers of their choice; and (4) exclude wholesalers, jobbers and distributors from the sale of Vibramycin in interstate and foreign commerce. Moreover, it is apparent from plaintiff's Memorandum in Opposition to Defendants' Motion to Dismiss that even if plaintiff were given an opportunity to amend its complaint, it would be unable to allege the requisite effects on United States trade or commerce.

Plaintiff concedes in its memorandum that defendants' conduct lacks a direct, substantial and reasonably foreseeable effect on either import commerce into the United States or export commerce from the United States. Plaintiff argues, however, that defendants' activities have had a spillover effect on domestic commerce within the United States. Plaintiff characterizes defendants' conduct as a worldwide cartel directed by Pfizer, Inc. from the United States to ensure that prices for Vibramycin remained at or increased to monopolistic levels after the patent for the drug had expired. Plaintiff claims that this worldwide price-fixing and market allocation conspiracy had the direct, substantial and reasonably foreseeable effect of artificially inflating the price of Vibramycin in the United States. According to plaintiff, from 1981 to 1983 the price for 500 capsules of 100 milligrams of Vibramycin rose from $343.95 to $550.64, representing more than a 38% increase when drug prices during the same period rose only 15%. In addition, plaintiff maintains that due to the expiration in 1982 of defendants' patent on Vibramycin, the price should have declined, not have increased.

Even assuming the truth of plaintiff's allegations that the United States price of Vibramycin has risen since the expiration of defendants' patent, plaintiff has failed to allege any facts demonstrating a causal connection between defendants' conduct in Europe and the price increase in the United States. Plaintiff has not and apparently cannot allege that defendants' conduct has prevented the import of foreign manufactured

Vibramycin into the United States or prevented United States companies other than Pfizer, Inc. from manufacturing and selling the drug in the United States. Indeed, plaintiff has made no allegations whatsoever regarding the manufacture, sale or marketing of Vibramycin in the United States other than its allegation that the United States price has increased. Thus the link between defendants' conduct abroad and the price of Vibramycin in the United States is far from apparent.

Plaintiff has utterly failed to establish that defendants' alleged foreign price-fixing and market allocation scheme resulted in an anticompetitive effect on United States domestic or import commerce. This is precisely the type of case Congress sought to eliminate from United States antitrust jurisdiction when it amended the Sherman Act in 1982 to "more clearly establish when antitrust liability attaches to international business activities." House Report at 7, reprinted in 1982 U.S. Code Cong. & Ad. News at 2492 (remarks of Chairman Rodino). Accordingly, this Court grants defendants' motion to dismiss for lack of subject matter jurisdiction.

NOTES

1. After the passage of the FTAIA, does the Sherman Act prohibit exploiting foreign buyers if there is no effect in the U.S.? Is this solid antitrust policy? What about foreign buyers injured by global cartels which harm both U.S. and foreign markets?

2. After much confusion in the U.S. lower courts, the Supreme Court issued the following opinion in 2004.

F. Hoffman-La Roche Ltd. v. Empagran, S.A., 542 U.S. 155 (2004).

The Foreign Trade Antitrust Improvements Act of 1982 (FTAIA) excludes from the Sherman Act's reach much anticompetitive conduct that causes only foreign injury. It does so by setting forth a general rule stating that the Sherman Act "shall not apply to conduct involving trade or commerce ... with foreign nations." 15 U.S.C. § 6a. It then creates exceptions to the general rule, applicable where (roughly speaking) that conduct significantly harms imports, domestic commerce, or American exporters.

We here focus upon anticompetitive price-fixing activity that is in significant part foreign, that causes some domestic antitrust injury, and that independently causes separate foreign injury. We ask two questions about the price-fixing conduct and the foreign injury that it causes. First, does that conduct fall within the FTAIA's general rule excluding the Sherman Act's application? That is to say, does the price-fixing activity constitute "conduct involving trade or commerce ... with foreign nations"? We conclude

that it does.

Second, we ask whether the conduct nonetheless falls within a domestic-injury exception to the general rule, an exception that applies (and makes the Sherman Act nonetheless applicable) where the conduct (1) has a " direct, substantial, and reasonably foreseeable effect" on domestic commerce, and (2) "such effect gives rise to a [Sherman Act] claim." § § 6a(1)(A), (2). We conclude that the exception does not apply where the plaintiff's claim rests solely on the independent foreign harm.

To clarify: The issue before us concerns (1) significant foreign anticompetitive conduct with (2) an adverse domestic effect and (3) an independent foreign effect giving rise to the claim. In more concrete terms, this case involves vitamin sellers around the world that agreed to fix prices, leading to higher vitamin prices in the United States and independently leading to higher vitamin prices in other countries such as Ecuador. We conclude that, in this scenario, a purchaser in the United States could bring a Sherman Act claim under the FTAIA based on domestic injury, but a purchaser in Ecuador could not bring a Sherman Act claim based on foreign harm.

I

The plaintiffs in this case originally filed a class-action suit on behalf of foreign and domestic purchasers of vitamins under, *inter alia,* § 1 of the Sherman Act. Their complaint alleged that petitioners, foreign and domestic vitamin manufacturers and distributors, had engaged in a price-fixing conspiracy, raising the price of vitamin products to customers in the United States and to customers in foreign countries.

As relevant here, petitioners moved to dismiss the suit as to the *foreign* purchasers (the respondents here), five foreign vitamin distributors located in Ukraine, Australia, Ecuador, and Panama, each of which bought vitamins from petitioners for delivery outside the United States. Respondents have never asserted that they purchased any vitamins in the United States or in transactions in United States commerce, and the question presented assumes that the relevant "transactions occurr[ed] entirely outside U.S. commerce." The District Court dismissed their claims. It applied the FTAIA and found none of the exceptions applicable. Thereafter, the *domestic* purchasers transferred their claims to another pending suit and did not take part in the subsequent appeal.

A divided panel of the Court of Appeals reversed. The panel concluded that the FTAIA's general exclusionary rule applied to the case, but that its domestic-injury exception also applied. It basically read the plaintiffs' complaint to allege that the vitamin manufacturers' price-fixing conspiracy (1) had "a direct, substantial, and reasonably foreseeable effect" on ordinary domestic trade or commerce, *i.e.,* the conspiracy brought about higher domestic vitamin prices, and (2) "such effect" gave "rise to a [Sherman Act] claim," *i.e.,* an injured *domestic* customer could have brought a Sherman Act suit, 15 U.S.C. § § 6a(1), (2). Those allegations, the court held, are sufficient to meet the exception's requirements.

The court assumed that the foreign effect, *i.e.,* higher prices in Ukraine, Panama, Australia, and Ecuador, was independent of the domestic effect, *i.e.,* higher domestic prices. But it concluded that, in light of the FTAIA's text, legislative history, and the policy goal of deterring harmful price-fixing activity, this lack of connection does not matter. The District of Columbia Circuit denied rehearing *en banc* by a 4-to-3 vote.

II

The FTAIA seeks to make clear to American exporters (and to firms doing business abroad) that the Sherman Act does not prevent them from entering into business arrangements (say, joint-selling arrangements), however anticompetitive, as long as those arrangements adversely affect only foreign markets. See H.R.Rep. No. 97-686, pp. 1-3, 9-10 (1982), U.S. Code Cong. & Admin. News 1982, 2487, 2487-2488, 2494-2495 (hereinafter House Report). It does so by removing from the Sherman Act's reach, (1) export activities and (2) other commercial activities taking place abroad, *unless* those activities adversely affect domestic commerce, imports to the United States, or exporting activities of one engaged in such activities within the United States.

The FTAIA says:

"Sections 1 to 7 of this title [the Sherman Act] shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless--

(1) such conduct has a direct, substantial, and reasonably foreseeable effect--

(A) on trade or commerce which is not trade or commerce with foreign nations [*i.e.,* domestic trade or commerce], or on import trade or import commerce with foreign nations; or

(B) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States [*i.e.,* on an American export competitor]; and

(2) such effect gives rise to a claim under the provisions of sections 1 to 7 of this title, other than this section.

If sections 1 to 7 of this title apply to such conduct only because of the operation of paragraph (1)(B), then sections 1 to 7 of this title shall apply to such conduct only for injury to export business in the United States." 15 U.S.C. § 6a.

This technical language initially lays down a general rule placing *all* (non-import) activity involving foreign commerce outside the Sherman Act's reach. It then brings such conduct back within the Sherman Act's reach *provided that* the conduct *both* (1) sufficiently affects American commerce, *i.e.,* it has a "direct, substantial, and reasonably foreseeable effect" on American domestic, import, or (certain) export commerce, *and* (2) has an effect of a kind that antitrust law considers harmful, *i.e.,* the "effect" must "giv[e] rise to a [Sherman Act] claim." § § 6a(1), (2).

We ask here how this language applies to price-fixing activity that is in significant

part foreign, that has the requisite domestic effect, and that also has independent foreign effects giving rise to the plaintiff's claim.

III

Respondents make a threshold argument. They say that the transactions here at issue fall outside the FTAIA because the FTAIA's general exclusionary rule applies only to conduct involving exports. The rule says that the Sherman Act "shall not apply to conduct involving trade or commerce (other than import trade or import commerce) *with* foreign nations." The word "with" means *between* the United States and foreign nations. And, they contend, commerce between the United States and foreign nations that is not import commerce must consist of export commerce--a kind of commerce irrelevant to the case at hand.

The difficulty with respondents' argument is that the FTAIA originated in a bill that initially referred only to "export trade or export commerce." H.R. 5235, 97th Cong., 1st Sess., § 1 (1981). But the House Judiciary Committee subsequently changed that language to "trade or commerce (other than import trade or import commerce)." 15 U.S.C. § 6a. And it did so deliberately to include commerce that did not involve American exports but which was wholly foreign.

The House Report says in relevant part:

> "The Subcommittee's 'export' commerce limitation appeared to make the amendments inapplicable to transactions that were neither import nor export, *i.e.,* transactions within, between, or among other nations .... *Such foreign transactions should, for the purposes of this legislation, be treated in the same manner as export transactions*--that is, there should be no American antitrust jurisdiction absent a direct, substantial and reasonably foreseeable effect on domestic commerce or a domestic competitor. The Committee Amendment therefore deletes references to 'export' trade, and substitutes phrases such as 'other than import' trade. *It is thus clear that wholly foreign transactions as well as export transactions are covered by the amendment,* but that import transactions are not." House Report 9-10, U.S.Code Cong. & Admin.News 1982, 2487, 2494-2495 (emphases added).

For those who find legislative history useful, the House Report's account should end the matter. Others, by considering carefully the amendment itself and the lack of any other plausible purpose, may reach the same conclusion, namely that the FTAIA's general rule applies where the anticompetitive conduct at issue is foreign.

IV

We turn now to the basic question presented, that of the exception's application. Because the underlying antitrust action is complex, potentially raising questions not directly at issue here, we reemphasize that we base our decision upon the following: The price-fixing conduct significantly and adversely affects both customers outside the United States and customers within the United States, but the adverse foreign effect is

independent of any adverse domestic effect. In these circumstances, we find that the FTAIA exception does not apply (and thus the Sherman Act does not apply) for two main reasons.

First, this Court ordinarily construes ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations. This rule of construction reflects principles of customary international law--law that (we must assume) Congress ordinarily seeks to follow.

This rule of statutory construction cautions courts to assume that legislators take account of the legitimate sovereign interests of other nations when they write American laws. It thereby helps the potentially conflicting laws of different nations work together in harmony--a harmony particularly needed in today's highly interdependent commercial world.

No one denies that America's antitrust laws, when applied to foreign conduct, can interfere with a foreign nation's ability independently to regulate its own commercial affairs. But our courts have long held that application of our antitrust laws to foreign anticompetitive conduct is nonetheless reasonable, and hence consistent with principles of prescriptive comity, insofar as they reflect a legislative effort to redress *domestic* antitrust injury that foreign anticompetitive conduct has caused.

But why is it reasonable to apply those laws to foreign conduct *insofar as that conduct causes independent foreign harm and that foreign harm alone gives rise to the plaintiff's claim?* Like the former case, application of those laws creates a serious risk of interference with a foreign nation's ability independently to regulate its own commercial affairs. But, unlike the former case, the justification for that interference seems insubstantial. See Restatement § 403(2) (determining reasonableness on basis of such factors as connections with regulating nation, harm to that nation's interests, extent to which other nations regulate, and the potential for conflict). Why should American law supplant, for example, Canada's or Great Britain's or Japan's own determination about how best to protect Canadian or British or Japanese customers from anticompetitive conduct engaged in significant part by Canadian or British or Japanese or other foreign companies?

We recognize that principles of comity provide Congress greater leeway when it seeks to control through legislation the actions of *American* companies, see Restatement § 402; and some of the anticompetitive price-fixing conduct alleged here took place in *America.* But the higher foreign prices of which the foreign plaintiffs here complain are not the consequence of any domestic anticompetitive conduct *that Congress sought to forbid,* for Congress did not seek to forbid any such conduct insofar as it is here relevant, *i.e.,* insofar as it is intertwined with foreign conduct that causes independent foreign harm. Rather Congress sought to *release* domestic (and foreign) anticompetitive conduct from Sherman Act constraints when that conduct causes foreign harm. Congress, of

course, did make an exception where that conduct also causes domestic harm. See House Report 13, U.S.Code Cong. & Admin.News 1982, 2487, 2498 (concerns about American firms' participation in international cartels addressed through "domestic injury" exception). But any independent domestic harm the foreign conduct causes here has, by definition, little or nothing to do with the matter.

We thus repeat the basic question: Why is it reasonable to apply this law to conduct that is significantly foreign *insofar as that conduct causes independent foreign harm and that foreign harm alone gives rise to the plaintiff's claim?* We can find no good answer to the question.

The Areeda and Hovenkamp treatise notes that under the Court of Appeals' interpretation of the statute

> "a Malaysian customer could ... maintain an action under United States law in a United States court against its own Malaysian supplier, another cartel member, simply by noting that unnamed third parties injured [in the United States] by the American [cartel member's] conduct would also have a cause of action. Effectively, the United States courts would provide worldwide subject matter jurisdiction to any foreign suitor wishing to sue its own local supplier, but unhappy with its own sovereign's provisions for private antitrust enforcement, provided that a different plaintiff had a cause of action against a different firm for injuries that were within U.S. [other-than-import] commerce. It does not seem excessively rigid to infer that Congress would not have intended that result." P. Areeda & H. Hovenkamp, Antitrust Law ¶ 273, pp. 51-52 (Supp.2003).

We agree with the comment. We can find no convincing justification for the extension of the Sherman Act's scope that it describes.

Respondents reply that many nations have adopted antitrust laws similar to our own, to the point where the practical likelihood of interference with the relevant interests of other nations is minimal. Leaving price fixing to the side, however, this Court has found to the contrary. See, *e.g., Hartford Fire,* 509 U.S. at 797-799, 113 S.Ct. 2891 (noting that the alleged conduct in the London reinsurance market, while illegal under United States antitrust laws, was assumed to be perfectly consistent with British law and policy).

Regardless, even where nations agree about primary conduct, say price fixing, they disagree dramatically about appropriate remedies. The application, for example, of American private treble-damages remedies to anticompetitive conduct taking place abroad has generated considerable controversy. And several foreign nations have filed briefs here arguing that to apply our remedies would unjustifiably permit their citizens to bypass their own less generous remedial schemes, thereby upsetting a balance of competing considerations that their own domestic antitrust laws embody.

These briefs add that a decision permitting independently injured foreign plaintiffs to pursue private treble-damages remedies would undermine foreign nations' own antitrust

enforcement policies by diminishing foreign firms' incentive to cooperate with antitrust authorities in return for prosecutorial amnesty.

Respondents alternatively argue that comity does not demand an interpretation of the FTAIA that would exclude independent foreign injury cases *across the board.* Rather, courts can take (and sometimes have taken) account of comity considerations case by case, abstaining where comity considerations so dictate.

In our view, however, this approach is too complex to prove workable. The Sherman Act covers many different kinds of anticompetitive agreements. Courts would have to examine how foreign law, compared with American law, treats not only price fixing but also, say, information-sharing agreements, patent-licensing price conditions, territorial product resale limitations, and various forms of joint venture, in respect to both primary conduct and remedy. The legally and economically technical nature of that enterprise means lengthier proceedings, appeals, and more proceedings--to the point where procedural costs and delays could themselves threaten interference with a foreign nation's ability to maintain the integrity of its own antitrust enforcement system. Even in this relatively simple price-fixing case, for example, competing briefs tell us (1) that potential treble-damage liability would help enforce widespread anti-price-fixing norms (through added deterrence) and (2) the opposite, namely that such liability would hinder antitrust enforcement (by reducing incentives to enter amnesty programs). How could a court seriously interested in resolving so empirical a matter--a matter potentially related to impact on foreign interests--do so simply and expeditiously?

We conclude that principles of prescriptive comity counsel against the Court of Appeals' interpretation of the FTAIA. Where foreign anticompetitive conduct plays a significant role and where foreign injury is independent of domestic effects, Congress might have hoped that America's antitrust laws, so fundamental a component of our own economic system, would commend themselves to other nations as well. But, if America's antitrust policies could not win their own way in the international marketplace for such ideas, Congress, we must assume, would not have tried to impose them, in an act of legal imperialism, through legislative fiat.

Second, the FTAIA's language and history suggest that Congress designed the FTAIA to clarify, perhaps to limit, but not *to expand* in any significant way, the Sherman Act's scope as applied to foreign commerce. And we have found no significant indication that at the time Congress wrote this statute courts would have thought the Sherman Act applicable in these circumstances.

The Solicitor General and petitioners tell us that they have found no case in which any court applied the Sherman Act to redress foreign injury in such circumstances. And respondents themselves apparently conceded as much at a May 23, 2001, hearing before the District Court below.

Nevertheless, respondents now have called to our attention six cases, three decided by this Court and three decided by lower courts. In the first three cases the defendants included both American companies and foreign companies jointly engaged in anticompetitive behavior having both foreign and domestic effects. See *Timken Roller Bearing Co. v. United States,* 341 U.S. 593 (1951) (agreements among American, British, and French corporations to eliminate competition in the manufacture and sale of antifriction bearings in world, including United States, markets); *United States v. National Lead Co.,* 332 U.S. 319, 325-328 (1947) (international cartels with American and foreign members, restraining international commerce, including United States commerce, in titanium pigments); *United States v. American Tobacco Co.,* 221 U.S. 106, 171- 172 (1911) (American tobacco corporations agreed in England with British company to divide world markets). In all three cases the plaintiff sought relief, including relief that might have helped to protect those injured abroad.

In all three cases, however, the plaintiff was the Government of the United States. A Government plaintiff, unlike a private plaintiff, must seek to obtain the relief necessary to protect the public from further anticompetitive conduct and to redress anticompetitive harm. And a Government plaintiff has legal authority broad enough to allow it to carry out this mission. This difference means that the Government's ability, in these three cases, to obtain relief helpful to those injured abroad tells us little or nothing about whether this Court would have awarded similar relief at the request of private plaintiffs.

Neither did the Court focus explicitly in its opinions on a claim that the remedies sought to cure only independently caused foreign harm. Thus the three cases tell us even less about whether this Court then thought that foreign private plaintiffs could have obtained foreign relief based solely upon such independently caused foreign injury.

Respondents also refer to three lower court cases brought by private plaintiffs. In the first, *Industria Siciliana Asfalti, Bitumi, S.p.A. v. Exxon Research & Engineering Co.,* 977 WL 1353 (S.D.N.Y., Jan.18, 1977), a District Court permitted an Italian firm to proceed against an American firm with a Sherman Act claim based upon a purely foreign injury, *i.e.,* an injury suffered in Italy. The court made clear, however, that the foreign injury was "*inextricably bound up with ... domestic restraints of trade,*" and that the plaintiff *"was injured ... by reason of an alleged restraint of our domestic trade,*" *id.,* at *11, *12 (emphasis added), *i.e.,* the foreign injury was dependent upon, *not independent of,* domestic harm.

In the second case, *Dominicus Americana Bohio v. Gulf & Western Industries, Inc.,* 473 F. Supp. 680 (S.D.N.Y.1979), a District Court permitted Dominican and American firms to proceed against a competing American firm and the Dominican Tourist Information Center with a Sherman Act claim based upon injury apparently suffered in the Dominican Republic. The court, in finding the Sherman Act applicable, weighed several different factors, including the participation of American firms in the unlawful conduct, the partly domestic nature of both conduct and harm (to American tourists, a

kind of "export"), and the fact that the domestic harm depended in part upon the foreign injury. The court did not separately analyze the legal problem before it in terms of independently caused foreign injury. Its opinion simply does not discuss the matter. It consequently cannot be taken as significant support for application of the Sherman Act here.

The third case, *Hunt v. Mobil Oil Corp.,* 550 F.2d 68, 72 (C.A.2 1977), involved a claim by Hunt, an independent oil producer with reserves in Libya, that other major oil producers in Libya and the Persian Gulf (the "seven majors") had conspired in New York and elsewhere to make it more difficult for Hunt to reach agreement with the Libyan government on production terms and thereby eliminate him as a competitor. The case can be seen as involving a primarily foreign conspiracy designed to bring about foreign injury in Libya. But, as in *Dominicus,* the court nowhere considered the problem of independently caused foreign harm. Rather, the case was about the "act of state" doctrine, and the sole discussion of Sherman Act applicability--one brief paragraph--refers to other matters. We do not see how Congress could have taken this case as significant support for the proposition that the Sherman Act applies in present circumstances.

The upshot is that no pre-1982 case provides significant authority for application of the Sherman Act in the circumstances we here assume. Indeed, a leading contemporaneous lower court case contains language suggesting the contrary. See *Timberlane Lumber Co. v. Bank of America, N. T. & S. A.,* 549 F.2d 597, 613 (C.A.9 1976) (insisting that the foreign conduct's domestic effect be "sufficiently large to present a cognizable injury *to the plaintiffs*" (emphasis added)).

Taken together, these two sets of considerations, the one derived from comity and the other reflecting history, convince us that Congress would not have intended the FTAIA's exception to bring independently caused foreign injury within the Sherman Act's reach.

V

Respondents point to several considerations that point the other way. For one thing, the FTAIA's language speaks in terms of the Sherman Act's *applicability* to certain kinds of *conduct.* The FTAIA says that the Sherman Act applies to foreign "conduct" with a certain kind of harmful domestic effect. Why isn't that the end of the matter? How can the Sherman Act both *apply to the conduct* when one person sues but *not apply to the same conduct* when another person sues? The question of who can or cannot sue is a matter for other statutes (namely, the Clayton Act) to determine.

Moreover, the exception says that it applies if the conduct's domestic effect gives rise to "*a* claim," not to "*the plaintiff's* claim" or "*the* claim *at issue.*" 15 U.S.C. § 6a(2) (emphasis added). The alleged conduct here did have domestic effects, and those effects were harmful enough to give rise to "a" claim. Respondents concede that this claim is not their own claim; it is someone else's claim. But, linguistically speaking, they say, that

is beside the point. Nor did Congress place the relevant words "gives rise to a claim" in the FTAIA to suggest any geographical limitation; rather it did so for a here neutral reason, namely, in order to make clear that the domestic effect must be an *adverse* (as opposed to a beneficial) effect.

Despite their linguistic logic, these arguments are not convincing. Linguistically speaking, a statute can apply and not apply to the same conduct, depending upon other circumstances; and those other circumstances may include the nature of the lawsuit (or of the related underlying harm). It also makes linguistic sense to read the words "a claim" as if they refer to the "plaintiff's claim" or "the claim at issue."

At most, respondents' linguistic arguments might show that respondents' reading is the more natural reading of the statutory language. But those arguments do not show that we *must* accept that reading. And that is the critical point. The considerations previously mentioned--those of comity and history--make clear that the respondents' reading is not consistent with the FTAIA's basic intent. If the statute's language reasonably permits an interpretation consistent with that intent, we should adopt it. And, for the reasons stated, we believe that the statute's language permits the reading that we give it.

Finally, respondents point to policy considerations that we have previously discussed, namely, that application of the Sherman Act in present circumstances will (through increased deterrence) help protect Americans against foreign-caused anticompetitive injury. As we have explained, however, the plaintiffs and supporting enforcement-agency *amici* have made important experience-backed arguments (based upon amnesty-seeking incentives) to the contrary. We cannot say whether, on balance, respondents' side of this empirically based argument or the enforcement agencies' side is correct. But we can say that the answer to the dispute is neither clear enough, nor of such likely empirical significance, that it could overcome the considerations we have previously discussed and change our conclusion.

For these reasons, we conclude that petitioners' reading of the statute's language is correct. That reading furthers the statute's basic purposes, it properly reflects considerations of comity, and it is consistent with Sherman Act history.

VI

We have assumed that the anticompetitive conduct here independently caused foreign injury; that is, the conduct's domestic effects did not help to bring about that foreign injury. Respondents argue, in the alternative, that the foreign injury was not independent. Rather, they say, the anticompetitive conduct's domestic effects were linked to that foreign harm. Respondents contend that, because vitamins are fungible and readily transportable, without an adverse domestic effect (*i.e.,* higher prices in the United States), the sellers could not have maintained their international price-fixing arrangement and respondents would not have suffered their foreign injury. They add that this "but for" condition is sufficient to bring the price-fixing conduct within the scope of the FTAIA's

exception.

The Court of Appeals, however, did not address this argument, and, for that reason, neither shall we. Respondents remain free to ask the Court of Appeals to consider the claim. The Court of Appeals may determine whether respondents properly preserved the argument, and, if so, it may consider it and decide the related claim.

For these reasons, the judgment of the Court of Appeals is vacated, and the case is remanded for further proceedings consistent with this opinion.

NOTES

1. On remand, the D.C. Circuit addressed the appellants claim that the foreign injury complained of was not independent of domestic harm and, therefore, was within the jurisdiction of the Sherman Act, as defined by the FTAIA. The court rejected the appellants' theory that "because vitamins are fungible and readily transportable, without an adverse domestic effect (*i.e.,* higher prices in the United States), the sellers could not have maintained their international price-fixing arrangement and respondents would not have suffered their foreign injury." The court concluded that the "but for" causal relationship asserted by appellants did not satisfy the direct causal relationship required by the language of the statute, i.e., that "such effect *gives rise to* a claim…" Because the U.S. effects of the appellees' allegedly anti-competitive conduct did not give rise to their claims, the court did not have jurisdiction. *Empagran S.A. v. F. Hoffmann-LaRoche, Ltd.*, 417 F.3d 1267 (D.C. Cir. 2005).

2. Did *Empagran* settle questions regarding what conduct is covered by the Sherman Act? Did it address who has standing to bring suit under the Sherman Act? Did the D.C. Circuit provide a workable test for distinguishing harm that is interdependent from that which is independent?

3. In addition to jurisdictional defenses, Congress has provided certain statutory exemptions for exporters concerned with possible U.S. antitrust risks. This next section looks at the Export Trading Company Act, as well as the Chlor/Alkali Certificate of Review and subsequent actions brought based on the issuance of the Certificate.

Excerpts from the Export Trading Company Act of 1982, 15 U.S.C. §§ 4001-4003, 4011-4021.

§ 4001. Congressional findings and declaration of purpose

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(b) It is the purpose of this Act 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.

§ 4002(§ 103). Definitions

(a) For purposes of this title --

(1) the term "export trade" means trade or commerce in goods or services produced in the United States which are exported, or in the course of being exported, from the United States to any other country;

(2) the term "services" includes, but is not limited to, accounting, amusement, architectural, automatic data processing, business, communications, construction franchising and licensing, consulting, engineering, financial, insurance, legal, management, repair, tourism, training, and transportation services;

(3) the term "export trade services" includes, but is not limited to, consulting, international market research, advertising, marketing, insurance, product research and design, legal assistance, transportation, including trade documentation and freight forwarding, communication and processing of foreign orders to and for exporters and foreign purchasers, warehousing, foreign exchange, financing, and taking title to goods, when provided in order to facilitate the export of goods or services produced in the United States;

(4) the term "export trading company" means a person, partnership, association, or similar organization, whether operated for profit or as a nonprofit organization, which does business under the laws of the United States or any State and which is organized and operated principally for purposes of--

(A) exporting goods or services produced in the United States; or

(B) facilitating the exportation of goods or services produced in the United States by unaffiliated persons by providing one or more export trade services;

****

(7) the term "antitrust laws" means the antitrust laws as defined in subsection (a)

of the first section of the Clayton Act (15 U.S.C. § 12(a)), section 5 of the Federal Trade Commission Act (15 U.S.C. § 45) to the extent that section 5 [15 USCS § 45] applies to unfair methods of competition, and any State antitrust or unfair competition law.

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§ 4011. Export trade promotion; duties of Secretary of Commerce

To promote and encourage export trade, the Secretary may issue certificates of review and advise and assist any person with respect to applying for certificates of review.

§ 4012 (§ 302). Application for issuance of certificate of review

(a) Written form; limitation to export trade; compliance with regulations. To apply for a certificate of review, a person shall submit to the Secretary a written application which -

(1) specifies conduct limited to export trade, and

(2) is in a form and contains any information, including information pertaining to the overall market in which the applicant operates, required by rule or regulation promulgated under section 310 [15 USCS § 4020].

(b) Publication of notice of application; transmittal to Attorney General.

(1) Within ten days after an application submitted under subsection (a) is received by the Secretary, the Secretary shall publish in the Federal Register a notice that announces that an application for a certificate of review has been submitted, identifies each person submitting the application, and describes the conduct for which the application is submitted.

(2) Not later than seven days after an application submitted under subsection (a) is received by the Secretary, the Secretary shall transmit to the Attorney General--

(A) a copy of the application,

(B) any information submitted to the Secretary in connection with the application, and

(C) any other relevant information (as determined by the Secretary) in the possession of the Secretary, including information regarding the market share of the applicant in the line of commerce to which the conduct specified in the application relates.

§ 4013(§ 303). Issuance of certificate

(a) Requirements. 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 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.

(b) Time for determination; specification in certificate. Within ninety days after the Secretary receives an application for a certificate of review, the Secretary shall determine whether the applicant's export trade, export trade activities, and methods of operation meet the standards of subsection (a). If the Secretary, with the concurrence of the Attorney General, determines that such standards are met, the Secretary shall issue to the applicant a certificate of review. The certificate of review shall specify--

(1) the export trade, export trade activities, and methods of operation to which the certificate applies,

(2) the person to whom the certificate of review is issued, and

(3) any terms and conditions the Secretary or the Attorney General deems necessary to assure compliance with the standards of subsection (a).

(c) Expedited action. If the applicant indicates a special need for prompt disposition, the Secretary and the Attorney General may expedite action on the application, except that no certificate of review may be issued within thirty days of publication of notice in the Federal Register under section 302(b)(1) [15 USCS § 4012(b)(1)].

§ 4014. Reporting requirement; amendment of certificate; revocation

(a) Report of changes in matters specified; application to amend; treatment as application for issuance.

(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 certificate to reflect the effect of the change on the conduct specified in the certificate.

(2) An application for an amendment to a certificate of review shall be treated as an application for the issuance of a certificate. The effective date of an amendment shall be the date on which the application for the amendment is submitted to the Secretary.

(b) Request for compliance information; failure to provide; notice of noncompliance; revocation or modification; antitrust investigation; no civil investigative demand.

(1) If the Secretary or the Attorney General has reason to believe that the export trade, export trade activities, or methods of operation of a person holding a certificate of review no longer comply with the standards of section 303(a) [15 USCS § 4013(a)], the Secretary shall request such information from such person as the Secretary or the Attorney General deems necessary to resolve the matter of compliance. Failure to comply with such request shall be grounds for revocation of the certificate under paragraph (2).

(2) If the Secretary or the Attorney General determines that the export trade, export trade activities, or methods of operation of a person holding a certificate no longer comply with the standards of section 303(a) [15 USCS § 4013(a)], or that such person has failed to comply with a request made under paragraph (1), the Secretary shall give written notice of the determination to such person. The notice shall include a statement of the circumstances underlying, and the reasons in support of, the determination. In the 60-day period beginning 30 days after the notice is given, the Secretary shall revoke the certificate or modify it as the Secretary or the Attorney General deems necessary to cause the certificate to apply only to the export trade, export trade activities, or methods of operation which are in compliance with the standards of section 303(a) [15 USCS § 4013(a)].

(3) For purposes of carrying out this subsection, the Attorney General, and the Assistant Attorney General in charge of the antitrust division of the Department of Justice, may conduct investigations in the same manner as the Attorney General and the Assistant Attorney General conduct investigations under section 3 of the Antitrust Civil Process Act [15 USCS § 1312], except that no civil investigative demand may be issued to a person to whom a certificate of review is issued if such person is the target of such investigation.

§ 4015 Judicial review; admissibility

(a) District court review of grants or denials; erroneous determination. If the Secretary grants or denies, in whole or in part, an application for a certificate of review or for an amendment to a certificate, or revokes or modifies a certificate pursuant to section 304(b) [15 USCS § 4014(b)], any person aggrieved by such determination may, within 30 days of the determination, bring an action in any appropriate district court of the United States to set aside the determination on the ground that such determination is erroneous.

(b) Exclusive provision for review. Except as provided in subsection (a), no action by the Secretary or the Attorney General pursuant to this title shall be subject to judicial review.

(c) Inadmissibility in antitrust proceedings. If the Secretary denies, in whole or in part, an application for a certificate of review or for an amendment to a certificate, or revokes or amends a certificate, neither the negative determination nor the statement of reasons therefor shall be admissible in evidence, in any administrative or judicial proceeding, in support of any claim under the antitrust laws.

§ 4016. Protection conferred by certificate of review

(a) Protection from civil or criminal antitrust actions. Except as provided in subsection (b), no criminal or civil action may be brought under the antitrust laws against a person to whom a certificate of review is issued which is based on conduct which is specified in, and complies with the terms of, a certificate issued under section 303 [15 USCS § 4013] which certificate was in effect when the conduct occurred.

(b) Special restraint of trade civil action; time limitations; certificate governed conduct presumed in compliance; award of costs to successful defendant; suit by Attorney General.

(1) Any person who has been injured as a result of conduct engaged in under a certificate of review may bring a civil action for injunctive relief, actual damages, the loss of interest on actual damages, and the cost of suit (including a reasonable attorney's fee) for the failure to comply with the standards of section 303(a) [15 USCS § 4013(a)]. Any action commenced under this title [15 USCS §§ 4011 et seq.] shall proceed as if it were an action commenced under section 4 or section 16 of the Clayton Act [15 USCS § 15 or 26], except that the standards of section 303(a) of this title [15 USCS § 4013(a)] and the remedies provided in this paragraph shall be the exclusive standards and remedies applicable to such action.

(2) Any action brought under paragraph (1) shall be filed within two years of the date the plaintiff has notice of the failure to comply with the standards of section 303(a) [15 USCS § 4013(a)] but in any event within four years after the cause of action accrues.

(3) In any action brought under paragraph (1), there shall be a presumption that conduct which is specified in and complies with a certificate of review does comply with the standards of section 303(a) [15 USCS § 4013(a)].

(4) In any action brought under paragraph (1), if the court finds that the conduct does comply with the standards of section 303(a) [15 USCS § 4013(a)], the court shall award to the person against whom the claim is brought the cost of suit attributable to defending against the claim (including a reasonable attorney's fee).

(5) The Attorney General may file suit pursuant to section 15 of the Clayton Act (15 U.S.C. 25) to enjoin conduct threatening clear and irreparable harm to the national interest.

****

§ 4021. Definitions

As used in this title --

(1) the term "export trade" means trade or commerce in goods, wares, merchandise, or services exported, or in the course of being exported, from the United States or any territory thereof to any foreign nation,

(2) the term "service" means intangible economic output, including, but not limited to--

(A) business, repair, and amusement services,

(B) management, legal, engineering, architectural, and other professional services, and

(C) financial, insurance, transportation, informational and any other data-based services, and communication services,

(3) the term "export trade activities" means activities or agreements in the course of export trade,

(4) the term "methods of operation" means any method by which a person conducts or proposes to conduct export trade,

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Export Trade Certificate of Review for Chlor/Alkali Producers International, App. No. 84-00034.

Chlor/Alkali Producers International ("Chlor/Alkali"), a joint venture, has applied to the Department of Commerce for a certificate of review under the [ETC] Act and its implementing regulations.

The application was deemed submitted on November 1, 1984 and a summary of the application was published in the Federal Register on November 15, 1984.

The Department of Commerce and the Department of Justice have reviewed the application and other information in their possession.

Based on analysis of this information, the Department of Commerce has determined, and the Department of Justice concurs, that the Export Trade, Export Trade Activities and Methods of Operation set forth below meet the four standards set forth in section 303(a) of the Act.

Accordingly, under the authority of the Act and the Regulations, Chlor/Alkali and the members are certified to engage in the Export Trade Activities and Methods of Operation described below in the following Export Trade and Export Markets:

Export Trade

Caustic soda and chlorine.

Export Markets

The Export Markets include all parts of the world except the United States (the fifty states of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, American Samoa, Guam, the Commonwealth of the Northern Mariana Islands, and the Trust Territory of the Pacific Islands).

Export Trade Activities and Methods of Operation

1. Each member may independently dedicate the quantity of caustic soda and chlorine that it will make available to Chlor/Alkali for sale in the Export Markets.

2. Chlor/Alkali and the members may enter into agreements wherein Chlor/Alkali agrees to act as the members' exclusive export sales representative for the quantity of caustic soda and chlorine dedicated by each member for sale in the Export Markets. In such agreements, (i) Chlor/Alkali may agree not to represent any other supplier for sales in the Export Markets and (ii) the members may agree that they will export the quantity dedicated for sale in the Export Markets exclusively through Chlor/Alkali, and that they will not export independently of Chlor/Alkali either directly or through other export intermediaries.

3. The member may refuse to deal with export intermediaries other than Chlor/Alkali.

4. Chlor/Alkali may, for itself and on behalf of the members, by agreement with its distributors or agents in the Export Markets or with the members' distributors or agents in the Export Markets, or on the basis of its own determination:

a. establish the prices at which it will sell caustic soda and chlorine in the Export Markets,

b. establish the quantity of caustic soda and chlorine it will sell in the Export Markets,

c. allocate the Export Markets or customers in the Export Markets among the members' distributors or agents and/or its distributors or agents, and

d. refuse to quote prices for, or to market or sell, caustic soda and chlorine to its or its members' competitors in the Export Markets.

5. Chlor/Alkali and the members may agree on the quantities and prices at which it and its members may sell caustic soda and chlorine in the Export Markets, and may also agree on territorial and customer allocations in the Export Markets among the members.

6. Chlor/Alkali may enter into nonexclusive agreements appointing export intermediaries for the sale of caustic soda and chlorine in the Export Markets. Such agreements may contain the price, quantity, territorial, and customer restrictions for the Export Markets contained in paragraph 4 above.

7. Chlor/Alkali and the members may exchange and discuss the following types of information:

a. information about sales and marketing efforts, activities and opportunities for caustic soda and chlorine for and in Export Markets, selling strategies for the Export Markets, sales for the Export Markets, contract and spot pricing in the Export Markets, projected demands in the Export Markets for caustic soda and chlorine, customary terms of sale in the Export Markets, prices and availability of caustic soda and chlorine from competitors for sales in the Export Markets, and specifications for caustic soda and chlorine by customers in the Export Markets;

b. information about what quality and quantity of, and from where and when, caustic would be available from the members for export;

c. information about terms and conditions of contracts for sales in the Export

Markets to be considered and/or bid on by Chlor/Alkali and the members;

d. information about expenses specific to exporting to and within the Export Markets, including without limitation, transportation, trans- or intermodal shipments, insurance, inland freight to port, port storage, commissions, export sales documentation and financing, and customs, duties and taxes;

e. information about U.S. and foreign legislation and regulations affecting sales for the Export Markets; and

f. information about Chlor/Alkali's operation, including without limitation, sales and distribution networks established by Chlor/Alkali in the Export Markets;

Provided that, (1) Chlor/Alkali must keep copies of all information that is exchanged in written form and (2) in all such discussions among Chlor/Alkali and the members, legal counsel must be present and must maintain an accurate and complete record of all matters discussed.

8. Chlor/Alkali and the members may prescribe the following conditions for withdrawal of coventurers from Chlor/Alkali and for admission of new coventurers;

a. A coventurer may withdraw from Chlor/Alkali as of the last day of any calendar quarter by giving 180 days' prior written notice to the remaining coventurers. The remaining coventurers shall then have the option to terminate Chlor/Alkali or to pay the withdrawing coventurer the value of its capital account, as adjusted, on the date of its withdrawal.

b. Additional coventurers may be admitted to Chlor/Alkali from time to time upon receiving a majority vote of Chlor/Alkali's Management Board, executing a counterpart of the Chlor/Alkali's Joint Venture Agreement and making such capital contribution in cash as is directed by Chlor/Alkali's Management Board.

<u>Definitions</u>

(a) "Coventurer" means a participant in the Chlor/Alkali joint venture that has been duly admitted into the joint venture in accordance with the joint venture agreement, its charter or bylaws, and has been certified by the Department of Commerce, with the concurrence of the Department of Justice, to be a member.

(b) "Export intermediary" means a person who acts as a distributor, sales representative, sales or marketing agents, or broker, or who performs similar functions, including providing or arranging for the provision of such export trade services as consulting, international market research, advertising, marketing, insurance, product research and

design, legal assistance, transportation, trade documentation and freight forwarding, communication and processing of foreign orders to and for exporters and foreign purchasers, warehousing, foreign exchange, financing, and taking title to goods.

(c) "Member" means "member" as defined in section 325.2(1) of the Regulations.

(d) "Supplier" means a person who produces, provides, or sells caustic soda or chlorine.

Members

The B.F. Goodrich Company, Kaiser Aluminum and Chemical Corporation, Occidental Chemical Corporation, and Vulcan Materials Company are each a member so long as it remains a coventurer.

Terms and Conditions of Certificate

(a) Each member of Chlor/Alkali will not intentionally disclose, directly or indirectly, any information on caustic soda or chlorine that is about its or any other supplier's costs, production, capacity, inventories, domestic prices, domestic sales, domestic orders, terms of domestic marketing or sale, or U.S. business plans, strategies, or methods to Chlor/Alkali or to any other supplier, unless such information is already generally available to the trade or public.

(b) Chlor/Alkali and its members will comply with requests made by the Department of Commerce on behalf of itself or the Department of Justice for information or documents relevant to conduct under the certificate. The Department of Commerce will request such information or documents when either the Department of Justice or the Department of Commerce believes it requires the information or documents to determine that the Export Trade, Export Trade Activities or Methods of Operation of a person protected by this certificate of review continue to comply with the standards of section 303(a) of the Act.

(c) Chlor/Alkali shall notify the Department of Commerce of a withdrawal of a coventurer from Chlor/Alkali within thirty (30) days of such withdrawal.

(d) Chlor/Alkali shall not permit any supplier to become a coventurer in Chlor/Alkali unless such supplier has been certified through amendment to this certificate to be a member of Chlor/Alkali. The preceding sentence does not prohibit discussions that Chlor/Alkali might have held or might hold with the supplier about the possibility of its becoming a coventurer, but such discussions would be subject to the normal application of the antitrust laws.

Protection Provided by Certificate

This certificate protects Chlor/Alkali, its members and their directors, officers, and

employees acting on their behalf from private treble damage actions and government criminal and civil suits under U.S. federal and state antitrust laws for the export conduct specified in the certificate and carried out during its effective period in compliance with its terms and conditions.

Effective Period of Certificate

This certificate continues in effect from the effective date indicated below until it is revoked or modified.

Other Conduct

Nothing in this certificate prohibits Chlor/Alkali and its members from engaging in conduct not specified in this certificate, but such conduct is subject to the normal application of the antitrust laws.

Disclaimer

The issuance of this certificate of review to Chlor/Alkali by the United States Government under the provisions of the Act, does not constitute, explicitly or implicitly, an endorsement or opinion of the United States Government concerning either (a) the viability or quality of the business plans of Chlor/Alkali or the members or (b) the legality of such business plans of Chlor/Alkali or the members under the laws of the United States (other than as provided in the Act) or under the laws of any foreign country.

The application of this certificate to conduct in export trade where the U.S. Government is the buyer or where the U.S. Government bears more than half the cost of the transaction is subject to the limitations set forth in Section V. (D.) of the "Guidelines for the Issuance of Export Trade Certificates of Review (Second Edition)," 50 F.R. 1786 (January 11, 1985).

In accordance with the authority granted under the Act and Regulations, this certificate of review is hereby issued to Chlor/Alkali Producers International.

Secretary of Commerce

Effective Date: Jan. 25, 1985

NOTES

1. Does the ETCA adequately take into consideration possible indirect effects on domestic competition?

2. What protections does the ETCA provide beyond what the FTAIA confers?

3. What are the risks of seeking ETCA certification versus relying on the FTAIA?

Horizons International, Inc. v. Baldridge, 811 F.2d 154 (3rd Cir. 1987)

This appeal is from an order of the district court entered in the first instance of judicial review of a decision of the Secretary of Commerce under Title III of the Export Trading Company Act of 1982. Title III authorizes the Secretary to issue certificates of review providing limited antitrust immunity to engage in specified concerted export activity if he finds that the proposed activity meets statutory requirements. The Secretary acts upon an application after publication in the Federal Register of notice of that application. The purpose of such a certificate is to provide immunity from criminal or civil action under the antitrust laws for conduct which is specified in the certificate in effect when the conduct occurred. Parties aggrieved by the grant or denial of an application may within 30 days of the Secretary's determination "bring an action in any appropriate district court of the United States to set aside the determination on the ground that such determination is erroneous."

In the instant case, the Secretary issued such a certificate to Chlor/Alkali Producers International (Chlor/Alkali), a joint venture comprising four major domestic manufacturers of caustic soda and chlorine. The plaintiffs, Horizons International, Inc. and Kenchem, Inc., are traders in caustic soda and chlorine and claim to be aggrieved by that determination. Their complaint names as defendants the Secretary and Department of Commerce and the Attorney General and Department of Justice. One of the joint venturers, Occidental Chemical Company, successfully moved to intervene. Over objections by the government the district court permitted discovery. The court denied the government's motion to dismiss the Attorney General as a party, and denied its motion for summary judgment based upon the administrative record. Based on the expanded record, which included district court discovery materials, the court vacated the certificate of review and remanded the case for further proceedings. The government and the intervenor appeal. We reverse.

I.

On November 1, 1984, Chlor/Alkali applied pursuant to *15 U.S.C. § 4012*(a) for a certificate of review for a proposed joint venture in the export sale of caustic soda and chlorine. Chlorine and caustic soda are produced simultaneously by the electrolysis of salt water. The process yields approximately 1.1 tons of caustic soda for every ton of chlorine. Although they are co-produced, chlorine and caustic soda are used for different purposes and are subject to different demand cycles. Production of both products is geared to chlorine demand because the toxic and corrosive nature of chlorine makes it

difficult to store and to transport. The application for the joint venture sought a certificate of review which would permit use of an exclusive sales agent for sale by its members of quantities of both products to be sold exclusively in foreign markets. The joint venture proposed to determine quantities to be sold, to allocate markets, to discuss and to exchange information on export-related topics among the members, to refuse to quote prices to or sell to foreign competitors, and to restrict withdrawal from or entry to the venture. It also proposed to make purchases from nonmembers. The application was submitted to the Federal Register for publication on November 9, 1984 and published on November 15, 1984. The notice specified that comments would be received within 20 days after publication.

Upon the filing of the application the Secretary was required to act upon it within ninety days. Since Title III also provides for expedited review if an applicant indicates a need for prompt disposition, Chlor/Alkali sought expedited review. But it voluntarily withdrew that request when the Department of Justice indicated that its review could not be completed in the 30 days specified in section 4013(c). Thus agency action on the application was mandated no later than 90 days from November 1, 1984, or January 30, 1985. The participation of the Department of Justice was required because a certificate of review is issued "if the Secretary [of Commerce], with the concurrence of the Attorney General, determines that . . . standards [for its issuance] are met. . . ." Title III requires the Secretary to submit to the Attorney General a copy of the application, applicant information submitted in connection with it, and any other information the Secretary deems relevant.

The plaintiffs filed no comments with the agency. The Department of Commerce reviewed the materials submitted by Chlor/Alkali, interviewed other members of the industry, and made an economic analysis of the probable domestic effects of Chlor/Alkali's proposed conduct. It also reviewed judgments in antitrust cases extant against members of the caustic soda and chlorine industry. The Department's investigation was conducted because Title III mandates the issuance of a certificate to any applicant that establishes that its export trade, export trade activities, and methods of operation will --

(1) result in neither a lessening of competition or restraint of trade within the United States nor a substantial restraint of the export trade of any competition of the applicant,

(2) not unreasonably enhance, stabilize, or depress prices within the United States of 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.

On January 25, 1985, with the concurrence of the Attorney General, the Secretary issued a certificate of review, authorizing Chlor/Alkali to engage in the export trade of caustic soda and chlorine on specified conditions. This was final agency action.

II.

On February 22, 1985 the plaintiffs sued in the district court, alleging that the Secretary and the Attorney General acted erroneously, improperly, and contrary to law in issuing the certificate of review. Specifically it was alleged that the export trade, export trade activities, and methods of operation of Chlor/Alkali would: (1) result in a substantial lessening of competition or restraint of trade within the United States, or a substantial restraint of the export trade of its competitors; (2) unreasonably enhance, stabilize or depress prices of caustic soda or chlorine within the United States; and (3) constitute unfair methods of competition against competitors engaged in the export trade of those chemicals. The complaint set forth a history of antitrust law violations in the caustic soda-chlorine industry and charged an ongoing conspiracy in that industry in violation of Sections 1 and 2 of the Sherman Act. It sought a declaration that the defendants have engaged in such violations of the Sherman Act and an order setting aside the issuance of the certificate of review.

The plaintiffs undertook discovery going beyond the contents of the administrative record. Pursuant to Fed. R. Civ. P. 26(c)(1), the government moved that discovery not be had beyond the administrative record of the issuance of the certificate of review. It also sought a stay of discovery pending consideration of its summary judgment motion. It was the government's position that review was confined to the record considered by the Secretary and the Attorney General. The motion to limit discovery or stay it until consideration of the motion for summary judgment was denied on April 24, 1985. Extensive discovery ensued.

On May 6, 1985 the government moved pursuant to Fed. R. Civ. P. 12(b)(1) to dismiss the action against the Attorney General, alleging that [the Act] does not authorize judicial review of his concurrence in the Secretary's determination. The government moved simultaneously for summary judgment, relying on the administrative record which, it urged, amply supported the Secretary's action. These motions were not argued until October 18, 1985. They were denied by an order dated January 3, 1986. In ruling on the motion for summary judgment the trial court considered evidence outside the administrative record. Although the plaintiffs had not moved for summary judgment, the trial court ordered:

Chlor/Alkali's certificate of review is vacated and the matter is remanded to the Secretary of Commerce and the Attorney General. On remand, the agencies should consider the questions, set forth below, which raise genuine issues of material fact concerning whether the grant of a certificate of review to Chlor/Alkali was arbitrary, capricious, and an abuse of discretion. The order then listed 5 questions, all of which appear to be predicated upon materials obtained during discovery.

V.

The plaintiffs urge that even if review is confined to the agency record the order vacating the Secretary's determination is required. The district court agreed, ruling that even looking at the administrative record alone the agencies have not articulated a satisfactory explanation for the Chlor/Alkali certification. The court focused on two principal issues: the inclusion of chlorine in the certificate and the alleged failure to consider two outstanding antitrust consent decrees involving the caustic soda-chlorine industry. Before addressing the district court's ruling on the agency's record it is appropriate to describe Title III in its overall antitrust setting.

A

The Effect of Title III

In 1918, in the Webb-Pomerene Act, Congress provided that nothing in the Sherman Act of 1890 or the Wilson Tariff Act of 1894 should be construed as declaring illegal an association entered into for the sole purpose of engaging in export trade. *15 U.S.C. 62* (1982). This antitrust exemption was qualified by the provisions that the participants not act in restraint of trade within the United States, not restrain the export trade of any competitor, and not do any act which artificially or intentionally enhances or depresses prices within the United States or substantially lessens competition within the United States. Section 3 of Webb-Pomerene provided an exemption for member companies buying stock in an export association from the merger provisions of section 7 of the Clayton Act. *15 U.S.C. § 63* (1982). The purpose of the Webb-Pomerene Act was to encourage American exports by exempting exports from constraints which placed them at a competitive disadvantage in foreign trade. While at one time Webb-Pomerene associations accounted for a significant percentage of United States exports, by 1979 their impact on the export trade had declined. Webb-Pomerene was widely perceived to have failed in its intended purpose. That perception was reinforced by mounting United States balance of payments deficits.

One defect in Webb-Pomerene was that while Webb-Pomerene export associations were required to register with the Federal Trade Commission, such registration did not confer immunity from public or private antitrust enforcement. Thus members of export

associations remained at risk after the fact determinations that their activities were not exempt. That perceived defect was addressed in Title III. The Export Trading Company Act is the product of a compromise between House and Senate bills having similar purposes. The House version would have permitted an export trading association to obtain from the Attorney General a binding advisory opinion about proposed export activity, which would protect the holder from antitrust liability. The Senate version proposed to house the exempting function in the Commerce Department. As enacted Title III requires that the Secretary of Commerce issue the certificate with the concurrence of the Attorney General.

Oddly, Title III does not purport to repeal Webb-Pomerene. However several of the limitations on the Secretary's certificating authority found in section 303(a) of Title III parallel those found in section 2 of that 1918 legislation. The Senate Report notes that the section 303(a) standards for certification are to a large extent "a codification of court interpretations of the Webb-Pomerene exemption to antitrust law." The exempting language of Webb-Pomerene has over the years received considerable judicial and Federal Trade Commission scrutiny. See, e.g., *United States v. Concentrated Phosphate Export Ass'n, 393 U.S. 199, 21 L. Ed. 2d 344, 89 S. Ct. 361 (1968)* (Webb-Pomerene Act does apply to foreign aid transactions financed by the public).

Section 303(a) borrows, as well, from section 5 of the Federal Trade Commission Act, proscribing approval of activities and methods of operation by an application which "constitute unfair methods of competition against competitors engaged in the export of goods, wares, merchandise or services" Cases interpreting the "unfair methods of competition" language of section 5 of the Federal Trade Commission Act are, of course, legion. The Webb-Pomerene Act did not immunize its beneficiaries from enforcement under section 5. To the contrary, section 4 of that Act provided that the prohibition against unfair competition in section 5 and the remedies in the Federal Trade Commission Act "shall be construed as extending to unfair methods of competition used in export trade against competitors engaged in export trade, even though the acts constituting such unfair method are done without the territorial jurisdiction of the United States." Because it was proposed that Title III would confer on a certificate holder immunity from actions brought pursuant to the Federal Trade Commission Act, Congress incorporated in section 303(a) of that title the same prohibition that applied by virtue of section 4 of Webb-Pomerene.

The final exemption standard in section 303(a) provides that the applicants' proposed activities or methods of operation "not include any act that may reasonably be expected to result in the sale for consumption or resale within the United States of goods, wares, merchandise or services exported by the applicants." Although no identical language appears in Webb-Pomerene, that act implicitly prohibited export and reimportation since it covered only the export trade. The quoted language is in any event similar to that contained in section 2(a) of the Robinson-Patman Act. *15 U.S.C. § 13*(a) (1982). The Commerce Department has suggested that under this standard the Secretary and the

Attorney General "will look at whether the applicant reasonably expects the exported goods or services to re-enter the United States for sale or consumption, and if so, whether such sale or consumption within the United States may have a significant domestic impact." Guidelines for the Issuance of Export Trade Certificates of Review, *48 Fed. Reg. 15937, 15940 (1983).* This interpretation has been suggested to be consistent with the sparse caselaw interpreting section 2(a) of Robinson-Patman.

Thus the substantive standards in section 303(a) for issuance of certificates of exemption are standards which at the time of their enactment were familiar matters in the antitrust law. The certificate procedure differs, however, from familiar antitrust law in that it contemplates not a determination of liability based upon events which occurred in the past, but an advisory opinion that if contemplated activities occur they will not result in antitrust liability. That being the case, the agency has adopted a regulation requiring the applicant for such an advisory opinion to set forth the details of the course of conduct sought to be exempted and to specify the antitrust concern, if any, raised by that export conduct. The application must include "a description of each member's domestic (including import) and export operations, including the nature of its business, the types of products or services in which it deals, and the places where it does business," and "[a] description of the goods or services which the applicant exports or proposes to export under the certificate of review." Information about the geographic areas in the United States in which each applicant sells its goods and services and all information available to the applicant about total sales of such goods and services must also be included. If, after an application has been submitted, either the Secretary or the Attorney General finds that additional information is necessary in order to make a determination, the applicant must furnish it, thereby suspending the running of time for completing the determination. The information required of applicants appears to be reasonably calculated to permit the rendition of the requested opinion on the legality of the proposed conduct.

The consequences of the issuance of a certificate are specified in section 306 of Title III. As noted at the outset of the opinion, "no criminal or civil action may be brought under the antitrust laws against a person to whom a certificate of review is issued which is based on conduct which is specified in, and complies with the terms of, a certificate . . . in effect when the conduct occurred." Thus neither the government nor a private party suing under section 4 or 12 of the Clayton Act, *15 U.S.C. §§ 15,* 22 (1982), can sue claiming that conduct which complies with the certificate violates the Sherman Act or any other federal or state antitrust law. On the other hand Title III creates a new and independent private cause of action:

> Any person who has been injured as a result of conduct engaged in under a certificate of review may bring a civil action for injunctive relief, actual damages, the loss of interest on actual damages, and the cost of suit (including a reasonable attorneys' fee) for the failure to comply with the standards of section 4013(a) of this title.

In such an action there is a presumption that conduct specified in and complying with a certificate of review does comply with those standards. A private plaintiff who loses a section 306 suit is liable for costs and attorneys' fees.

Thus the consequences in private antitrust enforcement of the issuance of a certificate of review are as follows:

(1) the legal standards set forth in section 303(a) are a complete substitute for legal standards which would otherwise apply by virtue of the antitrust laws;

(2) private plaintiffs may sue to enforce the section 303(a) standards, seeking either injunctive relief or damages;

(3) private plaintiffs must in such a suit overcome the presumption in section 306(b)(3) that conduct complying with a certificate comports with the legal standards of section 303(a);

(4) private plaintiffs may recover only actual, not treble damages for a violation of a section 303(a) legal standard;

(5) private plaintiffs who win may recover attorneys' fees and costs of suit, but are liable for attorneys' fees and cost of suit if they lose;

(6) conduct not in compliance with a certificate is not exempted from treble damage recovery under section 4 of the Clayton Act.

A private litigant can, therefore, in a suit against a certificate holder, go behind the Secretary's advisory opinion that the conduct specified in the certificate is legal under section 303(a) if the litigant overcomes the 306(b)(3) presumption. But the litigant cannot obtain treble damages.

The consequences of issuance of a certificate of review in public antitrust enforcement are broader. Under section 304(b)(2) a certificate may be revoked if the Secretary or the Attorney General determines that activities of the holder no longer comply with section 303(a). While they are outstanding, however, the only public antitrust enforcement which is authorized is a suit by the Attorney General pursuant to section 15 of the Clayton Act "to enjoin conduct threatening clear and irreparable harm to the national interest." Apparently this includes conduct in compliance with a certificate since conduct not in compliance is not exempt from the antitrust laws. It is not clear whether in an action by the Attorney General for injunctive relief against a certificate holder the legal standards of section 303(a), to the extent they differ from other antitrust laws, will be deemed to define the national interest.

Summarizing, the holder of a certificate is insulated both from private treble damage actions and from government criminal prosecutions. A private cause of action for actual damages or injunctive relief can be successfully prosecuted against the certificate holder only if the plaintiff can overcome the presumption that the Secretary of Commerce correctly issued the certificate. Public enforcement by the Attorney General in an action for injunctive relief is available to some as yet undetermined extent.

In an action against a certificate holder pursuant to section 306(b)(1) the plaintiff will have the procedural advantages of the Federal Rules of Civil Procedure. Aside from the presumption created by section 306(b)(3), no particular deference is owed in such an action to the agency determination. The suit will be decided by the district court on the record made in that court. Thus in a section 306(b)(1) suit the factual record to which the section 303(a) standards will be applied may be entirely different from that on which the agency acted. This also appears to be the case in an action by the Attorney General pursuant to section 306(b)(5).

B.

The instant action is not brought against Chlor/Alkali pursuant to section 306(b)(1). It is brought against the Secretary and the Attorney General pursuant to section 305(a). In Part IV above we hold that in a section 305(a) judicial review proceeding the district court must decide on the basis of the administrative record. As we note in Part I above, the agency record consists of materials submitted by Chlor/Alkali, the Commerce Department's economic analysis, interviews with other members of the industry, and extant antitrust consent decrees in the caustic soda-chlorine industry.

In determining that the joint venture would facilitate the ability of members of Chlor/Alkali to export, the Commerce Department initially found that the relevant domestic market for caustic soda manufactured by those members was the Central United States, while the relevant market for their chlorine was a three-state Gulf Region. Commerce Department staff concluded that these markets are concentrated and that each Chlor/Alkali member is a large corporation. They concluded, nevertheless, that the joint venture would enhance the members' ability to compete for export contracts because Chlor/Alkali's combined market share amounted to only 14 percent for caustic soda and 11 percent for chlorine. They noted, as well, that up to 70% of individual members' output was committed to domestic use, making it difficult for such individual members to compete effectively for large export contracts. Given the small increase in concentration that would result from the joint venture, coupled with the fact that the joint venture's potential customers are large sophisticated buyers, the staff concluded that Chlor/Alkali would not possess substantial market power and that its export activities would not be likely to affect domestic competition adversely. Finally, the staff concluded that the outstanding Chlor/Alkali consent decrees do not prohibit the activities sought to be certified. The staff noted, as well, that if a conflict arose between the certificate and an antitrust decree, the decree would control.

The Secretary adopted the staff's conclusions and its recommendation that a certificate be issued. Thus the staff memorandum contains the Secretary's findings and conclusions. The Department of Justice did not send any written recommendation to the Secretary. This inaction constitutes concurrence by the Attorney General within the meaning of section 303(b). The Secretary therefore issued the certificate on January 25, 1985.

The certificate specifies the activity that Chlor/Alkali may engage in, such as setting export prices and quantities. It also contains several conditions and restrictions. For example it requires that an attorney be present and maintain a complete and accurate record whenever discussions take place about price, sales, contracts, etc. It also prohibits any discussions of domestic price or output information and warns members that engaging in any conduct not specified in the certificate is subject to the normal application of the antitrust laws. New members cannot be added to the joint venture unless the Secretary amends the certificate.

C.

The plaintiffs, traders in caustic soda and chlorine, contend that for two substantive legal reasons the certificate should not have issued. First, plaintiffs contend that the members of Chlor/Alkali have had a history of engaging, in the domestic market, in allocating customers, stabilizing prices, limiting output, and boycotting traders like them. Second, they urge that Chlor/Alkali as a powerful new entry in the export market will have the power to exclude competitors, including the plaintiffs, from that market. Thus, they urge, the Secretary of Commerce erred in concluding that the certificate meets the legal standards of section 303(b)(1) and (3). A separate objection, more factual in nature, is that the certificate covers the export of chlorine, when in fact none of the members have in the past exported chlorine in significant quantities.

We find no merit in the plaintiffs' legal objections. After calculating the Herfindahl-Hirshman Index for the relevant domestic markets, the Commerce Department staff noted that both the chlorine and the caustic soda markets are highly concentrated. Thus, the staff noted there were structured characteristics suggesting a strong potential for oligopolistic problems. Nevertheless the staff concluded that the proposed joint venture would not be a proximate cause for giving rise to such problems because of the relatively small share of the market held by the members for each product. Were the members to merge, the staff noted, the Herfindahl measures would increase by 140 for caustic soda and 93 for chlorine, which would not suggest that Chlor/Alkali would have price-setting power in the United States even if the joint venture ignored the limitations in the certificate designed to prevent coordination in domestic pricing. The staff noted as well that customers of the Chlor/Alkali members were sophisticated buyers. Moreover the Secretary considered the history of antitrust noncompliance allegedly reflected in the

extant antitrust consent decrees, noting that they applied only to the United States and by their terms exempted Webb-Pomerene Act activities.

As to the factual contention that chlorine should not have been included, the administrative record discloses a careful consideration of that issue. Chlorine is a necessary by-product of the manufacture of caustic soda. Despite the difficulty of storing and exporting it, chlorine is exportable. According to the record one member of the joint venture, Occidental Chemical Corporation, is exporting it. Vulcan Materials Company seeks through the joint venture to establish a chlorine export market. Moreover the 1986 U.S. Industrial Outlook, U.S. Department of Commerce, shows that export of chlorine in 1985 increased. Thus there is record evidence that Chlor/Alkali is likely to export chlorine.

Given the relatively short time frame specified by Congress for completing an investigation for the purpose of determining whether to issue a certificate, the material obtained by the Commerce Department from the applicant and elsewhere, and the careful analysis made in the Commerce Department staff memorandum which the Secretary adopted, we cannot find any procedural defect in the issuance of the certificate. The agency's explanation as to why the certificate complies with the standards of section 303(a) is carefully reasoned. The reasons relied on are supported in the record. Thus the determination to issue the certificate was not arbitrary, capricious, an abuse of discretion, or a violation of the Export Trading Company Act. The district court's order setting it aside must therefore be reversed.

NOTE

1. Horizons did not comment in response to the Agency's request during the investigatory period prior to issuing the certificate. Such comments would have been included in the Administrative record and available to the court on review.

Spencer Weber Waller, *The Failure of the Export Trading Company Program*, 17 N.C. J. INT'L L. & COMM. REG. 239 (1992).

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 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 companies by banks. The $1 billion figure is reached by estimating export trade from companies with bank investments eight times the size of the equity invested by financial institutions.

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. 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.

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 and the limited number of new ETCs. 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. The most recent statistics indicate that slightly more than 4,200 firms are covered by ETC certificates of review. The vast majority of these firms are covered by virtue of their membership in trade associations. 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.

There is no evidence that certification has changed the export performance of firms passively benefiting from certification by reason of member ship 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.

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 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.

TABLE 2
CLASSIFICATION OF ETC BY NATURE OF ASSOCIATION

	1983-1986	1987-1990	TOTAL
EXPORT INTERMEDIARIES OR OTHER VERTICAL ARRANGEMENT	47	27	74
HORIZONTAL AGREEMENT AMONG COMPETITORS	21	27	48

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.

TABLE 3
EXTENT OF CERTIFICATION BY HORIZONTAL ETCS

	1983-86	1987-90	TOTAL
FULL CERTIFICATION AS EXPORT CARTEL	12	14	26
CERTIFICATION FOR LESS THAN CARTEL BEHAVIOR	9	13	22

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.

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. 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. Nor do the certificates contain any penalties for selling outside the ETC, except the possibility of expulsion from the ETC.

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 law. Virtually every state with a developed market economy enforces some form of national competition law. The 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.

NOTES

1. The ETCA supplements the older export immunity, the Webb-Pomerene Act, which dates back to 1918.

2. The most extreme activity allowed under the ETCA, FTAIA and Webb-Pomerene (discussed next) would likely run afoul of foreign antitrust laws today due in part to transparency and registration requirements. What benefits remain for exporters under the Acts?

Webb-Pomerene Act, 15 U.S.C. §§ 61-65.

15 U.S.C. § 61 Definitions

["**Export Trade**"] The words "export trade" wherever used in this Act mean solely trade or commerce in goods, wares, or merchandise exported, or in the course of being exported from the United States or any Territory thereof to any foreign nation; but the words "export trade" shall not be deemed to include the production, manufacture, or

selling for consumption or for resale, within the United States or any Territory thereof, of such goods, wares, or merchandise, or any act in the course of such production, manufacture, or selling for consumption or for resale.

["**Trade Within the United States**"] The words "trade within the United States" wherever used in this Act mean trade or commerce among the several States or in any Territory of the United States, or in the District of Columbia, or between any such Territory and another, or between any such Territory or Territories and any State or States or the District of Columbia, or between the District of Columbia and any State or States.

["**Association**"] The word "association" wherever used in this Act means any corporation or combination, by contract or otherwise, of two or more persons, partnerships, or corporations.

15 U.S.C. § 62 Export Trade and Antitrust Legislation.

Nothing contained in the Act entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," approved July second, eighteen hundred and ninety, shall be construed as declaring to be illegal an association entered into for the sole purpose of engaging in export trade and actually engaged solely in such export trade, or an agreement made or act done in the course of export trade by such association, provided such association, agreement, or act is not in restraint of trade within the United States, and is not in restraint of the export trade of any domestic competitor of such association: And provided further, That such association does not, either in the United States or elsewhere, enter into any agreement, understanding, or conspiracy, or do any act which artificially or intentionally enhances or depresses prices within the United States of commodities of the class exported by such association, or which substantially lessens competition within the United States or otherwise restrains trade therein.

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15 U.S.C. § 64 Unfair Methods of Competition in Export Trade

The prohibition against "unfair methods of competition" and the remedies provided for enforcing said prohibition contained in the Act entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," approved September twenty-sixth, nineteen hundred and fourteen, shall be construed as extending to unfair methods of competition used in export trade against competitors engaged in export trade, even though the acts constituting such unfair methods are done without the territorial jurisdiction of the United States.

15 U.S.C. § 65 Information Required from Export Trade Corporation; Powers of Federal

Trade Commission

Every association now engaged solely in export trade, within sixty days after the passage of this Act, and every association entered into hereafter which engages solely in export trade, within thirty days after its creation, shall file with the Federal Trade Commission a verified written statement setting forth the location of its offices or places of business and the names and addresses of all its officers and of all its stockholders or members, and if a corporation, a copy of its certificate or articles of incorporation and by-laws, and if unincorporated, a copy of its articles or contract of association, and on the first day of January of each year thereafter it shall make a like statement of the location of its offices or places of business and the names and addresses of all its officers and of all its stockholders or members and of all amendments to and changes in its articles or certificate of incorporation or in its articles or contract or association. It shall also furnish to the commission such information as the commission may require as to its organization, business, conduct, practices, management, and relation to other associations, corporations, partnerships, and individuals. Any association which shall fail so to do shall not have the benefit of the provisions of section two and section three of this Act and it shall also forfeit to the United States the sum of $ 100 for each and every day of the continuance of such failure, which forfeiture shall be payable into the Treasury of the United States, and shall be recoverable in a civil suit in the name of the United States brought in the district where the association has its principal office, or in any district in which it shall do business. It shall be the duty of the various district attorneys [United States attorneys], under the direction of the Attorney General of the United States, to prosecute for the recovery of the forfeiture. The costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States.

Whenever the Federal Trade Commission shall have reason to believe that an association or any agreement made or act done by such association is in restraint of trade within the United States or in restraint of the export trade of any domestic competitor of such association, or that an association either in the United States or elsewhere has entered into any agreement, understanding, or conspiracy, or done any act which artificially or intentionally enhances or depresses prices within the United States of commodities of the class exported by such association, or which substantially lessens competition within the United States or otherwise restrains trade therein, it shall summon such association, its officers, and agents to appear before it, and thereafter conduct an investigation into the alleged violations of law. Upon investigation, if it shall conclude that the law has been violated, it may make to such association recommendations for the readjustment of its business, in order that it may thereafter maintain its organization and management and conduct its business in accordance with law. If such association fails to comply with the recommendations of the Federal Trade Commission, said commission shall refer its findings and recommendations to the Attorney General of the United States for such action thereon as he may deem proper.

For the purpose of enforcing these provisions the Federal Trade Commission shall have

all the powers, so far as applicable, given it in "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes."

Note

The following case involves ANSAC, one of the seven export associations registered under the Webb-Pomerene Act. At the time of this action, Stauffer was a member of ANSAC. See the FTC website for Webb-Pomerene listings and the current registered members of ANSAC.

International Raw Materials, Inc. v. Stauffer Chemical Co., TG, 767 F.Supp. 687 (E.D.Pa. 1991).

Defendants in this antitrust case are the nation's leading producers of soda ash. Together, they comprise the "American Natural Soda Ash Corporation" (ANSAC), an export trade association registered with the Federal Trade Commission (FTC) under the Webb-Pomerene Act, 15 U.S.C. 61 et seq. Plaintiff International Raw Materials (IRM) is a Pennsylvania corporation that operates a shipping terminal in Port Longview, Washington, where it loads white dry bulk products, including soda ash, onto ocean-going vessels.

ANSAC and its members have moved for summary judgment against IRM's amended complaint, which asserts two causes of action under Section 1 of the Sherman Act, claiming to be exempt from ordinary application of the antitrust laws by virtue of their status as a Webb-Pomerene association. Under the Webb-Pomerene Act, "an association entered into for the sole purpose of engaging in export trade and actually engaged solely in such export trade" enjoys immunity from antitrust prosecution with respect to any "agreement made or act done in the course of export trade." IRM denies that ANSAC qualifies for Webb-Pomerene immunity and has cross-moved for summary judgment on the basis of the virtually unrebutted substantive allegations recited in its complaint.

The central question before me, in resolving both motions for summary judgment, is whether ANSAC and its members have asserted a valid Webb-Pomerene defense.

I.
Factual and Procedural Background

This case, like an export, comes to me having had a significant history somewhere else. This case was initiated before my colleague Judge Hannum. He, and the Court of

Appeals on review of his grant of summary judgment, have both previously summarized relevant issues and facts. International Raw Materials v. Stauffer Chemical, 716 F. Supp. 188, 191 (E.D.Pa. 1989), vacated and remanded, 898 F.2d 946 (3d Cir. 1990).

Formed in 1983, ANSAC is an association of American soda ash producers, registered under the Webb-Pomerene Act. All ANSAC members are United States corporations whose principal places of business are in the United States. Yet, with one exception, every member of ANSAC is wholly or partly foreign owned or has major foreign connections: (1) Defendant Stauffer Chemical Company is wholly owned by the French corporation, Rhone Poulenc Chemie S.A., the third largest producer of soda ash in the world. (2) Defendant TG Soda Ash is wholly owned by the French chemical conglomerate, Societe Nationale Elf Aquitaine, a major manufacturer of caustic soda (a soda ash substitute). (3) Defendant General Chemical Partners is forty-nine percent owned by Australian Consolidated Industries, a major re-seller of soda ash. (4) Defendant Tenneco Minerals has entered into a joint venture with Japanese-owned ASAHI Glass, the largest Japanese producer of soda ash, to exploit Tenneco Minerals' soda ash reserves. (5) Defendant Kerr-McGee recently sold its soda ash reserves to North American Chemical Company, which is thirty-percent owned by the largest Korean producer of soda ash, Oriental Chemical Industries. (6) Only defendant FMC Wyoming Corporation is not linked to a foreign enterprise significantly engaged in the production or sale of soda ash or caustic soda.

Prior to formation of ANSAC, the practice in the soda ash industry was for each producer to bargain individually for terminal rates and services. ANSAC changed this practice by negotiating on behalf of all of its members and demanding a common rate. As the operator of a principal terminal, IRM bargained for rates under both regimes. Its 1985 ANSAC-negotiated rate was significantly lower than the range of rates it had managed to negotiate with individual producers between 1982 and 1984; IRM attributes this reduction to the leverage imposed by ANSAC's collective bargaining.

In October of 1987, ANSAC moved its business from IRM to a rival terminal, operated by Hall Buck Marine Inc. (HBM), at the Port of Portland, Oregon. Less than a month later, IRM filed a one-count complaint in this district charging ANSAC and its members with conspiring to fix and depress prices for terminal services.

IRM's complaint was dismissed on summary judgment by Judge Hannum, who concluded -- on the basis of the complaint, the motion for summary judgment, and the motion's supporting affidavits -- that ANSAC's trade practices "fall squarely within" the Webb-Pomerene exemption. In so holding, Judge Hannum rejected IRM's contentions that ANSAC should be denied Webb-Pomerene status because (1) many ANSAC members are foreign owned, and (2) evidence may show that ANSAC's purpose in contracting with HBM "has gone beyond soda ash export and now, in reality, extends to the terminalling of white bulk chemical product," in contravention of the "sole purpose" clause of the Webb-Pomerene Act, which limits the exemption to export-related activity.

On appeal, the Third Circuit vacated the grant of summary judgment, holding that at least one factual issue -- the nature of the ANSAC-HBM relationship -- required further development before ANSAC's Webb-Pomerene defense could be properly assessed:

Appellee says that there is nothing in his relationship with Hall Buck that affects his Webb-Pomerene status and appellant says that there is. We disagree with the district court's conclusion that 'a more developed record is not required. . . .' The district court cannot decide this issue properly until it has before it the facts as to the exact nature of that relationship.

On remand, the case was reassigned to me because Judge Hannum was unwell. The parties then undertook discovery with respect to the ANSAC-HBM relationship. The details of that relationship are now clear: On October 26, 1987, ANSAC and HBM entered into a "Terminaling Agreement" (the Agreement) under which ANSAC agreed, for an initial period of five years, to export an annual minimum of 500,000 tons of soda ash through HBM's Port of Portland terminal at a rate which was substantially lower than that which it had previously bargained for with IRM. At the close of five years, ANSAC would have the option to renew the Agreement according to the same terms. If ANSAC should choose not to renew, the agreement provides as follows:

The estimated cost of construction of the Terminal is $4,3000,000. On the basis of this estimate, and an assumption that the investment cost will be amortized over fifteen (15) years, at the end of the initial five-year term of this Agreement, there will be an unamortized cost of $ 2,866,667. In the event that ANSAC does not renew the contract after the initial five-year term, ANSAC shall pay to Hall-Buck $1,433,333 within thirty (30) days after completion of five years of operation, regardless of the actual investment cost and unamortized cost. ANSAC shall have the option, exercisable by written notice to Hall-Buck, to require that an economic arrangement be entered into between ANSAC and Hall-Buck providing for ANSAC's ownership, in consideration for making the above referenced payment, of 50% of the Terminal. In such event, Hall-Buck shall be given a \tab contract to operate the Terminal for the duration of the lease on a basis to be negotiated between both parties. Parties agree that such 50 percent ownership interest by ANSAC is not intended to put ANSAC in the Terminalling business, but is rather intended to confer on ANSAC an appropriate equity interest in compensation for its contribution to the cost of the investment and that ANSAC shall have the right to sell, assign, or otherwise dispose of such ownership, provided however that Hall-Buck shall have the right of first refusal should ANSAC decide to sell its ownership interest. (Emphasis added).

In other words, the Agreement provides for an ongoing commitment of capital by ANSAC to HBM, either in the form of rates paid on a guaranteed level of annual throughput or -- if ANSAC elects not to renew after five years -- in the form of a direct cash contribution to the terminal's unamortized costs. If ANSAC elects non-renewal, ANSAC has the further option of acquiring a fifty percent interest in the terminal.

In more general terms, the Agreement describes the relationship between the parties as follows:

It is understood and agreed that Hall-Buck's operations hereunder are those of an independent contractor and that Hall-Buck has the authority to control and direct the performance of the details of the work hereunder, and it is further agreed that neither Hall-Buck nor any of Hall-Buck's employees are employees of ANSAC and that Hall-Buck is not, except as herein provided, subject to control by ANSAC.

Upon completion of discovery with regard to the ANSAC-HBM relationship, ANSAC and its members renewed their motion for summary judgment, and IRM filed its cross-motion. Hence, the present dispute.

II.

Foreign Ownership of ANSAC Members

IRM contended before Judge Hannum, and now contends on remand, that ANSAC should be denied Webb-Pomerene status because of the substantial foreign ownership and/or control of all but one of ANSAC's members. IRM submits that extensive foreign ownership or control undermines the basic purpose of the Webb-Pomerene Act -- to enable American exporters to compete more effectively abroad. United States v. Concentrated Phosphate Export Association, 393 U.S. 199 (1968).

Congress felt that American firms needed the power to form joint export associations in order to compete with foreign cartels."). Given what it perceives as an inconsistency between the Act's underlying purpose and ANSAC's membership structure, IRM maintains that ANSAC is not entitled to the exemption as a matter of law.

IRM's position -- that an association's Webb-Pomerene status is defeated by pervasive foreign ownership or control -- is not supported by any authority. The language of the Webb-Pomerene Act imposes no such qualification on membership, and there appears to be nothing in the Act's legislative history which indicates that foreign ownership or control is to be a significant factor in determining whether the exemption applies. Moreover, there appears to be no judicial or administrative authority which supports the proposition that membership in a Webb-Pomerene association turns on whether (or to what extent) a corporation is foreign owned or controlled.

Nor does it follow by simple syllogism that foreign ownership is necessarily at odds with the design of the Webb-Pomerene Act to confer domestic benefits: by virtue of the exemption the Act provides, American producers, workers, and raw materials encounter fewer competitive obstacles and thereby command easier access to international markets than would be the case if they were afforded no antitrust immunity. In other words, an

export exemption can advance American interests, even though various exporters may be foreign owned or controlled. Of course, it can be plausibly argued that the privilege of antitrust exemption should only be extended to export enterprises most or all of which are not subject to foreign control. However, it is up to Congress, not this court, to fashion the nation's trade policies within the broad limits set by the Constitution's commerce clause.

Accordingly, I conclude that ANSAC's Webb-Pomerene status is not diminished by the circumstance that most ANSAC members are foreign owned or controlled.

III.

The ANSAC-HBM Relationship

IRM also contends that ANSAC should be denied immunity because its relationship with HBM is not for the "sole purpose" of export trade and thus exceeds the scope of the Webb-Pomerene exemption. Advancing the same argument it made before Judge Hannum, this time equipped with evidence obtained through discovery and with an affidavit by an expert, Professor Herbert R. Northrup, who has analyzed that evidence and endeavored to spell out its economic implications, IRM submits that the ANSAC-HBM Agreement, and the relationship it entails, have effectively made ANSAC a participant in the general business of terminalling, in addition to its being a participant in the business of export trade.

IRM's position that the ANSAC-HBM relationship is not confined to export trade rests on a number of related claims:

IRM claims that construction of HBM's Port of Portland Terminal would not have been completed but for ANSAC's annual guarantee of a minimum of 500,000 metric tons of soda ash throughput, as provided in the ANSAC-HBM Agreement. According to IRM, this guarantee made the terminal "bankable;" it created a solid business base for obtaining further financing. Second, IRM claims that HBM arranged, in return for ANSAC's guarantee, to have ANSAC's rate for terminal services subsidized by other terminal users. That is, ANSAC's relatively lower rate is said to be the result of correspondingly higher rates charged other terminal users. n11 In this way, IRM submits, ANSAC profits from the general business of the terminal, ANSAC's future prospect of becoming (if it so chooses) a fifty percent owner of HBM's terminal, as contemplated by the renewal-default provision recited in the ANSAC-HBM Agreement, creates for ANSAC a present economic interest in the general business and overall prosperity of the terminal.

Yet, none of these allegations can sustain the claim that ANSAC has made any agreement or done any act which exceeds the scope of the protection provided by the Webb-Pomerene Act for "agreement[s] made or acts done in the course of export trade. There is no feature of the ANSAC-HBM relationship that goes so far as to make ANSAC

a direct participant, investor, or privileged beneficiary in HBM's terminal operations. That ANSAC's annual guarantee was the sine qua non of HBM's Port of Portland terminal, effectively underwriting the completion of construction, does not tend to establish that ANSAC was undertaking to advance any interest beyond that of securing a viable and efficient terminal for loading and throughputting its exports. Similarly, there is nothing to indicate that the lower rate received by ANSAC, even if subsidized to some degree by higher rates charged other terminal users, serves any purpose other than to enhance the capacity of ANSAC members to compete effectively in world markets.

Finally, the fact that ANSAC maintains an option, exercisable upon the close of the initial five-year period, to acquire fifty percent of the equity in HBM's terminal, does not add any meat to the theory that ANSAC has entered the general business of terminalling. ANSAC currently maintains no equity share in the terminal, and it is not clear that it will exercise its option and procure an equity share in the future. Thus, as things now stand, ANSAC's joint-ownership of HBM's terminal is a possibility, not a reality. Furthermore, ANSAC's future prospect of co-owning the terminal does not create for it a present economic stake in the general operations of the terminal different from that of any other terminal user; all users of HBM's terminal have an interest in the terminal's overall success and prosperity insofar as their business depends on it.

In short, even though it is not inconceivable that ANSAC may one day enter a relationship with HBM that would jeopardize its Webb-Pomerene status, that point has not been reached as of yet. The evidence of record, though providing a full view of the ANSAC-HBM relationship, cannot be construed as suggesting that ANSAC's current relationship with HBM at the Port of Portland terminal in any way exceeds the scope of activity permitted by the Webb-Pomerene Act as activity done "in the course of export trade."

It may be true, as IRM points out, that ANSAC receives a number of indirect economic benefits through its relationship with HBM at the Port of Portland terminal. And it may be true that the ANSAC-HBM relationship generates a number of adverse collateral effects, such as higher rates charged other terminal users and lower use of competing terminals by association members. However, these effects are not a basis for stripping ANSAC of its Webb-Pomerene status; rather, they are the "inevitable consequences" of legislation designed to promote American export trade at the risk of inducing and enduring some anti-competitive practices.

ANSAC's relationship with HBM, albeit complex, and though certainly involving more than a standard stevedoring agreement to have HBM's terminal load ANSAC's products, still fits wholly within the bounds of the antitrust exemption provided by the Webb-Pomerene Act for the purpose of promoting American export trade.[16]

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[16] Thus, although the FTC has rejected as inconsistent with the Act those arrangements in which an

association has in the course of its activity collided with non-members, participated in foreign manufacture, impeded the flow of imports, or denied terminal access to competitors, cf. In re Florida Hard Rock Phosphate Export Association, 40 F.T.C. 843, 860-61 (1945) (Webb-Pomerene Act does not permit association to exercise its control of a terminal by excluding non-association members); In re Export Screw Association of the United States, 43 F.T.C. 980 (1947) (Webb-Pomerene Act does not permit association to include non-members in price-fixing or to restrain foreign imports); In re Sulphur Export Corp., 43 F.T.C. 820 (1947) (Webb-Pomerene Act does not permit association to collude with non-members to restrict imports), I am aware of no instance in which the FTC or any other administrative authority or court has thought it necessary to preclude a Webb-Pomerene association from contracting to procure the services of a more cost-effective terminal as a means of enhancing its export trade.

NOTES

1. Taking into consideration activities prohibited, as discussed in n.16, what would ANSAC need to be mindful of in the five years of its contract with HBM?

2. While ANSAC was found to be immune from antitrust liability in the U.S., the same soda ash association was challenged under EU competition law. See the following decision of the European Commission.

Ansac (Decision 91/301) (OJ 1991 L152/54), OJ 1991 L152/54, 19 December 1990.

1. This decision concerns the application of art. 85 of the EEC Treaty to arrangements notified by Ansac for selling in the Community natural dense soda-ash produced in the US by its member companies for which Ansac has requested negative clearance or in the alternative exemption under art. 85(3) of the Treaty.

2. Ansac is a "Webb-Pomerene" Association--a corporation set up in accordance with the provisions of the US *Export Trade Act* 1918, commonly called the Webb-Pomerene Act. The purpose of that Act is to exclude the application of the Sherman Act to US associations engaged solely in export trade and whose activities do not restrain trade within the US.

The Ansac membership agreement relates solely to export sales, defined as sales of soda-ash produced in the US and its territories for export to any country other than Canada, except sales made under US foreign aid or procurement programmes. The EEC market was excluded up to the notification and pending its outcome Ansac has not implemented the agreement with respect to that market.

Ansac in its current form dates from 1983: its membership agreement was adopted in December of that year. It was formerly known as the Soda Ash Export Association.

3. Ansac's members are the six US producers of natural soda-ash:

- FMC Wyoming Corp ("FMC");
- General Chemical (Soda Ash) Partners (formerly known as Allied Corp) ("General Chemical");
- Kerr McGee Chemical Corp ("KMG");
- Stauffer Chemical Co (a division of Rhone-Poulene Inc., the US affiliate of the Rhone-Poulenc Group)("Stauffer");
- Tenneco Minerals Co ("Tenneco");
- TG Soda Ash Inc (a wholly owned subsidiary of Elf Aquitaine Inc, the US Affiliate of the Elf Aquitaine-Group)("Texas Gulf").

4. Soda-ash (sodium carbonate--Na_2Co_3) is a white powder used principally as raw material in glassmaking, where it accounts for approximately 60 per cent of manufacturing costs, and also in making detergents and paper and in metallurgy. It is produced by two distinct processes:

-in Europe soda-ash is produced from brine and limestone by the synthetic process developed by Solvay in the last century. Solvay's patents for the process have long expired;

-in the US almost all soda-ash is of natural origin. It is produced by refining trona ore (a mixture of sodium carbonate and sodium bicarbonate), found principally in the Green River basin in Wyoming, Colorado and Utah.

Natural soda-ash offers a number of advantages over the synthetic product. Its production uses less energy and is less labour-intensive: it is therefore cheaper to produce. It is also purer, containing only 300-600 ppm of chloride, as against 3,000 ppm for synthetic soda-ash. Removing residual chloride (for example, in the course of glass manufacture) is expensive; and if it is not removed it causes environmental pollution.

Soda-ash exists in two densities, light and dense. Either form can be produced by either process. Dense soda-ash is preferred for glassmaking and is the only form marketed by Ansac.

5. World soda-ash capacity (natural and synthetic) is currently around 36 million tonnes (nominal) per annum, of which the EEC accounts for some 7.2 million tonnes. Soda-ash consumption in the EEC is currently around 5.5 million tonnes per year, worth

some ECU 900m.

6. The US natural-ash producers have total nominal capacity of 9.5 million tonnes per year and a domestic market demand of some 6.2 million tonnes. They supply the whole of their home market and export the balance of production. Costs of production of natural-ash are very much lower than for the synthetic product, but the mines are located far from their principal markets and distribution costs are correspondingly high.

7. EEC producers tend to concentrate their end user sales in those member states where they possess production facilities. Solvay is the market leader with almost 60 per cent of the total market and sales in all member states except the UK and Ireland. The other EEC producers' approximate shares are: ICI 15 per cent; Rhone-Poulenc ten per cent; Akzo six per cent; Chemische Fabrik Kalk and Matthes & Weber five per cent each. ICI sells exclusively in the UK and Ireland where it has over 90 per cent of the market.

Some 65-70 per cent of soda-ash produced in the EEC is used in the manufacture of flat and hollow (container) glass. The glass industry has in recent years been the subject of a Europe-wide consolidation with large manufacturers operating on a pan-European basis and manufacturing in several member states.

8. The US market has since the development of natural-ash mining in the 1960s shown a substantial excess of capacity over domestic demand and a surplus of some 2.5 million tonnes is now available annually for export.

Given the over-supply and the presence of a number of producers with similar costs, the US domestic market has been characterized by strong price competition. The product has in recent years been sold at a substantial discount off the list price of $93 per short ton fob Wyoming, ex-works prices at the end of 1989 being around $73 per short ton. List prices were raised by most producers to $98 per short ton with effect from 1 July 1990 and the effective price went up to around $85.

9. The pressure to export has led the US producers to attempt to penetrate the European and other markets: European manufacturers view them as the major competitive threat in their home markets. At current exchange rates it is possible for US producers to sell in the EEC at prices substantially below local list prices without dumping. Natural soda-ash began to appear in the EEC in the late 1970s, principally in the UK. In 1982 US imports into the EEC amounted to some 100,000 tonnes, almost 80,000 tonnes in the UK. The European industry successfully applied for anti-dumping protection against these imports in 1982.

10. The most recent measures granting anti-dumping protection against US dense-ash involved:

(a) for the two produces then in the market--Allied (now General Chemical) and Texas Gulf--minimum-price undertakings of £112.26 per tonne ex-

store;

(b) for those producers not in the market--Tenneco, KMG, FMC and Stauffer--a definitive anti-dumping duty of ECU 67.49 per tonne.

The price undertakings accepted by the Commission provided for conversion into other currencies at the exchange rates then prevailing: the changes in parities since 1984 meant that the undertaking price for Germany, France and other markets was substantially above the market price so that sales outside the UK were no longer commercially feasible under the undertakings.

11. Texas Gulf suffered a loss in volume and withdrew from the UK in 1985, leaving General Chemical in the market (with sales of only some 30,000 tonnes per year).

[...](In the published version of the decision, some information has been omitted in this paragraph, pursuant to the provisions of art. 21 of Regulation 17/62 concerning non-disclosure of business secrets.) Texas Gulf has also sold some tonnage in Belgium. In both cases the imports have been made free of anti-dumping duties under the inward-processing regime.

12. A number of large EEC customers in the glass sector have already indicated their intention to place a substantial percentage of their business with US producers. So far, however, a total of only about 40,000 tonnes of US soda-ash has been supplied in continental western Europe (CWE), almost all of it under inward-processing rules.

The anti-dumping measures provided for by Council Regulation 3337/84 expired in November 1989. A review of the measures had been requested by certain US producers and by representatives of the EEC glassmaking industry in 1988. On 7 September 1990 the review was terminated without imposition of protective measures by Commission Decision 90/507.

The Commission has in parallel with this decision adopted decisions finding that European soda-ash producers have infringed art. 85 and 86 of the EEC Treaty.

13. Under the membership agreement of 8 December 1983, the members agree that all export sales by them or by any subsidiary will be made through Ansac, with the exception of sales or deliveries to companies in which a member owns 20 per cent or more of the shares. Ansac's board of directors is empowered to ensure that each member receives a fair share of total tonnage shipped, to determine price policies and to exclude particular sales or territories from Ansac procedures; each member is responsible for providing a minimum share of estimated export needs. Ansac has an autonomous management and absolute authority to decide what to ship, to whom and at what price. However, a board resolution provides that if Ansac should begin operations in the EEC, General Chemical would be allocated its present (UK) tonnage in addition to its

entitlement under the Ansac rules. The intention of Ansac as outlined in the notification is to enter the EEC market as a second supplier to glass manufacturers, as they would be unwilling to jeopardize relations with their main suppliers.

14. Ansac maintained that, because of the rigidity of the EEC soda-ash market, only a new entrant could create genuine competition; and that only Ansac, representing the whole of the US natural soda-ash industry, had the necessary economic power to achieve a significant share of the market. Two of Ansac's members (General Chemical and Texas Gulf) had set up their own distribution facilities in the UK: Texas Gulf had been obliged to withdraw, and General Chemical maintained a presence only at the request of its large customers, which were prepared to pay a higher price for an alternative source of supply.

Ansac claimed that art. 86(1) did not apply: here, the aim of its proposed market entry was pro-competitive, and the judgment of the Court of Justice of 25 October 1977 in Case 26/76 *Metro SB-GroBmarkte GmbH & Co KG v EC Commission* ("Metro I") [1977] ECR 1875; and in Case 42/84 *Remia BV & Ors v EC Commission* [1985] ECR 2545 were examples of a wider principle, that:

". . . if the end is good, the means (within limits) cannot be regarded as restrictive." Such restrictions as the arrangements contained were ancillary to Ansac's overall, pro-competitive, aim. Moreover, Ansac was not a "cartel" but a dedicated sales organisation with 26 staff members.

15. If art. 85(1) was found to apply, Ansac argued that exemption under art. 85(3) was justified:

1. Natural soda-ash being lower in chloride was environmentally superior and thus contributed to an improvement in the production of goods and to the promotion of technical progress.

2. The economies of scale achievable only by Ansac were necessary in view of the high overhead costs involved in setting up distribution facilities in the EEC and would thus lead to an improvement in the distribution of goods.

3. Ansac would, by helping to change the oligopolistic structure of the EEC market, promote economic progress.

4. Consumers would benefit from:

   (a) the avoidance of the duplication of costs which would have been incurred had Ansac's member companies decided to enter the market separately;

   (b) The lower prices which Ansac would need to offer;

(c) the existence of a credible competitive source of supply

(d) the environmental superiority of natural soda-ash;

(e) the improved security offered by Ansac rather than its member companies acting separately.

5. The restrictions were indispensable and did not enable the parties to eliminate competition in respect of a substantial part of the soda-ash market. According to Ansac, competition in the EEC market could be achieved only by allowing US producers to combine.

16. During the oral hearing Ansac's president demonstrated how, calculating back from a price ex-warehouse of $165 per tonne, Ansac could show a higher cif value than an individual US producer ($143 as against $138) and a higher price ex-works ($86 as against $70), giving Ansac a "safety margin" of $16 per tonne for anti-dumping purposes.

An economic expert called by Ansac sought to show by reference to a theoretical model that Ansac's entry would lead to an overall decrease in soda-ash prices for the glass industry. He made it clear, however, that his model was based on the assumption that Ansac would enter the market with sales comparable to those of the leading Community producers.

Another expert who had undertaken market research for Ansac stated, however, that the initial market share available to a new entrant would be only of the order of five per cent, or 200,000 tonnes.

17. Representatives of the glass industry stated that they wished to have a reliable second source of supply, because limited storage facilities at glassworks made regular deliveries essential, and that US natural soda-ash, because of its purity, offered considerable advantages over other alternative sources. They made it clear, however, that the industry had no particular preference for Ansac over other possible suppliers, including its member companies, provided that price, quality and security of supply could be guaranteed.

18. Following the hearing a number of further submissions were made to the Commission on Ansac's behalf. It was argued that an exemption for a limited period (two years) would allow Ansac to demonstrate that its behavior in the market would have a beneficial effect on competition.

It was also claimed that the ending of the Commission's anti-dumping review without a finding of injury created a situation in which only Ansac, and not its members acting individually, could market US soda-ash in the EEC without running the risk of a finding

of dumping injury by the Commission: economies of scale would allow Ansac to show a higher nominal ex-works price than its members selling individually.

19. The Ansac membership agreement is an agreement between undertakings of the kind envisaged in art. 85(1). Any decisions or resolutions made by Ansac's board of directors under the agreement are decisions of an association of undertakings within the meaning of that article.

The agreement has as its object and likely effect a restriction of competition within the common market with respect to prices and quantities. The agreement obliges the members to sell soda-ash for export exclusively through Ansac and prevents them from selling individually, with the exception of sales or deliveries to associated companies. The overall size of the US producers, their low production costs (compensating largely for higher transport costs) and the fact that some of them have sold regularly on an individual basis show however that they could compete effectively among themselves and with the European producers. their past sales activities show that they have, on their own initiative, been capable of overcoming shortage and transport problems and assuring regular supplies to their customers. They are therefore capable of acting independently within the common market.

20. The object and effect of the Ansac arrangements is that customers are confronted with a single supplier of natural soda-ash applying uniform prices and conditions. Ansac's members are entitled to a fair share of the sales allocated to them. The fact that one member--General chemical--has been allocated an additional tonnage equivalent to its current annual deliveries to the UK demonstrates that Ansac is bound to respect the contractual rights of its members and to assure coordination between them. The Commission therefore does not accept the argument that Ansac enjoys an autonomous structure and organisation such as to exclude any anti-competitive cooperation. The fact that Ansac is set up as a separate corporation in order to function as a single selling agent for all US producers, rather than to coordinate the activities of its members, is not relevant to an assessment under art. 85(1). Ansac as a joint sales organisation must therefore been seen as the vehicle for eliminating competition between its members.

21. Moreover, the Commission does not accept the argument that the restrictions are needed to allow a strong and credible new entrant to open up the structure of the market in the EEC.

1. It does not follow from the limited success of attempts to enter the market by General Chemical and TG Soda Ash and that Ansac's proposals fall outside the scope of art. 85(1) as being the only way to achieve increased competition. The Commission found in *Floral* that the parties in that case had failed to demonstrate the need for their collaborative arrangements. In *Woodpulp* (Decision 85/202, IV/29.725--OJ 1985 L85/1) the Commission found that the members of the Pulp, Paper and Paperboard Export

Association (KEA)--like Ansac a Webb-Pomerene association--had refrained from pursuing independent pricing policies in the EEC, thereby restricting competition between themselves. Ansac's proposed role in the present case is more active than that of the KEA in *Woodpulp*.

2. Ansac has stated that it expects to gain only a very limited share of the market -- 200,000 tonnes, an amount which, although important to the competitive structure of the market as a second source of supply, could easily be supplied by one or two of its members.

22. If Ansac enters the EEC soda-ash market on the terms set out in the notification there will be only one new operator on the market. Trade within the Community will necessarily be conducted on different terms from those which would prevail if all or any of Ansac's members were to enter the market individually. The notified arrangements are thus liable to affect trade between member states.

23. The notified arrangements will not contribute to improving production or promoting technical progress. The Commission does not dispute the environmental arguments in favour of the use of natural, rather than synthetic, soda-ash. Those arguments have no bearing, however, on the marketing of the product, with which alone Ansac's proposals are concerned. Ansac's environmental argument in any case presupposes that it is the only vehicle by which natural soda-ash could reach the Community, i.e., that if Ansac were not granted an exemption, no individual US producer or producers would market the product in the EEC. As shown in para. 25, the Commission does not accept that this would be the case. Further, as Ansac's own documents show, its current marketing plans are limited to supplying only a very small percentage (around five per cent) of total demand.

24. Ansac has also failed to demonstrate that its proposals will lead to an improvement in the distribution of soda-ash or promote economic progress in the common market. To be exempted under art. 85(3) restrictions should bring about an objective improvement over the situation which would have existed in their absence.

25. The Commission does not accept Ansac's contention that is entry would enhance competition and lead to the improvement of the present rigidly oligopolistic market structure. If Ansac were granted an exemption under art. 85(3) there would be no possibility of competition between its member companies, which would be obliged to grant it exclusive sales rights in the EEC for all natural soda-ash produced by them. Ansac would thus control, and be able to restrict, the amount of US natural soda-ash produced for, imported into and sold within the Community, and would also determine the price at which it was sold. US producers acting independently, however, would compete amongst themselves and improve competition in the EEC soda-ash market generally. They are all large undertakings with sufficient trading experience and resources to provide their customers with a reliable source of supply. The ending of the

anti-dumping review without the imposition of protective measures means that they are now free to enter the EEC market.

26. Furthermore, the concentration of all supplies of natural soda-ash imported from the US in the hands of a single sales agency would facilitate the opportunity for collusion with the existing suppliers. Even if there is no express collusion on pricing, Ansac's current intention is to limit its sales in the Community to a level of around 200,000 tonnes and effectively to accept the role of a permanent secondary supplier. Ansac would at this level of business be in the market as a price follower, as indeed was clear from the presentation during the oral hearing of the economics expert called by Ansac.

27. the Ansac agreement also forecloses an important element of competition which would otherwise be available A number of major EEC glass producers have expressed an interest in buying soda-ash directly from producers in the US, a plan which would be impossible under Ansac's membership agreement which specifically prohibits such direct sales for export by its members.

28. The notified arrangements cannot be said to be indispensable or to offer consumers advantages which could not have been achieved by less restrictive means. The Commission does not accept the argument that the only means by which the rigidity of the EEC market can be reduced is by permitting the US producers to combine as Ansac. Collusive pricing or marketing arrangements between the EEC producers do not by themselves keep out competition: if they set prices above the market level, competitors outside the arrangements should in theory be able to enter more easily by underpricing the collusive price. The principal obstacles to the entry of American natural-ash into the EEC were the anti-dumping measures which have now been removed and the exclusionary rebate systems operated by Solvay and ICI which are the subject of a prohibition in decisions of 19 December 1990.

29. The only advantages which Ansac's entry might offer consumers flow from the economies of scale achievable by shipping and storing soda-ash in much larger quantities than would be possible for any of Ansac's members acting individually.

However, Ansac itself does not intend those economics of scale to be passed on to the consumer in the form of lower prices. Its own forecasts (produced during the oral hearing) show that it intends to charge slightly higher prices in the EEC than it believes would be achieved by the individual US producers. For Ansac, the main benefit flowing from any cost savings in the form of joint shipping or storage facilities would be the possibility in any future anti-dumping proceedings of showing a higher notional ex-mine price than would be the case for individual producers. Such considerations are not however relevant under art. 85(3).

30. In any case, joint selling arrangements go far beyond what might be necessary to achieve economies of scale that could be passed on to the consumer. The Commission

has indicated to Ansac on numerous occasions, both before and during the present proceedings, that it would be prepared, in accordance with the provisions of its notice concerning agreements, decisions and concerted practices in the field of co-operation between enterprises to give favourable consideration to arrangements limited to joint storage and transport facilities. While claiming that cost savings are its main rationale, Ansac and its members have not been prepared to limit co-operation to such measures.

Note

1. The following is a Department of Justice statement regarding its stance on action taken by foreign firms against U.S. exports. The statement overturns prior policy, as was stated in a footnote to the 1988 Antitrust Enforcement Guidelines for International Operations, that harm to domestic commerce is necessary for the Department to bring an action against foreign business that harms export commerce. The Department stated that it does not change the consideration of comity principles that has always existed, nor does it conflict with the intent of U.S. antitrust laws.

JUSTICE DEPARTMENT WILL CHALLENGE FOREIGN RESTRAINTS ON U.S. EXPORTS UNDER ANTITRUST LAWS

WASHINGTON, D.C. -- The Department of Justice announced today a change in antitrust enforcement policy that would permit the Department to challenge foreign business conduct that harms American exports when the conduct would have violated U.S. antitrust laws if it occurred in the United States.

"Applying the antitrust laws to remove illegal barriers to export competition makes sense as a matter of law and policy," said Attorney General William P. Barr. "Our antitrust laws are designed to preserve and foster competition, and in today's global economy competition is international."

The new policy, effective immediately, does not alter the jurisdiction of U.S. courts over foreign persons or corporations, Barr said. Ordinary jurisdictional principles will continue to apply.

Under the changed policy, the Department will challenge anticompetitive conduct such as boycotts and other exclusionary activities that hinder the export of American goods or services to foreign markets, the Attorney General said. For example, the Department would take action against a foreign cartel aimed at limiting purchases from U.S. exporters or depressing the prices they receive, or boycott of American goods or services organized by competitors in foreign markets.

Today's announcement resulted from a Department review of antitrust

enforcement policy on export restraints.

It supersedes a footnote in the Department's 1988 Antitrust Enforcement Guidelines for International Operations that had been interpreted as prohibiting challenges to anticompetitive conduct in foreign markets unless there was direct harm to U.S. consumers.

Applying the antitrust laws to anticompetitive conduct that harms U.S. exports is consistent with the enforcement policy the Department had followed for many years prior to 1988, said James F. Rill, Assistant Attorney General in charge of the Antitrust Division.

"Our review of this issue confirms that Congress did not intend the antitrust laws to be limited to cases based on direct harm to consumers," said Rill. "As recently as 1982, Congress clarified the jurisdictional reach of the Sherman Act to cover cases of direct, substantial and reasonably foreseeable harm to U.S. export commerce.

"We have always applied our law to challenge foreign as well as domestic cartel aimed at raising prices to American consumers, and during most of this period we were prepared in appropriate cases to attack cartels aimed at our exporters, as well. Today, when both imports and exports are of growing importance to our economy, we should not limit our concern to competition in only half of our trade."

Rill said the Department would continue its practice of notifying and consulting with foreign governments in antitrust proceedings that significantly affect their interests.

"Our concern is opening markets to competition," said Rill. "In most cases conduct that harms our exporters also harms foreign consumers, and may be actionable under the other country's antitrust laws. If the importing country is better situated to remedy the conduct, and is prepared to act, we are prepared to work with them."

Rill emphasized that the policy change has general application and is not aimed at particular foreign markets.

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Department of Justice Policy Regarding
Anticompetitive Conduct that Restricts U.S. Exports

Statement of Antitrust Enforcement Policy

The Department of Justice will, in appropriate cases, take antitrust enforcement action against conduct occurring overseas that restrains United States exports, whether or not there is direct harm to U.S. consumers, where it is clear that:

(1) the conduct has a direct, substantial, and reasonably foreseeable effect on exports of goods or services from the United States;

(2) the conduct involves anticompetitive activities which violate the U.S. antitrust laws -- in most cases, group boycotts, collusive pricing, and other exclusionary activities; and

(3) U.S. courts have jurisdiction over foreign persons or corporations engaged in such conduct.

This policy statement in no way effects existing laws or established principles of personal jurisdiction.

This enforcement policy is one of general application and is not aimed at any particular foreign country. The Department of Justice will continue its longstanding policy of considering principles of international comity when making antitrust enforcement decisions that may significantly affect another government's legitimate interests. The Department also will continue its practice of notifying and consulting with foreign governments, where appropriate.

This statement of enforcement policy supersedes a footnote in the Department of Justice's 1988 Antitrust Enforcement Guidelines for International Operations that generally had been interpreted as foreclosing Department of Justice enforcement actions against anticompetitive conduct in foreign markets unless the conduct resulted in direct harm to U.S. consumers. The new policy represents a return to the Department's pre-1988 position on such matters.

If the conduct is also unlawful under the importing country's antitrust laws, the Department of Justice is prepared to work with that country if that country is better situated to remedy the conduct and is prepared to take action against such conduct pursuant to its antitrust laws.

Department of Justice Antitrust Enforcement Policy Regarding Anticompetitive Conduct that Restricts U.S. Exports

Background

The Change Announced Today Would Return the Department to its Longstanding Pre-1988 Enforcement Policy

The Justice Department's longstanding enforcement policy prior to 1988 was most clearly expressed in the Department's 1977 Antitrust Guide for International Operations,

which identified two purposes served by the Antitrust laws' application to international trade: to protect U.S. consumers from restraints that raised the price or limited their choice of imported as well as domestic products and, separately,

> to protect American export and investment opportunities against privately imposed restrictions. The concern is that each U.S.-based firm engaged in the export of goods, services or capital should be allowed to compete on the merits and not be shut out by some restriction imposed by a bigger or less principled competitor.

Although the Department had brought few cases based solely on harm to exporters in recent years, it did not hesitate to bring such cases when there was evidence of a violation. For example, in 1982 the Department sued eight Japanese trading companies for fixing the prices they paid Alaskan seafood processors for crab to be exported to Japan. The case was settled by a consent decree. *U.S. v. C. Itoh & Co., et al.,* 1982-83 (CCH) Trade Cases ¶65,010 (W.D. Wash. 1982).

The Department's 1988 Antitrust Enforcement Guidelines for International Operations, however, indicated that harm to exporters would not be a sufficient basis for enforcement action unless there also was direct harm to U.S. consumers. While acknowledging that Congress had provide for actions against export restraints in 1982 when it codified Sherman Act subject matter jurisdiction in foreign commerce cases, the Guidelines stated that as a matter of enforcement policy,

> The Department is concerned only with adverse effects on competition that would harm U.S. consumers by reducing output or raising prices.

The Department has never limited its antitrust enforcement to cases in which there is direct harm to consumers where the conduct in question is wholly domestic. The antitrust laws have always applied to anticompetitive conduct that harms producers as well as to conduct that harms consumers. For example, a buyers' cartel that suppresses the price paid to suppliers is treated in the same way as a sellers' cartel that raises the price charged to customers -- even though the immediate harm is to producers in the first instance and to consumers in the second. The 1988 policy, however, has been interpreted as precluding action against a cartel of offshore buyers who suppress prices paid to U.S. exporters, even though it has always been clear that the Department would act against offshore sellers' cartels that collusively raise prices to U.S. consumers.

The Policy Implements Existing Law

The enforcement policy announced today is fully consistent with existing law. The Supreme Court has confirmed that anticompetitive conduct that restrains American exports is actionable under the antitrust laws, and there is no debate about the law on this issue. Its clearest expression by the Supreme Court was in *Zenith Radio Corp. v.*

Hazeltine Research, Inc., 395 U.S. 100 (1969), in which the Court sustained Zenith's antitrust challenge to activities of a Canadian patent pool whose members conspired to give licenses only to firms manufacturing in Canada, and to refuse licenses Zenith needed to export U.S.-made radios and televisions to Canada.

Congress, moreover, endorsed the antitrust laws' application to conduct that restrains exports in the 1982 Foreign Trade Antitrust Improvements Act. 15 U.S.C. §6a. The Act amended the Sherman Act, and added a parallel provision to the Federal Trade Commission Act, codifying their jurisdictional reach over foreign conduct that has a direct, substantial and reasonably foreseeable effect "on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States." The Act was intended as a clarification of existing law, and was not seen as an extension of antitrust jurisdiction.

The Department Will Seek Cooperation With Foreign Antitrust Authorities

In adopting this enforcement policy, the Justice Department recognizes that a number of unique considerations can affect antitrust enforcement that involves parties or conduct outside the United States. The policy will operate within existing law, and will not alter the jurisdictional principles that determine when foreign firms and individuals are within the reach of U.S. courts.

The Department will also continue its longstanding policy of considering international comity principles when making antitrust enforcement decisions that may significantly affect another government's legitimate interests. Under this approach, the Department will continue its present practice with respect to notification and consultation with foreign governments. In most cases, conduct that harms U.S. exporters also harms foreign consumers who benefit from the availability of imported goods and services. Such conduct may be actionable under the importing country' antitrust laws. The Department of Justice is prepared to work with antitrust authorities in the importing country if they are better situated to remedy the conduct and are prepared to act.

NOTES

1. How can we solve the paradox of countries applying their antitrust laws extraterritorially against inbound restraints, while at the same time the U.S. is tolerating or permitting export restraints aimed at those countries? Is it a case of “do as we say and not as we do,” or is there more to it than that? What effect might this conflict have on extraterritorial enforcement?

2. Can antitrust laws open foreign markets to U.S. goods and services? See Spencer Weber Waller, “Can U.S. Antitrust Laws Open International Markets?,” 20 Nw. J. Int’l

L. & Bus. 207 (2000).

3. Despite the aggressive posture of the Justice Department press release and enforcement statements, only one case has been brought against foreign restraints on U.S. exports and was settled through a consent decree. United States v. Pilkington Plc., 1994 Trade Cas. (CCH) ¶ 70,842 (D. Ariz. 1994).

PROBLEM 3

You represent a United States firm which mines and sells phosphate rock ("Phosrock"), an ingredient in many fertilizers. Phosrock is one of six firms which mine and sell phosphate rock in the United States. All phosphate rock is physically identical. All of the phosphate producers are beginning to export to the member states of the European Union ("EU"). Competition for orders in the EU is intense with each producer cutting price to nearly cost to win orders.

Phosrock wants to cooperate with other US phosphate rock producers to promote exports through a trade association or otherwise. The association or new entity would act as the exclusive export sales agency for all American phosphate rock sold in the EU. All producers would be required to export only through this new entity which would set a single export price by a majority vote of its members. The producers would also meet periodically to exchange information about prices, sales, customers, and general market conditions and export opportunities. The producers would only cooperate with respect to exports to the EU and would continue to compete against each other for sales within the United States and exports to all other markets.

Phosrock management is seeking an opinion letter regarding the United States and EU antitrust risks for such an arrangement with its competitors.