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The Role of National Antitrust Laws in the Promotion of International Competition

James R. Atwood *

I. INTRODUCTION

Professor Rahl's international antitrust challenge¹ is a first-class, pocket-sized introduction to a debate that has run for decades and yet shows no signs of exhaustion. The piece echoes many of the themes of Professor Rahl's important 1974 Cornell article,² while bringing new freshness and vigor to the problem. His challenge demonstrates, in a few simple pages, that the scores of books and hundreds of articles of the last fifteen years have still not resolved key policy questions on the role of national antitrust laws in international commerce.

This Article cannot hope to address all facets of Professor Rahl's challenge. Instead, it will briefly discuss his implied criticism of the United States' decision not to apply its antitrust laws to its export commerce. Other nations, in their own way, follow a similar policy, but admittedly that does not explain the U.S. position. While generally an outspoken proponent of antitrust principles, the United States for decades has exempted registered export cartels from its antitrust reach,³ and indeed this approach was updated by Congress in the Export Trading Company Act of 1982.⁴ Another part of that same 1982 legislation, the Foreign Trade Antitrust Improvements Act, generally exempted all

* Covington & Burling, Washington, D.C.; A.B., Yale College, 1966; J.D., Stanford University, 1969.

¹ See Professor Rahl's *An International Antitrust Challenge*, which begins this Symposium.

² Rahl, *American Antitrust and Foreign Operations: What Is Covered?*, 8 CORNELL INT'L L.J. 1 (1974).

³ The Webb-Pomerene Act is codified at 15 U.S.C. §§ 61-65 (1982).

⁴ The Export Trading Company Act is codified at 15 U.S.C. §§ 4001-4021 (1982).

export-oriented conduct from Sherman Act scrutiny, whether or not registered with the government.⁵ Given the vigor of U.S. antitrust enforcement in both domestic and import commerce, what is the justification for the United States' "two-faced policies"⁶ that gleefully permit anticompetitive export conduct?

In the tradition of the common law, this article will approach this issue from the ground up by analyzing the facts of a few recent cases. While these cases differ from one to the other, in each instance either a U.S. court or a U.S. government agency concluded that U.S. export conduct should not be subjected to antitrust attack. These decisions were not grounded in crude mercantilism. Instead, they are defensible on more neutral and legitimate grounds. Moreover, these cases help show that the exemption of export conduct is not two-faced, even for a country dedicated to international competition. They demonstrate, rather, that it is entirely proper to accord national antitrust laws only a limited role in promoting international competition.

II. *McGLINCHY V. SHELL CHEMICAL CO.*

*McGlinchy v. Shell Chemical Co.*⁷ is one of the first appellate decisions to construe the Foreign Trade Antitrust Improvements Act. According to the plaintiffs, Shell had agreed to appoint Mr. McGlinchy and Dande Products as Shell's representatives to market polybutylene ("PB") pipe resin in Southeast Asia. Apparently the resin was to be exported from the United States. The plaintiffs alleged that, as part of a conspiracy in restraint of trade and monopolization attempt, Shell terminated the appointments. The background for the terminations is not explained in either the district court decision⁸ or court of appeals decision, and the plaintiffs' complaint was dismissed for failure to state a claim. Thus, one may assume the most lurid motivations—that Shell acted pursuant to a cartel agreement of international PB producers seeking to control the supply and prices of PB resin into, for example, Indonesia. The plaintiffs alleged that they had used their appointments to locate, develop, and promote Asian companies to use PB resin, and that the effect of the terminations was to injure those companies and consumers in Indonesia and elsewhere.⁹

The U.S. courts were unmoved by these allegations. Whatever anti-

⁵ Foreign Trade Antitrust Improvements Act, 15 U.S.C. § 6a (1982).

⁶ See Rahl, *supra* note 1.

⁷ *McGlinchy v. Shell Chem. Co.*, 845 F.2d 802 (9th Cir. 1988).

⁸ *McGlinchy v. Shell Chem. Co.*, 1985-2 Trade Cas. (CCH) ¶ 66,672 (N.D. Cal. 1984).

⁹ *McGlinchy*, 845 F.2d at 815.

competitive effects there were,¹⁰ they impacted only foreign interests. Both the district court and court of appeals walked through the language of the Foreign Trade Antitrust Improvements Act¹¹ and found the challenged conduct exempt from Sherman Act attack. There was no allegation of harm to U.S. consumers or to any company seeking to export from the United States in competition with Shell. Absent one or the other U.S. domestic effect, the conduct was outside the Sherman Act's jurisdiction, notwithstanding that U.S. exports were involved and that Shell was a U.S. corporation.¹²

This result should not be criticized as narrow-minded mercantilism showing no sensitivity to the benefits that competition can bring to world economies. First, a court in the United States would have questionable competence to adjudicate on competitive conditions in Indonesia and on the impact of Shell's actions on Indonesian consumers or Indonesian businesses. One would have to have extraordinary faith in the U.S. discovery and trial procedures to reach an opposite conclusion, particularly where a jury trial would govern. Second, if there really was harm to Indonesian competitive interests, the Indonesian government would be the logical one to take action. If Indonesia has an antitrust law to address such problems, the U.S. legal system should not interfere, and if Indonesia has not seen fit to adopt antitrust regulations for its economy, the United States should not second-guess that decision of a sovereign power.

In this particular example, any Indonesian effort to enforce its own competition laws would not have been hampered by problems of personal jurisdiction or the practical enforceability of a judgment. This is because the Shell group has significant operations in Indonesia. Even if the facts were different, however, the mechanisms of international judicial assist-

¹⁰ Both the district court and court of appeals were skeptical that the plaintiffs had alleged any adverse effects on competition, as opposed to adverse effects only on the plaintiffs' particular businesses. *McGlinchy*, 1985-2 Trade Cas. at 63,169; *McGlinchy*, 845 F.2d at 815.

¹¹ That language is cumbersome, but nonetheless clear in its basic intent:

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, 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 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.

¹² *McGlinchy*, 1985-2 Trade Cas. at 63,168-69; *McGlinchy*, 845 F.2d at 814-15.

ance (e.g., extradition, service-of-process conventions, and enforcement of foreign judgments) could be made available to the Indonesian enforcement agencies and courts to bring any evader of jurisdiction to justice. A constructive role for the United States, and for other competitively minded countries, would be to assist Indonesia in that country's application of its own laws. This approach would be more orderly than one in which the United States applied its own laws to advance U.S. perceptions of what would be good for Indonesia.

III. *'IN' PORTERS S.A. v. HANES PRINTABLES, INC.*

The *'In' Porters, S.A. v. Hanes Printables, Inc.*¹³ case also involved a suit by a foreign distributor who had been terminated by an American exporter. 'In' Porters, a French company, had distributed clothing in France for a number of U.S. manufacturers. The defendant, Hanes, allegedly induced 'In' Porters to terminate its relationships with other U.S. companies and act exclusively for Hanes. Later, Hanes itself terminated 'In' Porters, and the plaintiff brought suit. Unlike in *McGlinchy*, the plaintiff in *'In' Porters* could claim an adverse competitive effect not only abroad (in France, its distribution territory), but also in U.S. export commerce. This was because Hanes had allegedly induced 'In' Porters to cease its distribution of competitive U.S. products in France.

As in *McGlinchy*, however, the court dismissed the antitrust claim under the Foreign Trade Antitrust Improvements Act. The plaintiff's operations were wholly in France, and insofar as the plaintiff was injured, the suit did not involve injury to U.S. commerce. The plaintiff's allegation of injury to other parties in U.S. commerce (the U.S. exporters who lost a distribution channel in France) was of no avail:

A foreign company that demonstrates the requisite effect on the United States export trade, but fails to establish that it is within the class of injured United States exporters, lacks a jurisdictional basis to sue under the Sherman Act. In other words, a foreign company can not demonstrate the domestic injury requirement by "piggybacking" onto the injury of a United States exporter.¹⁴

The *'In' Porters* court correctly applied the Foreign Trade Antitrust Improvements Act, and it reached a sensible result as well. Where, as in *McGlinchy*, the alleged harm to competition impacted only foreign interests, Congress saw no reason for the application of U.S. law. Where, as in *'In' Porters*, the alleged harm to competition impacted both foreign

¹³ *'In' Porters, S.A. v. Hanes Printables, Inc.*, 663 F. Supp. 494 (M.D.N.C. 1987).

¹⁴ *Id.* at 500 (citing *Eurim-Pharm GmbH v. Pfizer, Inc.*, 593 F. Supp. 1102, 1106 n.5 (S.D.N.Y. 1984)).

interests and U.S. exporters, Congress intended U.S. law to apply only if and to the extent a claim is made by the U.S. exporters themselves. In the words of the Foreign Trade Antitrust Improvements Act, the Sherman Act is to apply to the challenged conduct "only for injury to export business in the United States,"¹⁵ meaning that any harmed U.S. exporters have standing to sue, but not foreign companies whose interests are not within the protective scope of U.S. law.¹⁶

One of the rationales for this limited application of U.S. law was explained by the *In' Porters* court as a desire to avoid handicapping U.S. businesses in their export trade:

Congress enacted the Export Act in response to complaints from American firms that the antitrust laws impaired their ability to increase exports through aggressive competition or cooperation. . . . 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. . . . [N]o 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.¹⁷

To be sure, blaming the U.S. trade deficit on U.S. antitrust laws is not very plausible as a general proposition.¹⁸ From a U.S. policy perspective, however, a French distributor should not have greater rights, through the unique remedy of treble-damage litigation in a U.S. court, to regulate the affairs of its U.S. supplier than it has to regulate the affairs of its Italian or Brazilian supplier. There can be no doubt that permitting a

¹⁵ 15 U.S.C. § 6a.

¹⁶ The legislative history is clear on this point:

If such solely export-oriented conduct affects export commerce of another person doing business in the United States, both the Sherman Act and FTC Act amendments preserve jurisdiction insofar as there is injury to that person. Thus, a domestic exporter is assured a remedy under our antitrust laws for injury caused by unlawful conduct of a competing United States exporter. But a foreign firm whose non-domestic operations were injured by the very same export oriented conduct would have no remedy under our laws.

H.R. REP. NO. 686, 97th Cong., 2d Sess. 10-11 (1982), reprinted in 1982 U.S. CODE CONG. & ADMIN. NEWS 2431, 2495.

Congress was not wholly consistent in applying this approach, for the 1982 legislation allows both domestic and foreign plaintiffs to sue where the challenged conduct is subject to U.S. jurisdiction because of an adverse impact on domestic or import commerce, rather than just on export commerce. *Id.* at 10, 1982 U.S. CODE CONG. & ADMIN. NEWS at 2495; 15 U.S.C. § 6a(1)(A). This result is faithful to a degree to some language in *Pfizer, Inc. v. India*, 434 U.S. 308 (1978), but it is nevertheless dubious policy. See 2 J. ATWOOD & K. BREWSTER, ANTITRUST AND AMERICAN BUSINESS ABROAD § 14.26 (2d ed. 1981) [hereinafter ATWOOD & BREWSTER].

¹⁷ McGlinchy, 663 F. Supp. at 498 (citations omitted). The first internal quote is from *Eurim-Pharm GmbH v. Pfizer, Inc.*, 593 F. Supp. 1102, 1105 (S.D.N.Y. 1984), and the second is from H.R. REP. NO. 686, *supra* note 16, at 10, 1982 U.S. CODE CONG. & ADMIN. NEWS at 2495.

¹⁸ See generally, 2 ATWOOD & BREWSTER, *supra* note 16, ch. 17.

suit such as *'In' Porters* would subject U.S. exporters to greater legal risk and less business freedom than is faced by their foreign competitors. In the absence of strong countervailing policy considerations, this would hardly be good policy from the standpoint of the United States.¹⁹

IV. NATIONAL MACHINE TOOL BUILDERS' ASSOCIATION

The third case involves a different part of the 1982 legislation, the Export Trading Company Act ("ETCA").²⁰ Specifically, Title III of the ETCA establishes an administrative mechanism by which U.S. companies can obtain clearance from the Departments of Commerce and Justice. If those agencies conclude that the proposed export activities are not likely to adversely affect U.S. competitive interests, the Secretary of Commerce will issue a "certificate of review" granting broad antitrust protection. These agencies have issued well over one hundred certificates under the program.²¹

A certificate recently issued to the National Machine Tool Builders' Association ("NMTBA") illustrates the potential of the ETCA concept.²² In its application,²³ the NMTBA explained that it was a national trade association representing more than 260 machine tool builders who accounted for between 60 and 65% of U.S. machine tool production. Sales of machine tools in the United States were in excess of \$2 billion, and export sales were in excess of \$375 million. Nevertheless, the machine tool industry in the United States was severely depressed due to a combination of factors, including a shrinking domestic market, greatly increased imports, and a heightening of competition in export markets traditionally dominated by U.S. firms.²⁴ The NMTBA maintained that

¹⁹ As *'In' Porters* suggests, and as the 1982 legislation makes clear, if an American exporter's conduct is unreasonably restraining the trade of other U.S. exporters, those exporters do have a claim under U.S. law. 15 U.S.C. § 6a(1)(B). Nor is this right available only to U.S. firms or U.S. nationals; any person engaged in U.S. export trade, regardless of nationality, may assert such rights.

²⁰ 15 U.S.C. §§ 4001-21.

²¹ For further description of the program, see, e.g., Department of Justice, *Antitrust Enforcement Guidelines for International Operations* § 2.6, 53 Fed. Reg. 21,584 (Nov. 10, 1988); 1 ATWOOD & BREWSTER, *supra* note 16, § 9.46A (1988 Supp.); Lewis, *Title III of the Export Trading Company Act: A Case Study in Interagency Coordination to Promote Exports*, 5 U. PITT. J.L. & COMM. 451 (1985). Pertinent regulations, forms, and a bibliography can be found in DEPT. OF COMMERCE, EXPORT TRADING COMPANIES: A HANDBOOK FOR PROFESSIONALS (1985).

²² Export Trade Certificate of Review for National Machine Tool Builders' Association, No. 87-00004 (May 19, 1987), summarized at 52 Fed. Reg. 19,371 (1987)[hereinafter National Machine Tool Certificate]. The author acted as counsel to NMTBA with respect to this certificate.

²³ NMTBA Application for an Export Trade Certificate of Review (Feb. 17, 1987)[hereinafter NMTBA Application].

²⁴ For example, total U.S. machine tool exports declined overall from \$924.1 million in 1981 to \$387.2 million in 1985. *Id.*, Item 15, at 2.

an export certificate would enable its members to compete more effectively in foreign markets by allowing, for example, the sharing of market intelligence, the formation of bidding consortia on large turn-key projects, and the joint promotion of U.S. products abroad.

After reviewing the evidence, the Secretary of Commerce granted the NMTBA an export certificate, broadly authorizing the association's members to coordinate their export activities as they saw fit, subject only to safeguards to prevent domestic "spillover" effects. Many of the authorized activities, such as the joining of small companies with complementary product lines to enable them to submit a joint bid on a large foreign contract, probably would have passed scrutiny under a rule of reason test even without certification. Other permitted activities, however, unquestionably fell within traditional areas of antitrust prohibition, such as price fixing, market allocations, and boycotts.

In granting export certificates such as this one, the United States is not acting as an international competitive outlaw. As already suggested, neither the United States nor any other government is well equipped to anticipate and protect the competitive interests of other countries. Additionally, by applying U.S. antitrust laws to conduct having adverse effects only on foreign markets, the United States would in many instances be limiting the business freedom of U.S. exporters to a degree well beyond what the law of the targeted foreign markets would require. Furthermore, export cooperation, particularly among small firms, can often be pro-competitive, because it allows the spreading of the risks and costs of overseas endeavors. Thus, even from the perspective of the export markets being targeted, an exemption from U.S. antitrust laws will often be a good thing.

Moreover, the U.S. export certification program is not designed to protect certificate holders from the consequences of foreign law. The NMTBA certificate, like all others issued under the program, contains an explicit disclaimer to that effect.²⁵ Further proof of the intentions of the United States on this point can be found in the record of the *Wood Pulp*²⁶ case recently decided by the European Court of Justice. There, the Court held that the European Economic Community ("EEC") anti-

²⁵ The issuance of this certificate of review to NMTBA by the United States Government under the provisions of the [Export Trading Company] 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 NMTBA or its Members under the laws of the United States (other than as provided in the Act) or (b) the legality of such business plans of NMTBA or its Members under the laws of any foreign country.

National Machine Tool Certificate, *supra* note 22 (emphasis added).

²⁶ A. Ahlström Osakeyhtiö v. Commission, 4 Common Mkt. Rep. (CCH) ¶ 14, 491 (Sept. 27, 1988)[hereinafter *Wood Pulp*].

trust authorities had jurisdiction over the pricing activities of a U.S. Webb-Pomerene export association. Webb-Pomerene associations were the precursors of the export trade associations now being formed under the 1982 legislation. The European Court specifically noted that the Webb-Pomerene Act,²⁷ like the Export Trading Company Act, "merely exempts the conclusion of export cartels from the application of United States antitrust laws but does not require such cartels to be concluded." In addition, "it should further be pointed out that the United States authorities raised no objection regarding any conflict of jurisdiction when consulted by the [EEC] Commission" about its antitrust investigation of the American group.²⁸

Indeed, I would argue that steps by the United States to limit the reach of *its* antitrust laws will encourage foreign governments to strengthen *theirs*. This should be true, at least, if the United States continues to support international cooperation and judicial assistance when a trading partner is seeking to apply its law to its own import commerce. I have previously debated Professor Rahl on this point as follows:

A redefinition of American substantive antitrust goals to exclude foreign restraints could be seriously resented if it were thought that the United States is also trying to promote American export cartels and to protect them from foreign prosecution. That would only encourage foreign governments to resist the application of American law to their firms. Thus our recommendation that the voluntary export restraint be clearly removed from the scope of American law is not intended as an endorsement of exploitation abroad. We do think it will have the effect of increasing the presence and profitability of American business abroad. But if the arrangements among American firms, or between American and foreign firms, unduly restrain trade in foreign markets, then foreign governments will have every right to call their antitrust laws into play and to expect that the United States should be able to expect similar treatment in the reverse situation.

Professor James Rahl has argued that this enforcement pattern has things exactly in reverse: American law should stop export restraints on United States territory where they occur, and foreign regimes should do the same to protect American markets.²⁹ Local rather than extraterritorial enforcement, after all, reduces the problems of proof, jurisdiction, and the

²⁷ 15 U.S.C. §§ 61-66.

²⁸ Wood Pulp, 4 Common Mkt. Rep. at ¶ 18,612.

The legislative history of the Foreign Trade Antitrust Improvements Act similarly evidences that the United States is not seeking to protect its export cartels from the application of foreign laws: [T]he Committee recognized the increased sensitivity of other nations to antitrust considerations and cartel activity. By more precisely defining the subject matter jurisdiction of U.S. antitrust law, H.R. 5235 in no way limits the ability of a foreign sovereign to act under its own laws against an American-based export cartel having unlawful effects in its territory.

H.R. REP. NO. 686, *supra* note 16, at 13-14, U.S. CODE CONG. & ADMIN. NEWS at 2498-99.

²⁹ Rahl, *A Rejoinder*, 8 CORNELL INT'L L.J. 42, 43-44 (1974).

enforcement of decrees. But it is unrealistic to rely on foreign antitrust officials to take action against their own firms, perhaps politically powerful, in aid of American consumers. Similar inhibitions may affect American prosecutors as well, and some courts and juries may also find it puzzling that United States law should be applied against Americans to help foreigners whose governments have shown no enforcement interest. In our judgment, the best chance for consistent and rational development of the law is for each nation to look after its own interests, and yet to recognize at the same time a mutual interest in the development of sound, reciprocal judicial assistance on discovery and judgment enforcement.³⁰

Congress seemed to endorse this view when it enacted the export trading company legislation.³¹

V. CONCLUSION

To be sure, there are problems both in applying national antitrust laws to import commerce, and in enhanced international judicial assistance. It may well be that a good number of international competition disputes will have to be treated under national trade laws or through government-to-government negotiations, rather than as matters for anti-trust litigation.³² I remain skeptical, however, that the solution to Professor Rahl's challenge lies in stronger U.S. antitrust scrutiny of its own export trade. The solution, if one exists, lies elsewhere.

³⁰ 2 ATWOOD & BREWSTER, *supra* note 16, at § 18.16.

³¹ See, e.g., H.R. REP. NO. 686, *supra* note 16, at 14, U.S. CODE CONG. & ADMIN. NEWS at 2499 ("Indeed, the clarified reach of our own laws could encourage our trading partners to take more effective steps to protect competition in their markets," citing my testimony on that point).

³² See, Atwood, *Conflicts of Jurisdiction: The Example of Export Cartels*, 50 LAW & CONTEMP. PROBS. 153 (1987).