

CHAPTER 7

Antitrust and Trade Issues

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The United States, and most other nations, has a wide variety of laws which allow domestic industries to seek relief from harm caused by imports. Some of these laws protect domestic industry from so-called “unfair” practices, including dumping and subsidies. Other laws allow U.S. domestic industry to seek protection from so-called fairly trade imports which have caused economic injury to the domestic firms. Most of these laws operate from fundamentally different premises than the US antitrust laws which seek to promote competition for the benefit of consumers, and are largely indifferent to the national identity of the producers in the market.

This chapter examines those international trade relief statutes and the tensions between those international trade statutes and the competitive ideals of the antitrust laws. We begin with a survey of the import relief laws themselves.

ANTITRUST ENFORCEMENT GUIDELINES FOR INTERNATIONAL OPERATIONS

U.S. Department of Justice and the Federal Trade Commission, April, 1995

2.82 Antidumping Act of 1916

The Revenue Act of 1916, better known as the Antidumping Act, 15 U.S.C. 71-74, is not an antitrust statute, but its subject matter is closely related to the antitrust rules regarding predation. It is a trade statute that creates a private claim against importers who sell goods into the United States at prices substantially below the prices charged for the same goods in their home market. In order to state a claim, a plaintiff must show both that such lower prices were commonly and systematically charged, and that the importer had the specific intent to injure or destroy an industry in the United States, or to prevent the establishment of an industry. Dumping cases are more commonly brought using the administrative procedures of the Tariff Act of 1930, discussed below.

2.83 Tariff Act of 1930

A comprehensive discussion of the trade remedies available under the Tariff Act is beyond the scope of these Guidelines. However, because antitrust questions sometimes arise in the context of trade actions, it is appropriate to describe these laws briefly.

2.831 Countervailing Duties

Pursuant to Title VII.A of the Tariff Act, U.S. manufacturers, producers, wholesalers, unions,

and trade associations may petition for the imposition of offsetting duties on subsidized foreign imports. The Department of Commerce's International Trade Administration ("ITA") must make a determination that the foreign government in question is subsidizing the imports, and in almost all cases the International Trade Commission ("ITC") must determine that a domestic industry is materially injured or threatened with material injury by reason of these imports.

2.832 Antidumping Duties

Pursuant to Title VII.B of the Tariff Act, parties designated in the statute (the same parties as in the countervailing duties provision) may petition for antidumping duties, which must be imposed on foreign merchandise that is being, or is likely to be, sold in the United States at "less than fair value" ("LTFV"), if the U.S. industry is materially injured or threatened with material injury by imports of the foreign merchandise. The ITA makes the LTFV determination, and the ITC is responsible for the injury decision.

2.833 Section 337

Section 337 of the Tariff Act, 19 U.S.C. 1337, prohibits "unfair methods of competition and unfair acts in the importation of articles into the United States," if the effect is to destroy or substantially injure a U.S. industry, or where the acts relate to importation of articles infringing U.S. patents, copyrights, trademarks, or registered mask works. Complaints are filed with the ITC. The principal remedies under Section 337 are an exclusion order directing that any offending goods be excluded from entry into the United States, and a cease and desist order directed toward any offending U.S. firms and individuals. The ITC is required to give the Agencies an opportunity to comment before making a final determination. In addition, the Department participates in the interagency group that prepares recommendations for the President to approve, disapprove, or allow to take effect the import relief proposed by the ITC.

2.84 Trade Act of 1974

2.841 Section 201

Section 201 of the Trade Act of 1974, 19 U.S.C. 2251 et seq., provides that American businesses claiming serious injury due to significant increases in imports may petition the ITC for relief or modification under the so-called "escape clause." If the ITC makes a determination that "an article is being imported into the United States in such increased quantities as to be a substantial cause of serious injury, or the threat thereof, to the domestic industry producing an article like or directly competitive with the imported article," and formulates its recommendation for appropriate relief, the Department participates in the interagency committee that conducts the investigations and advises the President whether to adopt, modify, or reject the import relief recommended by the ITC.

2.842 Section 301

Section 301 of the Trade Act of 1974, 19 U.S.C. 2411, provides that the U.S. Trade Representative ("USTR"), subject to the specific direction, if any, of the President, may take action, including restricting imports, to enforce rights of the United States under any trade agreement, to address acts inconsistent with the international legal rights of the United States, or to respond to unjustifiable, unreasonable or discriminatory practices of foreign governments that burden or restrict U.S. commerce. Interested parties may initiate such actions through petitions to

the USTR, or the USTR may itself initiate proceedings. Of particular interest to antitrust enforcement is Section 301(d)(3)(B)(i)(IV), which includes among the "unreasonable" practices of foreign governments that might justify a proceeding the "toleration by a foreign government of systematic anticompetitive activities by enterprises or among enterprises in the foreign country that have the effect of restricting . . . access of United States goods or services to a foreign market." The Department participates in the interagency committee that makes recommendations to the President on what actions, if any, should be taken.

NOTES

1. To what extent do the import relief laws work counter to the basic thrust of the antitrust laws that more competition is better for consumers?
2. To what extent do the import relief laws incorporate antitrust law or policy in deciding whether to grant or deny relief?
3. Is "material injury" or "substantial injury" a good thing or a bad thing from the antitrust point of view?
4. What are the political dynamics at work that make the trade laws so much powerful than antitrust and consumer interests and so difficult to amend?

Western Concrete Structures Co. v. Mitsui & Company (U.S.A.), Inc., 760 F.2d 1013 (9th Cir.), *cert. denied*, 474 U.S. 903 (1985).

Western Concrete Structures alleged in its second amended complaint that the defendants conspired to import steel strand from Japan at prices below the lawful price, so that VSL could underbid its competitors in this country, including Western, in the post-tensioning concrete industry. The district court entered a judgment dismissing all of Western's claims. We reverse in part and affirm in part.

I. Facts

In reviewing the district court's dismissal for failure to state a claim, we must treat the facts alleged in the complaint as true. The complaint's allegations are these:

Post-tensioning is a construction process used in building bridges, nuclear reactors, and other concrete structures, that involves the stretching of steel strand tendons within concrete slabs or girders. The cost of steel strand is approximately 55% of the direct cost of post-tensioning, while the profit margin is approximately 8%. Thus, the price of steel strand significantly affects a post-tensioning firm's competitive bidding position.

Plaintiff Western Concrete Structures and defendant VSL are California corporations that

compete in the post tensioning business. VSL is a subsidiary of defendant Losinger, a Swiss firm. Defendants Mitsui (Japan), a Japanese trading company, and its American subsidiary Mitsui (U.S.A.) supply VSL with steel strand manufactured in Japan by defendant Shinko Wire.

In early 1978, the United States Department of the Treasury implemented import restrictions for steel mill products, including steel strand. The restrictions established published trigger prices, based on the production costs of the most efficient domestic manufacturers, below which importation could trigger government action under the Antidumping Act of 1921, 19 U.S.C. § 1673 *et seq.* In 1982, VSL and Mitsui (U.S.A.) were indicted for, and pleaded guilty to, importing steel strand at prices below trigger prices, in violation of the Antidumping Act.

Western's action is for treble damages under the Sherman Act, 15 U.S.C. §§ 1 and 2, and § 4 of the Clayton Act, § 15(a), under the Wilson Tariff Act, § 8, under the Antidumping Act of 1916, § 72, and state law against unfair competition. Western alleges that the defendants conspired to import steel strand into the United States at prices below those permitted by the import restrictions, with the intent of restraining competition in the post-tensioning industry and thus helping VSL to attempt to monopolize that industry. However, Western expressly disclaimed that it alleges or claims "predatory" pricing by the defendants, that is, pricing below the seller's marginal or average variable or average total cost. The key allegation is that the conspiracy enabled VSL to obtain steel strand at prices 15% to 20% lower than the price at which VSL's competitors, including Western, could legally purchase steel strand from Mitsui, from other importers, or from domestic suppliers. VSL consequently increased its market share to about 70%. VSL's ability to underbid forced four out of five of its "substantial" competitors in the bridge post-tensioning business out of the market, and forced all three existing "substantial" commercial post-tensioning competitors out of the market. Western's share of the post-tensioning bridge market dropped from 13% to 5%, and its share of the commercial post-tensioning business dropped from about 15% to 4% in a year, and Western then left that market.

In considering appellant's claims, we bear in mind that the judgment was based on a determination under Rule 12(b)(6) F.R.Civ.P. that the complaint does not "state a claim upon which relief can be granted." No answer has been filed; no discovery has occurred; no trial has taken place. Only if it is clear that a viable claim cannot be stated should a judgment of dismissal be entered on a Rule 12(b)(6) motion.

II. Sherman Act: Restraint of Trade and Monopolization.

The district court ruled that Western failed to state a claim under the Sherman Antitrust Act and the Clayton Act because it did not allege facts amounting to anti-competitive conduct or antitrust injury. The court held that the alleged purchase and sale agreements for steel strand at below the Trigger Price Mechanism level and in violation of the Antidumping Acts were not, without more, anticompetitive or predatory within the meaning of 15 U.S.C. §§ 1 and 2. Western argues that the intent and purpose of the defendants' conspiracy to violate the import price controls was to suppress and restrain competition, a violation of Section 1, and to help VSL to monopolize the post-tensioning industry, a violation of Section 2. Western alleges that the defendants' conduct caused injury to competition because the competitors of VSL could not meet VSL's bid price or negotiated price for post-tensioned projects, and consequently were driven out

of the market.

Many decisions speak of "the anti-trust laws" or "the Sherman Act" without distinguishing between Section 1 and Section 2 of that Act. However, there is a difference, and in this case that difference may be material. We therefore consider the two sections separately.

A. Section 1 of the Sherman Act.

Section 1 prohibits "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations...." Thus the first thing that the pleader must allege is that there is a "contract, combination ... or conspiracy." The complaint does allege such a conspiracy.

The second requirement is that the conspiracy must be "in restraint of trade or commerce." That, too, is alleged. However, defendants argue, and the trial judge agreed, that price cutting does not violate § 1, unless it is "predatory" in the sense that it is below cost. Our cases say that this is usually, but not always correct. There are exceptions. See our discussion of this phase of the law in *Transamerica Computer Co., Inc. v. IBM Corp.*, 9 Cir., 1983, 698 F.2d 1377, 1387. "First, this court has already recognized that prices exceeding average total cost might nevertheless be predatory in some circumstances." And again: "A rule based exclusively on cost forecloses consideration of other important factors, such as intent, market power, market structure, and long-run behavior in evaluating the predatory impact of a pricing decision."

Here, intent to injure VSL's competitors and to drive them out of the market is specifically alleged. Also alleged is the peculiar market structure of the post-tensioning business. It is a protected market, in that steel strand may not lawfully be imported at prices below a fixed price. Domestic concerns cannot lawfully buy imported steel strand below that price and domestic sellers will not sell steel strand below that price. It is alleged that the conspirators arranged to supply VSL with imported steel strand at a price below what VSL's competitors could lawfully pay and that the intended and actual result was to enable VSL to put those competitors, including Western, at a competitive disadvantage, and drive most of them out of the post-tensioning business, including Western as to one part of the market. We hold that these allegations being this case within the exception that we articulated in *Transamerica Computer*. Here, the price cutting was not "pro-competitive" as most price cutting is. Rather, it was intended to be, and was, anti-competitive under the unique conditions of the relevant market.

The cases on which the appellees relied are not to the contrary. The first is *In re Japanese Electronic Products Antitrust Litigation*, 3 Cir., 1983, 723 F.2d 238, affirming in part *Zenith Radio Corp. v. Matsushita Electric Industries Co.*, E.D.Pa., 1981, 513 F.Supp. 1100. Defendants rely on a ruling in favor of Sears, one of the defendants. Here is what the court said: There is evidence from which it could be found that Sears negotiated prices from Sanyo and Toshiba substantially lower than the minimum prices fixed in the MITI-sponsored minimum price agreement, and took steps, over a long period, to conceal these dumping prices from the Japanese government and the United States Customs Service. While that activity, if it occurred, may have been illegal, it was clearly consistent with Sears' economic interest as a retailer. There is no evidence that Sears was aware of retail price stabilization in Japan, or of the five-company

rule, or that the suppliers with which it dealt were acting in concert with respect to the evasion of the minimum prices agreed upon with MITI. As the last sentence shows, the essence of the decision is that Sears was not a conspirator.

It is true that elsewhere in the *Japanese Electronic* opinion there is language that selling in this country at prices below the prices which the Japanese companies charged in Japan does not violate section 1 of the Sherman Act. But there is more here. In the same opinion, 723 F.2d at 311, the court said: "We hold that a finding of a conspiracy to sell at artificially high prices in Japan while at the same time selling at artificially low prices in the United States would support liability to NUE and Zenith under section 4 of the Clayton Act, ..."

The second case relied on by the appellees is *Knuth v. Erie-Crawford Dairy Cooperative Association*, 3 Cir., 1972, 463 F.2d 470. In that case, however, the court determined that the charged conspiracy had not been proved. Plaintiff argues that the conscious parallel action among all of the defendants was sufficiently inferable from the evidence that the existence of a conspiracy was a jury question. No specific evidence is referred to, and our own review of the record discloses no evidence tending to show that any handler was even aware of the price arrangement of any other. Evidence from which a conspiracy may be inferred is simply absent. We hold that the complaint alleges a sufficient claim under Section 1.

B. Section 2 of the Sherman Act.

Section 2 provides, in pertinent part:

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, ...

Under this section, whether or not conspiracy is charged, there must be a specific objective--to "monopolize, or attempt to monopolize." This differs from Section 1, which requires a conspiracy, but does not require monopolizing or attempting to monopolize. In this case the charge is that the defendants conspired to enable VSL to monopolize the post-tensioning business in this country. The means used were to reduce the price of steel strand to VSL, and thereby VSL's price for post-tensioning, to a point where Western and other competitors of VSL are driven from the market. Both an attempt to do so and actually doing so are charged.

Attempt to monopolize and actual monopolization involve, among other things, intentional predatory or anticompetitive conduct. This element of a Section 2 claim encompasses more than the parallel element of a Section 1 claim. Conduct that is competitive in a Section 1 context may be predatory or anticompetitive in a Section 2 context, because monopolization is, in effect, being so competitive as to destroy competition. Thus, while illegal price-cutting is usually not a restraint of trade when done for competitive purposes in a competitive market, it is predatory if the purpose is to monopolize the relevant market. *See United States v. Columbia Steel Co.*, 1948, 334 U.S. 495, 531-32 ("even though the restraint effected may be reasonable under Section 1, it may constitute an attempt to monopolize forbidden by Section 2 if a specific intent to monopolize may be shown").

The cases cited by defendants in support of their argument that illegal price-cutting is not anticompetitive conduct under Section 1 did not involve allegations comparable to Western's claim that the purpose of the dumping was to allow VSL to monopolize the American post-tensioning industry. Thus, they do not support an argument that such conduct is not predatory or anticompetitive under Section 2.

Western alleged that VSL violated the import restrictions in order to, and that it did, underbid its post-tensioning competitors harm those competitors, and enhance its long-term position in the market. Western alleged that the conspiracy resulted in VSL increasing its market share to 70% or more, while correspondingly decreasing the market shares of its rivals, and that several firms were forced out of the market. Western alleged that the defendants intended to create a monopoly by means of other than fair competition, specifically by importing steel strand at illegally low prices. This would be predatory conduct. *See William Inglis & Sons Baking Co. v. ITT Continental Baking Co.*, 9 Cir., 1981, 668 F.2d 1014, 1030-31, ("Such conduct is not true competition.... Its purpose is to create a monopoly by means other than fair competition").

Western's allegation that the defendants agreed that Mitsui (U.S.A.) would sell Shinko Wire's steel strand to VSL at a price substantially lower than it offered to Western and other post-tensioning competitors, for the purpose of enabling VSL to monopolize the post-tensioning industry, if borne out, would establish a violation of Section 2. Therefore, it is sufficient to survive a motion to dismiss.

We also conclude that the alleged illegal conduct resulted in antitrust injury. Western alleged that the defendants' conspiracy was intended to and did injure the post-tensioning market, in which Western competed, by creating a monopoly. Thus, Western's injury was "inextricably intertwined" with the injury to the market that the conspiracy sought to inflict.

IV. The 1916 Antidumping Act

The district court dismissed Western's action for violation of the 1916 Antidumping Act, 15 U.S.C. § 72, holding that Western lacked standing to sue under that statute. The court found that the history of the Act suggested that although a direct domestic competitor of an alleged dumper (such as a domestic steel strand producer) might have a private right of action, a competitor of a purchaser from the alleged dumper (such as Western) does not.

Western argues that the language of the Act plainly confers standing: *Any person injured* in his business or property by reason of any violation of, or combination or conspiracy to violate, this section, may sue therefore in the district court ... and shall recover threefold the damages sustained, and the cost of the suit, including a reasonable attorney's fee. 15 U.S.C. § 72 (emphasis added). The few cases that have addressed the extent of standing, however, demonstrate that the meaning of the language is not plain. *Compare Jewel Foliage Co. v. Uniflora Overseas Florida, Inc.*, M.D.Fla., 1980, 497 F.Supp. 513, 516-17 (importer has standing to sue a competing importer; standing not limited to domestic manufacturers), *with*

Schwimmer v. Sony Corp. of America, E.D.N.Y., 1979, 471 F.Supp. 793, 797 (domestic wholesale distributor of imported products lacks standing; standing limited to domestic manufacturers injured by alleged dumping); *accord Bywater v. Matsushita Electric Industrial Co.*, S.D.N.Y., 1971, CCH Trade Reg.Rep. ¶ 73,759.

We must construe the grant of standing to "any person injured" not only in the light of its literal expansiveness and its meaning in the context of other statutes, such as the Clayton Act, 15 U.S.C. § 15, but in its specific context. The 1916 Act prohibits import or sale at below market prices "with the intent of destroying or injuring an industry in the United States, or of preventing the establishment of an industry in the United States or of restraining or monopolizing any part of trade and commerce in such articles in the United States." Thus, the express purpose of the Act is to protect domestic industries from dumping by their foreign competitors. In every reported case, the statute has been applied or restricted to domestic producers (or importers, in *Jewel Foliage, supra*, where there were no domestic producers of wide-leaf comador foliage) *of the dumped good*, prohibiting restraint or monopolization of trade *in the dumped good*. This is faithful to the historical purpose of the 1916 Act to protect American producers from foreign competitors, specifically established European manufacturers.

Here, the claim is that defendants evaded the trigger price mechanism that protected the domestic steel industry. But Western is a member of the post-tensioning industry, not of the steel industry, and Western alleged that the defendants conspired to restrain and monopolize post-tensioning, not trade in steel strand. Violation by import and sale of steel strand at below market prices of antidumping laws intended to promote the domestic steel industry does not give rise to an action under the 1916 Antidumping Act by a member of the post-tensioning industry. We therefore conclude that the district court properly limited standing under the 1916 Act to domestic competitors of the alleged dumper, denying standing to a domestic competitor of a domestic buyer of allegedly dumped goods.

We affirm the judgment as it relates to the 1916 Anti-dumping Act. We reverse the judgment as it relates to Sections 1 and 2 of the Sherman Act and the Clayton Act, and as it relates to the Wilson Tariff Act.

SNEED, Circuit Judge, concurring in part and dissenting in part:

I concur in the opinion of the court in all respects except that part, II.A, which holds that a violation of Section 1 of the Sherman Act has been alleged.

Section 1 of the Sherman Act forbids every "contract, combination ..., or conspiracy, in restraint of trade or commerce." I agree that the complaint alleges a conspiracy. I do not believe, however, that the alleged conspiracy was "in restraint of trade or commerce." The majority reasons that the required element of restraint existed because the alleged object of the conspiracy was to drive VSL's competitors, including Western, out of business. I believe that such a motive renders the alleged conduct a conspiracy to monopolize or an attempt to monopolize within the meaning of Section 2 of the Sherman Act, but not a restraint of trade within the meaning of Section 1.

The improper conduct alleged in this case is a conspiracy to sell at prices below those that other competitors, acting within the law, could offer. This is no more and no less than a form of predatory pricing. The only difference between the conduct alleged in this case and ordinary predatory pricing is that here it is the law, rather than costs, that prevents the defendant's competitors from matching the defendant's price.

Our cases have always treated predatory pricing as a violation of Section 2, not Section 1. I have found no case in this circuit that has extended Section 1 coverage to a conspiracy to engage in predatory pricing. One case from the Third Circuit, *In re Japanese Electronic Products Antitrust Litigation*, 723 F.2d 238 (3d Cir. 1983), concerned a conspiracy to fix prices in one market while selling products at unlawfully low prices in another market. The court found that one defendant, Sears, had conspired with its supplier to import products at unlawfully low prices, but had not been part of the price-fixing conspiracy. Sears was held not to have violated Section 1.

This paucity of authority should caution us not to leap to the conclusion that a Section 1 violation has been alleged in this case. Ordinarily, an arrangement between a seller and his supplier designed to improve the seller's position in his market is not a violation of the Sherman Act. The purpose of competition from the merchant's point of view is to expand his market without regard to whether he thereby shrinks that of another merchant. The Sherman Act was designed to foster precisely that kind of activity.

The activity becomes a matter of concern under the Sherman Act only when the seller threatens to monopolize his market. Thus, Section 2 provides an appropriate test of the lawfulness of the conduct alleged. The analysis under Section 2 is straightforward, unstrained, and easy to grasp.

The majority's intent in declaring such an arrangement to be a "restraint of trade" under Section 1 is unclear. If the arrangement is unlawful under Section 1 only when it threatens to monopolize the market, then Section 1 simply duplicates of Section 2 in this context. If, however, Section 1 applicable even when the arrangement does not threaten to result in monopoly, then Section 1 becomes a "code of fair competition" that brings under the antitrust laws any unfair or unlawful scheme by which a seller seeks to improve his position in the market at the expense of his rivals. Antitrust law has always had a tendency to drift in this direction, but it is a drift to which I do not wish to add my weight.

The majority's interpretation of Section 1 could be far-reaching. For example, a business linked in some advantageous way with organized crime might well be made an antitrust target by its competitors. Or a supplier's violation of the minimum wage laws, when known to his purchaser, might render the latter subject to an antitrust suit by a competitor. Or a knowing purchaser from one who is violating the antitrust laws might also be liable under Section 1. Perhaps the majority intends to reach this far. Perhaps not. Not knowing whether they do or not, I respectfully dissent from Part II.A.

NOTES

1. Only one plaintiff has ever prevailed on the merits of a claim under the 1916 Antidumping Act. *Goss Intern. Corp. v. Man Roland Druckmaschinen Aktiengesellschaft*, 434 F.3d 1081 (8th Cir. 2006).
2. In response to the *Goss* case, the 1916 Antidumping Act was held unlawful by the appellate body of the World Trade Organization on the grounds that WTO rules permitted only the imposition of anti-dumping duties and not the imposition of other remedies like treble damages in response to illegal dumping. After much delay, the United States Congress eventually repealed the 1916 Antidumping Act eliminating the possibility that the WTO would impose sanctions against the United States.
3. Using the import relief laws as they were intended by Congress may raise important policy issues but is lawful under the antitrust laws. The following case raises the interesting possibility that going beyond the procedures and relief that Congress expressly authorized may subject the parties, both private and government, to potential antitrust liability.

Consumers Union of U.S., Inc. v. Rogers, 352 F.Supp. 1319 (D.D.C. 1973).

Consumers Union of U. S., Inc., by amended complaint filed October 5, 1972, has challenged the legality of so-called Voluntary Restraint Arrangements on Steel which were mutually made between certain foreign steel companies as a result of negotiations initiated by the Secretary of State at the direction of the President. Under these arrangements, nine Japanese steel companies, British Steel Corp., and various Western European steel manufacturers belonging to the European Coal and Steel Community by detailed agreements undertook to reduce substantially the amounts of steel they would import into the United States for domestic sale. These arrangements, which have been monitored and assisted by the Secretary, were consummated in May, 1972, and are to continue through the calendar year 1974. They affect 85 percent of United States steel imports and were widely publicized through press releases and transmittals to appropriate congressional committees.

Plaintiff, a recognized consumer organization, contends that the actions of the State Department officials in stimulating and implementing these arrangements are, in effect, *ultra vires*, and that no member of the Executive Department, including the President, has power under the Constitution and laws of the United States to enter into or to arrange the resulting restrictions on foreign commerce in steel. A declaratory judgment and injunction are sought. The matter comes before the Court on cross-motions for summary judgment, on agreed documents and statements of fact, and the admittedly novel issues have been very thoroughly briefed and extensively argued.

It was initially alleged that the steel arrangements violate the Sherman Act but this contention was dismissed by plaintiff, with prejudice, although the contention continues to be made in support of plaintiff's general position that any restraint offensive under the antitrust laws cannot be negotiated by the President or his representatives in view of congressional preemption in this field. Plaintiff now asserts that under Article I, Section 8, of the Constitution, Congress has

authority to regulate domestic and foreign trade and that the enactment of the Sherman Act, coupled with enactment of the Trade Expansion Act of 1962, 19 U.S.C. §§ 1801-1991 (1965), blankets the field to the exclusion of any residual power in the President to take unilateral action with private companies which is contrary to the intent of these statutes. In urging that these two statutes, by implication, deprive the President of any authority which he might otherwise have under Article II of the Constitution, plaintiff emphasizes the scope of antitrust prohibitions and the existence of a specific trade agreement as to steel approved under the congressional scheme for regulatory tariffs and imports.

Defendants respond that only the most general legislation designed to encourage competition and free trade is in effect and that this legislation cannot be read to carry an explicit preemption. Accordingly, the Government suggests the President retains his power in the field of foreign affairs to act through "diplomacy" and bring about such arrangements with private foreign companies as he feels are in the best interests of the country.

Obviously this litigation raises novel and difficult constitutional questions which have wide import. The Court recognizes that it will be well advised to avoid any decision that reaches beyond the specific dispute presented. Some observers note a gradual erosion of congressional authority in favor of the Executive, which is said to reflect the growing complexity of our society and widening involvement in foreign affairs. Others suggest the trend reflects stultifying inhibitions built into congressional processes and other factors. The courts have no general role in this shifting emphasis between competing branches of government. It is only when a distinct aspect of the struggle surfaces into a clearly justiciable controversy that a court must act. When this occurs, the Court should apply well-settled legal principles to the limited dispute presented, leaving ultimate solutions to our democratic processes.

All parties recognize that if in fact Congress has preempted the relevant field of foreign trade and commerce, then the President lacks authority to act in a manner inconsistent with the requirements of the preemption legislation. The steel arrangements were made although a specific trade agreement as to steel was in effect. Plaintiff points to the failure to ventilate the arrangements in advance under the procedures contemplated by the Trade Expansion Act of 1962 and contends that in view of the breadth of antitrust regulation it is only in this fashion that the President could have proceeded. This goes too far. To be sure, if the avenue chartered in the Trade Expansion Act of 1962 had been available and had been pursued, there would be no question of the legality of the Executive action taken and even immunity under the Sherman Act might well be implied. Although this was not done, there is nothing in the Trade Expansion Act of 1962 that makes its processes exclusive. Nor can it be said that a general statute of uncertain application like the Sherman Act was intended to preempt from the President his independent authority over foreign commerce. While the legislative pattern is indeed comprehensive and the President's authority has been narrowed, these acts cannot be read as a congressional direction to the President prohibiting him from negotiating in any manner with private foreign companies as to commercial matters. Far more explicit legislation would be required to deprive the President of this authority in foreign affairs where his preeminent role has quite properly long had firm constitutional recognition.

On the other hand, the Government's argument also overreaches. The President clearly has

no authority to give binding assurances that a particular course of conduct, even if encouraged by his representatives, does not violate the Sherman Act or other related congressional enactment any more than he can grant immunity under such laws. A flat agreement among private foreign producers mutually to limit a substantial amount of goods to be sold in the United States is a violation of the Sherman Act and to the extent participants are subject to the jurisdiction of our courts criminal penalties may be imposed and civil actions for damage or equitable relief may be pressed. The President must faithfully execute the law and cannot permit his subordinates to be participants in such a combination or agreement. There is no basis in the Constitution or case law for a contrary conclusion. Defendants cite *Parker v. Brown*, 317 U.S. 341 (1943), but the exception from Sherman Act strictures there recognized was based on legislative action and it cannot be said that the Executive charged with responsibility to execute the law can also create his own exceptions.

Obviously when representatives of the Executive Branch venture into areas where the antitrust laws have apparent application, they must proceed with strict regard for legislation outlawing restraints of trade so that no action taken will be inconsistent with the clear requirements of settled national policy. The implications of recognizing authority in the Executive to cartelize segments of our trade need no special emphasis except as they caution against attempting to imply authority where it has been clearly removed.

The Court declares that the Executive has no authority under the Constitution or acts of Congress to exempt the Voluntary Restraint Arrangements on Steel from the antitrust laws and that such arrangements are not exempt.

The Court further declares that the Executive is not preempted and may enter into agreements or diplomatic arrangements with private foreign steel concerns so long as these undertakings do not violate legislation regulating foreign commerce, such as the Sherman Act, and that there is no requirement that all such undertakings be first processed under the Trade Expansion Act of 1962.

The foreign companies who were apparently persuaded by the Secretary to enter into the steel arrangements proceeded on the stated assumption that the mutual agreements achieved were legal under American law and presumably immune from Sherman Act scrutiny. While official assurances to this effect may or may not have been given, there is no doubt that the companies proceeded in the belief the arrangements were legal under our law and the quiescence of all public authorities of the United States on this score was notable. Because of the Amended Complaint, the question of whether or not a violation of the Sherman Act is present is not before the Court to decide. However, it is apparent on this limited record that very serious questions can and should be raised as to the legality of the arrangements under the Act and that the undertakings of the foreign steel companies were made on a mistaken assumption which at least was encouraged, albeit in good faith, by the Secretary.

The parties are urged to re-examine their positions and premises in the light of this memorandum and the declarations made. No injunction is appropriate. To the extent the respective motions for summary judgment are inconsistent with the above declarations they are denied.

Consumers Union of U.S., Inc. v. Kissinger, 506 F.2d 136 (D.C. Cir. 1974).

III.

A substantial portion of the briefs and argument before us has been devoted to the Sherman Act. The defendant-appellants are, not surprisingly, perturbed by some of the comments made by the District Court with respect to possible Sherman Act liability. Although the court stated in terms that, by reason of the stipulation of dismissal, 'the question of whether or not a violation of the Sherman Act is present is not before the Court to decide,' it did not leave the matter at that. One of its declarations is that the Executive has no authority to exempt from the antitrust laws the arrangements here involved, and 'that such arrangements are not exempt.'

Since there is nothing in the record that shows the Executive as purporting to grant such an exemption, this observation by the court does not have the stature of a declaratory disposition of an actual controversy. The court's other comments in this connection are not couched in adjudicatory form, as indeed, so the court recognized, they could not be in the light of the abandonment by the plaintiff of its antitrust claim. With the declaration vacated, as we shall direct in our judgment, these expressions of the court's opinion are without judicial force or effect and are not appropriate for pursuit upon appeal.

We think that the Sherman Act issue, for all practical purposes, disappeared from this case when the plaintiff, for reasons best known to itself, stipulated its dismissal with prejudice. It is apparent from the face of the original complaint that the Sherman Act claim was originally conceived by the plaintiff as a vital aspect of its lawsuit. Its resolution would almost certainly have required the exploration by adversarial trial of a number of complex questions of fact and law, and the making of legal rulings in an area not distinguished for its simplicity. When the plaintiff, confronted by that formidable prospect, elected to abandon its antitrust claim, the Sherman Act could no longer play a significant part in this controversy, and we have no occasion to concern ourselves with the discussions by the parties of the precise reach of that statute.

The declaration in the District Court's order with respect to antitrust exemption is vacated, and the declaratory aspect of that order is confined to the proposition that the State Department defendants were not precluded from following the course they did by anything in the Constitution or Title 19 of the U.S. Code. As so confined, the order appealed from is affirmed.

It is so ordered.

NOTES

1. In response to the *Consumers Union* case, Congress passed a statute granting retroactive antitrust immunity to the participants in the steel voluntary restraints at issue in the case.
2. Because of continuing concerns over antitrust liability, members of the executive branch under the Carter Administration were extremely cautious in negotiating with foreign governments or foreign firms regarding establishing voluntary export restraints aimed at the United States.
3. At the end of the Carter Administration and the beginning of the Reagan administration, the US auto industry began suffering massive losses as a result of import competition, rising oil prices, and a change in consumer taste toward smaller cars. The Detroit auto makers suffered from a relative competitive disadvantage in the manufacture of attractive energy efficient car (has anything changed) and would be unable to change the mix of cars they produced for several years. The car manufacturers and the United Auto Workers filed a case under Section 201 of the Trade Act of 1974 (see page 2) but lost the case when the International Trade Commission (ITC) ruled that imports were not the principal cause of the injury the domestic industry was suffering. This left the Reagan administration in a quandary. Had the ITC ruled in favor of the industry the President could have restricted imports or lawfully negotiated voluntary restraints with the Japanese government. Congress meanwhile was getting into the act and threatening to pass strict quotas on imported autos which would have been unlawful under the rules of the GATT, the predecessor to the WTO. What could do the Reagan administration do without violating either the trade laws or the antitrust laws?

Correspondence Between the U.S. Attorney General and Ambassador of Japan on U.S. Antitrust Laws and Japan's Restraints on Automobile Exports

May 7, 1981

Dear Mr. Attorney General:

I have the honor to inform you that the Government of Japan, through explanations by the United States Government fully understands the difficult situation of the U.S. auto industry.

Based upon the above understanding, the Government of Japan will unilaterally restrain the volume of cars to be exported from Japan to the U.S., according to the scheme explained hereinafter, in order to cooperate with efforts to be taken for the recovery of the automobile industry in the U.S.

The Government of Japan considers the orderly export of Japanese products to be one of its basic trade policies so as not to create disruption in the national economies of other countries. On May 1, 1981, the Cabinet members concerned met, considered the attached scheme, and approved it.

It is the Ministry of International Trade and Industry (MITI) that has authority and responsibility for administering concretely Japan's basic trade policies.

The above-mentioned measures concerning Japanese car exports to the U.S. will be put into practice through written directives setting the maximum number of exportable units of passenger cars to the U.S. for each Japanese automobile company, to be given by MITI in

accordance with its authority for bringing into action trade policies set forth in Article Three (3) of the establishment law of MITI, as well as Article Forty-eight (48) of the Foreign Exchange and Foreign Trade Control Law (Law No. 228 of 1949).

Adherence to these directives will be secured by reports on car exports to the U.S. which are to be collected separately from each company under the competent authority and responsibility of MITI.

Further, if any firm should fail to make a report or should make a false report in violation of the provisions of Article Sixty-seven (67) of the Foreign Exchange and Foreign Trade Control Law, that firm will be proceeded against for punishment under Articles Seventy-two (72) and Seventy-three (73) of the Law.

If on the basis of the above reports it becomes clear that any company threatens to exceed the limits set forth by MITI, the Government of Japan will promptly make car exports to the U.S. subject to export licensing, by amending the Export Trade Control Order (Cabinet Order No. 378 of 1949) in accordance with Article Forty-eight (48) of the Foreign Exchange and Foreign Trade Control Law, MITI would then enforce the export maximums it had established for each company by refusing to license exports in excess of those maximums. The Government of Japan has the authority under Japanese Law to impose this requirement. It would be a violation of Japanese law to export cars without an export license in that situation, and any company engaging in such violation would be proceeded against for imposition of fines, penalties or other sanctions as provided by Article Seventy (70) of the Foreign Exchange and Foreign Trade Control Law.

As the above-mentioned directives setting limits for exportable cars and collecting reports from each company come as a result of the administrative authority inherent in the Government of Japan in accordance with the laws of Japan, each company must obey the orders of the Government of Japan.

The Government of Japan considers that implementation of such an export restraint by the Government of exportable units among the companies by MITI, and compliance with the restraints by Japanese automobile companies, would not give rise to violations of American antitrust laws. However, the Government of Japan requests that the Department of Justice, as the authority chiefly responsible for administering the U.S. laws, support the views of the Government of Japan.

Further, as to the export of passenger cars to Puerto Rico and the export of automobiles which are classified under "commercial vehicles" in JAMA statistics, but classified under "passenger cars" in the U.S., to the U.S. and Puerto Rico, we would like to know that the views of the Department of Justice are the same regarding the above should the Government of Japan restrain exports through the same measures mentioned above.

Sincerely yours,

Yoshio-Okawara
Ambassador of Japan

Dear Mr. Ambassador:

This letter is in response to the request of the Government of Japan, set forth in its letter of May 7, and the two enclosures thereto, for the views of the Department of Justice on antitrust

questions regarding measures now being considered by the Government of Japan to unilaterally restrain the export of passenger cars to the U.S. so as to cooperate with the U.S. Government's domestic automobile industry recovery program.

The Government of Japan has advised us that the Ministry of International Trade and Industry (MITI), which it represents has legal authority and responsibility in the Government of Japan for carrying out basic trade policy, including authority to take the measures described in your letter and its two enclosures, and has authority to maintain orderly exports, will establish at its discretion the maximum number of cars that company may export to the U.S. in a specified period.

Further, MITI will direct individual companies to submit accurate monthly reports on passenger car exports to the U.S. so as to assure the implementation of the export limitation directive. It is understood, and the directive will state that, in any case in which it becomes clear that any company threatens to exceed the limits set forth by MITI, the Government of Japan will promptly made the export of cars to the U.S. subject to export licensing, in accordance with Article Forty-eight (48) of the Foreign Exchange and Foreign Trade Control Law, (Law No. 228 of 1949), and Article One (1) of the Export Trade Control Order (Cabinet Order No. 378 of 1949 as amended), by amending the Export Trade Control Order. MITI will then enforce the export maximums it established for each company by refusing to license exports in excess of those maximums. The Government of Japan has advised us that MITI has the authority to impose this requirement, that it would be a violation of Japanese law to export cars without an export license in that situation, and that such violation would be punished pursuant to Japanese law by fines, penalties, or other sanction.

In these circumstances, we believe that the Japanese automobile companies' compliance with export limitations directed by MITI would properly be viewed as having been compelled by the Japanese Government, acting within its sovereign powers. The Department of Justice is of the view that implementation of such an export restraint by the Government of Japan, including the division among the companies, would not give rise to violations of United States antitrust laws. We believe that American courts interpreting the antitrust laws in such a situation would likely so hold.

Further, in response to your inquiry regarding exports of passenger cars to Puerto Rico and the exports of automobiles which are classified under "commercial vehicles" in JAMA statistics but classified under "passenger cars" in the U.S., we would like to state that if export limitations are achieved through the same measures and authorities previously described, the sovereign compulsion defense to any antitrust action that might be brought under United States laws would be equally available.

Sincerely,
William French Smith
Attorney General

NOTES

1. Compare the voluntary steel restraints in *Consumers Union* involving the Secretary of State, with the voluntary auto restraints which the Attorney General/Department of Justice assured

would not violate the antitrust laws. What is the difference between the two agreements under the U.S. antitrust laws?

2. Most commentators believe that the Japanese auto restraints would be lawful or at least cleverly insulated from legal challenge. For a more skeptical view, see Spencer Weber Waller, *Redefining the Foreign Compulsion Defense in U.S. Antitrust Law: The Japanese Auto Restraints and Beyond*, 14 LAW POL'Y INT'L BUS. 747 (1982).

3. Do you agree with the Attorney General that the Japanese auto companies would be protected under the foreign compulsion doctrine?

4. Should the Antitrust Division be in the business of advising the rest of the United States government and/or foreign governments how to restrict competition in the United States in order to settle trade disputes without actually violating the antitrust laws?

Statement on the Machine Tool Industry

President Ronald Reagan, May 20, 1986

I have decided to seek voluntary restraint agreements (VRA's) on machine tool imports. In March 1983 the National Machine Tool Builders Association submitted a petition to the Secretary of Commerce recommending import quotas based on the view that imports of machine tools threaten the national security. Pursuant to statute, Secretary Baldrige submitted a report to me in February 1984. In March 1984 I decided that this report should incorporate new mobilization, defense, and economic planning factors then being developed by an interagency group. I then directed the Secretary of Commerce to update the machine tools investigation. In March 1986 Secretary Baldrige submitted his report to reflect this guidance. The National Security Council subsequently discussed the report, and on this basis, I have directed that import levels be reviewed during the next 6 months.

The Secretary of Commerce, in consultation with the Secretary of Defense and other relevant administration officials, indicated that the machine tool industry is a small yet vital component of the U.S. defense base. The Secretary of Commerce further indicated that high levels of imports can potentially erode U.S. capabilities to manufacture critical machine tool product lines. Based on this information, I have decided on the following course of action:

-- Voluntary restraint agreements will be sought with Taiwan, West Germany, Japan, and Switzerland on machining centers, computer-controlled and noncomputer-controlled lathes, computer-controlled and noncomputer-controlled punching and shearing machines, and milling machines.

-- The Departments of Defense and Commerce, in cooperation with the other agencies, will implement an action plan that will:

- Integrate more fully U.S. machine tool manufacturers into the defense procurement process. In particular, companies will receive more timely information on U.S. defense programs and future DOD manufacturing requirements so that they may be able to participate at an earlier stage in the procurement process.
- Modernize machine tool capabilities that support our national defense. DOD programs that improve manufacturing productivity as well as those that advance technology will be applied to the machine tool industry.
- Provide up to \$5 million per year over the next 3 years in Federal Government matching funds to support a private sector technology center to help the machine tool industry make advances in manufacturing and design.
- The Attorney General and other agencies will investigate the potential for cooperative research and development efforts on the part of industry.
- The Secretary of Commerce will monitor the U.S. machine tool industry's performance on an annual basis, with emphasis on the steps it has taken to improve its production capabilities and competitive position.

This action plan, combined with the administration's growth-oriented economic policies and dedicated efforts on the part of the U.S. machine tool industry, will ensure a world-class U.S. industry.

Senate Bill S.99, 103^d CONGRESS, 1ST SESSION

SECTION 1. SHORT TITLE.

This Act may be cited as the “International Fair Competition Act of 1993”.

SEC. 2. FINDINGS.

The Congress finds that—

- (1) all nations should enact and vigorously enforce strong competition laws to benefit consumers, encourage international competition, and foster growth in jobs, productivity, and investment;
- (2) industries should not be allowed to take advantage of weak or nonexistent competition law enforcement in their home markets to compete unfairly in markets that do have strong competition laws and effective enforcement;
- (3) existing United States antitrust law is inadequate to prevent international competitors from unfairly exploiting United States markets; it should be amended to recognize that lack of competition abroad should not result in unfair competition domestically; and
- (4) United States antitrust laws applicable to foreign competitors that export articles to the United States market should be consistent with United States antitrust laws that are applicable to domestic business conduct.

SEC. 3. EXPORTATION TO THE UNITED STATES AND SALE OF ARTICLES BELOW COST.

(a) REPEAL OF CRIMINAL PROVISION.—The second paragraph of section 801 of the Act of September 8, 1916 (15 U.S.C. 72), is repealed.

(b) EXPORTATION OR SALE AT LESS THAN AVERAGE TOTAL COST.—

(2) by amending subsection (a), as designated by paragraph (1), to read as follows:

“(a)(1) It shall be unlawful for any person that exports a product from a foreign country into the United States, commonly and systematically to export the article into, cause the article to be exported into, or cause the article to be sold within the United States, at a price that is less than the average total cost of the article, if—

“(A) the exportation or sale has the effect of—

“(i) destroying or injuring commerce in the United States;

“(ii) preventing the establishment of a line of commerce in the United States; or

“(iii) substantially lessening competition or tending to create a monopoly in any part of trade and commerce in the article in the United States; and

“(B) the foreign country’s market in the article—

“(i) lacks effective price competition among competitors; or

“(ii) is substantially closed to effective international competition.

“(2) Nothing shall prevent a defendant from rebutting a prima facie case made with respect to the circumstances described in paragraph (1) by showing that the circumstances described in paragraph (1)(B) were not a factor in the price charged.”.

NOTES

1. S. 99 was never enacted. Would you recommend the enactment of a similar bill today?
2. For an example of an unsuccessful private antitrust suit premised on international predatory pricing see *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).
3. Private firms have the right under the *Noerr-Pennington* doctrine (which protects the right to petition the government) to file import relief petition even if the result is to limit or injure competition. However, domestic industries may still be subject to antitrust investigation and potential litigation if they go beyond the procedures set forth in the import relief laws and use the threat and instigation of the trade case as an opportunity to directly reach anticompetitive agreements with their foreign competition.

Joel Davidow, Cartels, Competition Laws and the Regulation of International Trade, 15
N.Y.U. J. Int'l L. & Pol. 351, 366-69 (1982-1983). Copyright NYU Journal of International Law
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D. "Voluntary" Trade Restraint Agreements

The most complex, ambivalent and anomalous policy approaches have been those toward "cartels" intended to solve problems relating to international trade and protectionism. Such cartels are sometimes called voluntary restraint arrangements, sectoral restraints or orderly marketing arrangements. They generally begin with one common factor: firms in one country believe that imports from another country have captured too large a share of their domestic market, and the domestic firms are prepared to initiate escape clause proceedings,⁶⁷ unfair competition proceedings or other public measures to limit imports. Both sides accept that imports have increased, that protectionist measures might be obtained and that the trade proceedings involved would be time-consuming and expensive, might not produce a result satisfactory to either side and could create harmful political tensions between the two nations.

To many people, thought not to antitrust enforcers and dedicated free traders, such situations cry out for "voluntary" solutions. A voluntary solution may, for a variety of reasons, come about in many different ways. The foreign sellers, sensing opposition in the other country, might simply agree to prevent their imports from increasing any further. They might discern from statements by the other country's industry what level of imports would be tolerable, or they might learn this through direct discussions with their rivals. Quite often, trade officials of one country or the other consult with the industry and urge or request some level of restraint. Officials of the exporting country may favor the restraint because they would like to avoid larger trade problems with the other country. Officials of the importing country may favor it because it relieves them of pressure to impose quotas or tariffs which would expose their country's exports to retaliation under the terms of the GATT.

If it were not for the existence of antitrust laws, particularly antitrust laws like those of the United States, the selection of approaches to [restraint] problems would be largely dictated by convenience and negotiation. However, because U.S. antitrust laws apply to overseas conduct, provide for severe criminal and damage penalties, are enforceable by private parties and relatively independent enforcement agencies and allow no complete defense for good motives or informal government approval, the fashioning of such trade deals is greatly complicated.

American Industry and foreign exporters to the United States may be unwilling to meet with each other to discuss their problems or to negotiate a specific agreement directly with their rivals due to the potential antitrust pitfalls. The risks involved are exemplified by the mink ranchers case, *United States v. National Board of Fur Farm Organizations*.⁶⁹ There, American mink ranchers objected to increased exports from Sweden. They sought quota legislation but received insufficient support in Congress. It was later discovered that they subsequently met in Canada with their foreign rivals and worked out a deal to drop their requests for quota legislation if the Scandinavians would limit exports and adhere to a floor price. The U.S. ranchers' associations

and their officials were indicted by a Federal grand jury in Milwaukee for violation of section 1 of the Sherman Act. They received fines and suspended sentences.

The related area of unfair trade practice settlements may also be subject to antitrust scrutiny. Under United States law, for instance, foreign competition will be deemed unfair and subject to duties, exclusion or injunction if products are subsidized, sold below cost or below their home

⁶⁷ Escape Clause proceedings allow industries which have been “seriously injured” by imports to seek temporary relief even though the foreign sellers have not engaged in any unfair trade practices. *See* Trade Act of 1974 § 201, 19 U.S.C. § 2551 (1976).

market price, or infringe patent or trademark rights held by domestic firms.⁷¹ If U.S. firms complain about such behavior or file against it, a deal may be considered under which the foreigners will modify their practice, or simply lessen their exports, in exchange for the case being dropped. This situation is analogous to the *Fur Farms* case discussed above. Certain Antitrust Division officials suggested a few years ago that the voluntary settlement of such cases – or even the concerted bringing of suits on weak grounds – might constitute antitrust violations. In contrast, there are procedures for formal settlement of such cases. Both the antidumping and unfair foreign competition statutes provide settlement mechanisms. Such settlements almost certainly pose no antitrust problems.⁷⁴ Moreover, there are no decisions indicating that the settlement of a case brought on good faith grounds would amount to an antitrust violation, though the issue might turn on how broad or how permanent a restraint on trade was created by the terms of the settlement.⁷⁵

Trade restraint agreements, in spite of antitrust reservations could be and sometimes have been negotiated pursuant to express authority providing for “orderly marketing arrangements” to cure injuries to U.S. industry found by the U.S. International Trade Commission (ITC).⁷⁶ They can also be negotiated under the constitutional foreign policy and treaty-making power of the Executive to enter into bilateral or multilateral agreements with other nations or foreign parties. It seems clear that achieving trade restraint through these means would generally obviate most U.S. antitrust law issues for the governments or enterprises involved. Important considerations of timing, flexibility and political necessity, however, have led to a number of situations, in which export restraint has been achieved by means not expressly provided for by statute.

Strong incentives exist nonetheless to challenge these restraint arrangements in the courts. Longstanding U.S. traditions in favor of free trade, consumerism, restraint of arbitrary executive power, free competition and antitrust, and the fact that U.S. importers and buyers as well as consumers may suffer real economic injury from such restraints, have caused various groups to organize legal challenges to them. Although the U.S. legal system permits antitrust actions and some private challenges to Executive Branch action, requirements of standing, injury and exhaustion of remedies have severely limited the ability of opponents of trade restraints to succeed in the courts.

⁶⁹ 395 F.Supp. 56 (E.D. Wis. 1975).

⁷¹ 19 U.S.C. §§ 1303, 1677 (1976 & Supp. IV 1980).

⁷⁴ These settlements would meet the standard of *California Retail Liquor Dealers Ass'n v. Midcal Aluminum*, 445 U.S. 97, 105 (1980), that implied immunity can be found where there is predominantly public purpose of a restraint and adequate public supervision of it.

⁷⁵ The Supreme Court in *United States v. Trenton Potteries*, 273 U.S. 392, 397 (1927) stated that "the reasonable price fixed today may through economic and business changes become the unreasonable price of tomorrow." Thus, a long term promise by foreigners to adhere to a particular price schedule would likely be considered unreasonable. A simple agreement to withdraw a price involving a dumping margin might not be.

⁷⁶ 19 U.S.C. § 1351 (1976 & Supp. IV 1980).

NOTES

1. The *Noerr-Pennington* doctrine does not protect the filing of a mere "sham" petition or complaint which lacks an objective basis in law or fact and is a mere attempt to directly interfere with a competitor.
2. What does a "sham" mean in the context of an import relief proceeding? The next case explores this concept in the context of a particularly bitter feud between family members who became bitter rivals in the United States and Italy in a highly specialized branch of the musical instruments industry.

Music Center S.N.C. Di Luciano Pisoni v. Prestini Musical Instruments Corp., 874 F.Supp. 543 (E.D.N.Y. 1995).

This motion to dismiss and for summary judgment revolves around a trade dispute between two manufacturers of pads for the keys of woodwind instruments. Plaintiffs are an Italian manufacturer, Music Center S.N.C. Di Luciano Pisoni & C., and a New York importer of these products, Enzo Pizzi, Inc. Defendants are Prestini Musical Instruments Corporation ("PMI"), an Arizona corporation also making keypads, its principal, Giuseppe Prestini, and its counsel, Miller, Canfield Paddock and Stone and William E. Perry, a member of that firm. Plaintiffs allege violations of Section 2 of the Sherman Act, as well as state-law unfair trade practices, theft of trade secrets, abuse of process, wrongful institution of civil proceedings and prima facie tort.

The antitrust cause of action alleges a course of anticompetitive conduct arising out of the filing of baseless or "sham" antidumping petitions and other actions before the International Trade Commission ("ITC") and International Trade Administration ("ITA") of the Department of Commerce ("Commerce"). During antidumping and countervailing duty proceedings, Commerce determines whether the pricing of goods by an importer is lower than fair value ("LTFV"), and whether the import and pricing of such goods is injuring a domestic industry in competition with the importer--a practice commonly known as "dumping." See Pierre F. De Ravel Esclapon, *Non-Price Predation and the Improper Use of U.S. Unfair Trade Laws*, 56 Antitrust L.J. 543 (1987) (hereinafter "*Non-Price Predation*").

These proceedings may pose a substantial burden on their target. The foreign companies who are the subject of an antidumping investigation are presented with questionnaires seeking information about their selling practices, and, in many cases, their cost of production as well. *See Non Price Predation*, at 549. After submission of questionnaire responses, these responses are verified by Commerce officials. The verification process sometimes involves up to five investigators reviewing source documents at the respondents' corporate offices and factories for periods ranging between three days and three weeks. There also appears to be no limit on the number of complaints a domestic industry may file, although the ITA has the discretion to terminate the investigation at any time after it determines that a petition lacks merit.

Plaintiffs allege here that three sets of filings before Commerce by PMI, in 1983, 1991 and 1992, each charging plaintiffs with dumping, were without factual basis. Plaintiffs claim that the filings were designed solely to injure them competitively by forcing them to incur the cost of defending the baseless antidumping proceedings. In pertinent part, the amended complaint charges that:

20. Despite numerous blatant and *prima facie* defects, deficiencies and false statements in PMI's petitions, including the attachment of materially incorrect and false price lists, newspaper articles and other data, the ITC and [Commerce] nevertheless commenced countervailing duty and antidumping investigations. PMI and [Giuseppe Prestini] induced the initiation of these proceedings through the submission of false information.

...

22. The 1983 countervailing duty investigation ended with a *de minimis* negative finding and the antidumping investigation resulted in the imposition [of] an antidumping duty of 1.16%. This finding was subsequently overturned on appeal by the United States Court of International Trade ... which ordered the U.S. government to revoke the antidumping order imposed on Pisoni's exports to the United States ...

24. Upon information and belief, shortly after joining [Miller Canfield], Perry, having become thoroughly familiar with the Pads antidumping case while employed by the ITC, encouraged [Miller Canfield] to represent PMI and encouraged [Giuseppe Prestini] to hire [Miller Canfield].

25. In the Fall of 1991, [Miller Canfield], including Perry, entered a Notice of Appearance before [Commerce] and intervened on behalf of PMI in the administrative review of the antidumping order, forcing Pisoni to defend itself even though the U.S. Court of International Trade had ordered the exclusion of Pisoni from the antidumping order, and [Commerce] had so complied.

26. On or about August 31, 1992, and prior thereto, Defendant [Prestini] communicated with [Enzo Pizzi] and Pisoni to propose fixing prices of woodwind pads and dividing the woodwind pad markets.

27. On October 21, 1992, after plaintiffs refused to engage in the proposed unlawful anticompetitive practices of price fixing and market division, PMI, with the assistance of [Miller Canfield] and Perry, filed a new antidumping petition against Plaintiffs ... which again contained material false information about Plaintiffs' sales and other misinformation.

28. In the course of this new investigation, Perry had access to and used confidential business information relating to Pisoni and revealed such information to PMI [...] in violation of Commerce's rules and regulations. The release of this confidential information to Pisoni's

principal competitor has caused Plaintiffs substantial competitive harm, especially since the confidential information concerned Pisoni's customers and sales, among other confidential matters.

Defendants argue that the Commerce filings at issue cannot provide a factual basis for an antitrust cause of action because such filings are subject to antitrust immunity under *Eastern Railways Presidents Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), *United Mine Workers of America v. Pennington*, 381 U.S. 657, 669 (1965), *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972), and *Professional Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49 (1993) ("*PRE* "). Accordingly, they move to dismiss the antitrust cause of action pursuant to Rule 12(b)(6).

The parties have submitted extensive materials and affidavits, including a full record of the results of the proceedings before the ITC and ITA relating to the allegations and findings there. Accordingly, to the extent the parties agreed at oral argument that discovery and further presentations are unnecessary as to what allegations the petitions before Commerce contained and the outcome of the Commerce proceedings, and to the extent that the motion turns on these factual issues, the motion to dismiss will be treated as one for summary judgment. Fed.R.Civ.P. 12(c).

Discussion

Those who petition for governmental redress are generally immune from antitrust liability unless the petitioning activities are "sham"--intended only to conceal an "attempt to interfere directly with business relationships of a competitor." *Noerr*, 365 U.S. at 144. Recently, in *PRE*, the Supreme Court established a two part definition for "sham" litigation:

First, the lawsuit must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits. If an objective litigant could conclude that the suit is reasonably calculated to elicit a favorable outcome, the suit is immunized under *Noerr*, and an antitrust claim premised on the sham exception must fail. Only if the challenged litigation is objectively meritless may a court examine the litigant's subjective motivation ... Under this "two-tiered process," an antitrust plaintiff must "disprove the challenged lawsuit's *legal* viability before the court will entertain evidence of the suit's *economic* viability."

Plaintiffs urge that the broad and indistinct allegations of the complaint are sufficient to allow them to proceed to discovery as to the truth of the allegations in the petition. This position, which may have had some merit before *PRE* and its requirement of a colorable claim of "objectively baseless" litigation, is now no longer tenable.

A rule permitting discovery, based solely on allegations of misrepresentation in a petition, would fail to recognize that an inaccurate petition, even one containing deliberate misstatements, might nonetheless not be so lacking in merit as to be objectively baseless. See *PRE*, 508 U.S. at ---- n. 5 (where proceeding terminates successfully, it cannot be sham); *Luciano Pisoni Fabbrica Accessori Instrumenti Musicali v. United States*, 640 F.Supp. 255, 257 (1986) (ITC is under no duty to terminate proceedings, even where it finds misstatements in petition, where there is still evidence of sale at LTFV); *Citrosuca Paulista v. United States*, 704 F.Supp. 1075 (1988) (where

ITC petition was flawed because petitioner lacked standing, proceeding could nonetheless go forward where Commerce had cured flaws in petition.

To allow antitrust claims based solely on broad and indistinct allegations of misrepresentation and "sham litigation" to reach discovery, regardless of the role the claimed misrepresentations played, or could have played, in the prior proceeding, would predicate the viability of an antitrust complaint on a petitioner's subjective intent, and not the objective merit of its petition, and thus directly contravene the Supreme Court's holding in *PRE*. Moreover, such discovery would have the effect of encouraging antitrust "strike suits", and effectively chill the First Amendment rights which *Noerr* immunity was intended to protect.

Before reaching the question of subjective intent, which discovery relating to the broad allegations of misrepresentation at issue here could evidence, it is necessary to determine whether the filing of the antidumping petitions and requests for administrative review may be viewed as objectively baseless. Such a determination requires consideration, *inter alia*, of the outcome of the proceedings, including the findings made by the relevant administrative tribunals, the nature of the particular allegations of the petition or actions before the administrative agency claimed to be fraudulent or improper, and whether these claimed misrepresentations or improper actions would have been significant to the ultimate outcome or continuation of the proceeding.

The Proceedings at Issue

The 1983 Petition

On November 7, 1983, PMI filed the first of the antidumping petitions at issue with the ITA and ITC. The petitions were filed against the plaintiffs here, and against another, apparently unrelated, Italian manufacturer of keypads, Pads Manufacture. The petition contained information including home market price lists of Pisoni in dollars dated January 1, 1982, export price lists for Prestini's pads in lira, estimated home market costs for Pisoni based on the petitioner's (Prestini's) costs when it manufactured in Italy, and the petitioner's current cost of production. On December 14, 1983, the ITA published its finding that the petition provided sufficient grounds on which to initiate an investigation. On December 22, 1983, the ITC issued a Preliminary Determination that there was a reasonable indication that imports of pads from Italy were materially injuring or were threatening to injure a U.S. industry.

On April 25, 1984, the ITA issued a Preliminary Determination finding that there was reasonable basis to believe or suspect that pads for woodwind instrument keys from Italy were being dumped, or sold at less than fair value. The ITA also found a "weighted-average margin," that is, a percentage by which the foreign market value of the merchandise exceeded the price of United States sale for Pisoni. On July 11, 1984, the ITA issued its Final Determination that woodwind key pads from Italy were being sold at less than fair value. In August, the ITC issued its Final Determination that a U.S. industry was being materially injured. On September 21, 1984, the ITA issued an Antidumping Duty Order, finding sales that took place at a weighted-average margin of approximately 1% for both Pisoni and Pads Manufacture.

The Court of International Trade reversed this decision. In its appeal, Pisoni made two

arguments in favor of reversal that are relevant here. The first was that certain inaccuracies and misrepresentations in the petition meant that the ITA should have terminated the proceeding and investigation as soon as the inaccuracies were discovered. Plaintiff alleged that the discovery of the mislabeling of the price list effective from 1976-1980 as being effective January 1, 1982 (leading to the initial use of an unjustifiably low U.S. market price, and thus a higher weighted average margin) and the incorrect denomination of the prices in dollars and lira meant that the entire investigation should have been terminated. The Court of International Trade rejected this argument, stating that, although the price lists were "suspect," the decision to continue was reasonable, because the ITA must make its investigation on the best evidence available, and must verify all data, and that "corrections to petitioner's data are the very point of verification procedures." The Court of International Trade concluded that it was not incumbent on the ITA to discontinue a proceeding, even if it found information in the petition to be inaccurate, if it still found evidence of sales at less than fair value.

The Court of International Trade found, however, that the use of certain quarterly exchange rates by ITA, instead of exchange rates prevailing at the time of the sales transactions at issue, had been improper. Accordingly, the administrative findings with respect to Pisoni were remanded to the ITA for recalculation. On remand, the ITA found that keypads manufactured by Pisoni were not being sold at less than fair value, although there was a *de minimis* weighted-average dumping margin of .286%. The Court of International Trade had affirmed the decision on September 15, 1986, and effective November 5, the antidumping order was revoked as to Pisoni. That order remained in effect as to Pads Manufacture.

Having prevailed in the Court of International Trade and on remand, plaintiffs proceeded to seek attorney's fees from Commerce under the Equal Access to Justice Act, arguing that Commerce's actions were not substantially justified, and that Commerce had persisted in pressing tenuous factual and legal claims. Both the Court of International Trade, and the Federal Circuit rejected this argument. The Court of Appeals for the Federal Circuit specifically found that the initial decision of the ITA to use the quarterly exchange rates, while not found to be correct, was "carefully considered" and that Commerce had provided "reasonable explanations for its approach" to this "evolving area of the antidumping laws," and therefore could not provide the basis for an award of fees.

On any meaningful examination, as set against these undisputed facts relating to the Commerce proceedings, the allegations of the complaint cannot provide support for a cause of action based on the 1983 petition. To begin with, there is a substantial question here as to whether plaintiffs antitrust claims based on the 1983 proceeding must be barred by the statute of limitations. Under the Sherman and Clayton Acts, the applicable statute of limitations is four years. A cause of action accrues "when a defendant commits an act that injures a plaintiff's business." *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 338 (1971). Because the litigation on which this portion of plaintiffs' claim is based ended, at the latest, in 1986, the plaintiffs' claim based on injuries caused by the sham litigation occurring before 1990 are barred.

Even if this portion of the claim was not barred by the statute of limitations, there are insufficient grounds here to support a finding that the actions before Commerce were objectively baseless. The *de minimis* finding of dumping in the 1983 proceeding indicates that sales at

LTFV were taking place, and suggests that although the dumping at issue was not sufficient to merit the imposition of a countervailing duty, the question was a close one. Moreover, as set out above, the initial imposition of the antidumping penalty (and the finding of dumping that was sufficient to merit adverse action on the part of the ITC) was overturned on a point of law that in the eyes of the Federal Circuit was by no means clear-cut. Even fully crediting plaintiffs' allegations that the initial petitions contained false statements relating to plaintiffs' pricing and applicable exchange rates, there was a basis for concluding the petition had merit. Under these circumstances, it would not be possible to find that the petitions were objectively baseless.

Plaintiffs also allege, however, that the findings in the 1983 antidumping proceeding were obtained by means of a fraud on Commerce, that is, a misrepresentation with respect to PMI's standing to file the 1983 petition. As best gathered from the papers and full record in this action, plaintiffs contend that misrepresentations made in the 1983 petition with respect to (1) defendants' status as a domestic industry or the location of its production; and, (2), the denomination of pricing and actual pricing of plaintiffs' products and the correct monetary conversion rate from dollar to lira and visa versa, acted as a fraud on the agency and unfairly subjected plaintiffs to the trouble and expense of participation in the various proceedings before the administrative tribunals.

As a complaint alleging fraud on Commerce with respect to the 1983 petition, however, the present pleadings are inadequate. Plaintiffs decline to specifically identify the false statements at issue, instead referring to certain false statements in the pleadings as "materially incorrect and false price lists, newspaper articles and other data." These pleadings thus do not specify what representations were made, or how such representations were untruthful or improper. As a result, they fail to state a cause of action for fraud sufficient to support a claim of "sham" litigation based on fraud upon the preceding tribunal.

Even viewing the allegations under Rule 12(b)(6), without the strictures of Rule 9(b), and supplemented by the assertions made by counsel for plaintiffs in its memoranda and at oral argument, plaintiffs' claims relating to the status of PMI as a domestic industry and the pricing alleged in the petitions are insufficient to state a cause of action for fraud in connection with the 1983 proceedings. The determination of whether a petitioner before Commerce may be viewed as a domestic producer is a complex issue of law and fact that must be resolved on a case-by-case basis. As explained by the ITC in the Preliminary Determination in the 1992 proceeding at issue here:

In determining whether a firm qualifies as a domestic producer, the Commission examines such facts as: (1) the extent and source of a firm's capital investment; (2) the technical expertise involved in the U.S. production activity; (3) the value added to the product in the United States; (4) employment levels; and (5) any other costs and activities in the United States directly leading to production of the like product, including where production decisions are made. No single factor is determinative and value added information is more meaningful when other indicia of production activity are taken into account. The Commission may consider other factors deemed relevant in light of the particular investigation. Thus, in the absence of a prior adjudication of the issue, the ultimate disposition of this issue by Commerce would be difficult to predict.

In any event, during the proceedings on the 1983 petition, the issue of PMI's status as a domestic producer was raised and resolved favorably to petitioner (the defendant here). Moreover, as set out in more detail below, the final determination in the 1992 proceeding holds that, even considering the additional allegations regarding defendants' Mexican manufacturing facilities prior to 1991, defendants qualified as domestic producers with standing to commence ITC proceedings.

Nor does the question of whether the correct conversion rate was employed in determining the pricing of the plaintiffs' products provide a basis for a claim of an action for fraud on the agencies or "sham litigation." As established by the record in this case, the agency, not the petitioner, ultimately determined the exchange rate employed in the price calculation. As described above, this issue was the subject of a previous proceeding in which plaintiffs here sought the costs of defending the Commerce proceedings from the government. There, the Court of Appeals for the Federal Circuit held that the issue of the correct conversion rate was sufficiently unclear as a matter of law as not to merit the award of costs. No coherent reason has been presented to allow a new proceeding based on these same allegations to go forward under another guise. Moreover, the presentation of plaintiff's--an importer's--prices in lira as opposed to dollars and visa versa hardly constitutes "fraud," since the filing of the petition itself would have alerted Commerce at that time to any problem with the denomination of pricing.

Similarly, the inaccurate labeling of price lists given to Commerce in the 1983 proceeding does not and could not support a finding in the present circumstances that the claim was brought without a reasonable objective hope of success. In *Luciano Pisoni*, 640 F.Supp. 255 (CIT 1986), the initial appeal of the determination finding dumping, the Court of International Trade found that certain price lists had been submitted which were mislabelled as to date by the petitioners and that those lists were "suspect." The mislabeling of the price lists, however, is apparently not the basis of plaintiffs' claim here. Moreover, even if such a claim were presented in the present action, it appears that Commerce, aware of the misrepresentations, and acting independently of the defendants, found sufficient substance to the petition to continue the investigation, and thus found that the mislabeling did not render the petition meritless. Accordingly, defendants are entitled to *Noerr* immunity with respect to the 1983 filings.

The 1991 Administrative Review

An interested party may request that Commerce conduct an annual administrative review of an antidumping order. After receipt of a timely request, or on its own initiative, the ITA will publish a notice of initiation and send out questionnaires to interested parties requesting factual information for the review.

On September 5, 1991 Commerce issued a notice of intent to revoke the previous antidumping order entered with respect to Pads Manufacture as result of the original 1983 proceeding. PMI, acting *pro se*, objected to the revocation, and on October 18, 1991, Commerce initiated an administrative review based on the 1984 order pertaining only to Pads Manufacture. No review was initiated against Pisoni.

Luciano Pisoni, the principal of Pisoni, deposes that he was "forced to defend" against an

improper administrative review in 1991. However, the uncontroverted administrative record of the proceedings before Commerce indicates that no administrative review with respect to Pisoni took place in 1991. At best, Mr. Pisoni's assertion reflects that defendant may have sought to have an administrative review take place with respect to Pisoni, but that no such review was ever brought underway.

Accordingly, a claim of sham litigation based on defendants' conduct in connection with the 1991 administrative review also appears to be unavailable on the present facts. Counsel's appearance in the 1991 administrative proceeding hardly gives rise to a claim of sham proceedings--a viable administrative review still existed with respect to defendants' co-defendant in the earlier proceeding, Pads Manufacture. Moreover, the record is uncontroverted that the administrative review undertaken in 1991 did not pertain to plaintiffs. It is therefore difficult to discern how defendants' conduct in association with the administrative review could constitute "sham litigation."

The 1992 Petition

In October 1992, PMI again filed petitions with Commerce alleging that the woodwind key pads manufactured in Italy were being, or were likely to be, sold in the United States at less than fair value, and that the imports were materially injuring or threatening material injury to a United States industry. On November 17, 1992, the ITA found that the petition filed by PMI was sufficient to initiate an investigation. On December 8, 1992 the ITC also made a Preliminary Determination that there was a reasonable indication that an industry in the United States was materially injured by reasons of imports of pads for woodwind instrument keys from Italy. The ITC also issued a supplemental opinion explaining its reasons for the Preliminary Determination. On May 25, 1993, Commerce issued its Preliminary Determination, and found sales at less than fair value, or LTFV, with a weighted average margin for Pisoni of 1.26%.

On September 23, 1993, the ITC issued its final determination which, despite the initial finding of sales at LTFV, found that an industry in the United States was not being materially injured or threatened with material injury by reason of the imports from Italy of keypads for woodwinds. Specifically, the ITC determined that woodwind pads from Italy were "like product" with respect to the U.S. manufacturer's product, as required for the entry of an antidumping order. In addition, the ITC found that the petitioner was a "domestic producer" for the purposes of bringing the proceedings, despite its earlier extensive assembly operations in Mexico. The agency determined that the petitioner's Mexican operations ceased in 1991, and noted that, even before that time, the nature of the assembly operation was such that the equipment used in Mexico was neither extensive nor expensive, that capital investment in Mexico was not as sizable as in the United States, and the value added to the product there was not as substantial as that added in the United States. Finally, the ITC found that "the technical expertise required to perform the assembly in Mexico was minimal. Therefore we do not exclude petitioner from the domestic industry.

The ITC also found, however, that the two products were not close substitutes for one another, because most purchasers of the Italian product still would have purchased the imports because of quality differences and other non-price factors, even if they had been fairly traded,

and accordingly the effect of LTFV imports on the domestic product, if there was any, was minimal. The ITC determined that, while there had been increased market penetration by the imports, there was no indication that the penetration would increase to an injurious level because of the lack of significant excess foreign capacity and the limited substitutability of the products. One of the Commissioners dissented and found that the LTFV imports were causing injury to the domestic industry. Defendants here appealed the negative determination of the ITC on October 29, 1993. The appeal was recently withdrawn by PMI with prejudice.

The 1992 petition cannot be viewed as "objectively baseless." The proceedings on that petition established that plaintiff had, in fact, been selling keypads at LTFV, and by a greater margin than in the 1983 proceedings. The basis for the conclusion that petitioner was not entitled to relief was thus not the same as that advanced for the denial of such relief in 1983 (when the ITC found the dumping margin insufficient to merit relief). Moreover, in the dissent from the final determination in 1993, one of the Commissioners took the position that dumping materially injuring a domestic industry was indeed taking place. At a minimum, this dissent demonstrates that there was substantial ground for disagreement as to the ultimate determination in that proceeding.

The possibility does exist, however remote, that the institution of two unsuccessful antidumping proceedings nine years apart was intended solely to injure plaintiffs competitively in a trade war that defendants appear to be losing, and not to secure the trade relief for which such petitions were created by Congress. Even if such a malevolent intent could be shown, plaintiffs cannot sustain their burden of proving that defendants could not have reasonably expected success on the merits. As explained by the Supreme Court in *PRE*:
Whether applying *Noerr* as an antitrust doctrine or invoking it in other contexts, we have repeatedly reaffirmed that evidence of anti-competitive intent or purpose alone cannot transform otherwise legitimate activity into a sham ... the legitimacy of objectively reasonable petitioning "directed toward obtaining governmental action" is "not at all affected by any anticompetitive purpose [the actor] may have had."

Conclusion

Defendants' motion to dismiss Counts I, II, IV, V and VI of the Amended Complaint, which is treated as a motion for summary judgment pursuant to Rule 12(c) to the extent previously indicated, is granted.

Notes

1. What is the best way of eliminating a seemingly unending pattern of thin (if not actually baseless) dumping petitions by the American firm and then federal court litigation by the Italian firm? Can you design a settlement for this case that is not itself a violation of the antitrust laws that will prevent future trade and antitrust filings that are thin but not objectively baseless and which will allow the firms to go back to competing in the market place rather than harassing

each other through administrative or judicial claims?

Problem 7

The Widget Manufacturers of America (WMA) is a trade organization representing the handful of remaining American widget manufacturers. While at one time American widget manufacturers dominated U.S. and world markets, now they control less than 40% of the American market, primarily at the low end, consumer widget market of the type sold at Target and Wal-Mart. High tech, high end widgets are now almost exclusively supplied by foreign manufacturers. Foreign manufacturers are also making important inroads with the customer base of WMA members. The same foreign manufacturers also supply certain critical parts and technology to WMA members.

The WMA is composed of 5 firms. H and M are the two largest American manufacturers located in the Midwest and there are three smaller manufacturers A,B, and C located on the West Coast who are seeking to transform themselves into high tech widget manufacturers.

The presidents of H and M meet in H's office with no one else present. Shortly thereafter, the president of M is in Taiwan meeting with his Taiwanese parts suppliers, who are also competitors in the finished widget market. The president of M expressed his anger that his suppliers are also competing with him and the other WMA members in the finished widget market in the United States. He further states that he believes that the Taiwanese widget industry is engaged in illegal dumping in the United States by selling at less than fair value. He indicates that the WMA will file anti-dumping actions with the Department of Commerce that will cripple the Taiwanese widget industry in the US, unless the Taiwanese industry agrees to raise price 15% and stop selling to Target (H's largest client in the US). He demands an answer within ten days and asks the Taiwanese to call him on his home phone with only the words "Yes" or "No" and the code "Limegreen".

The Taiwanese widget manufacturers debate the ultimatum from H's president. Contrary to instructions, they contact H at his office and indicate that they could increase price 10% in order to avoid costly and uncertain anti-dumping litigation but that is their final offer. They receive no further communications with H or other WMA members.

However, rumors begin to appear at industry trade shows and publications that the US industry is preparing an antidumping petition. Widget customers get nervous about the delivered prices they can expect from their import suppliers and several switch to WMA members for future orders.

Within six months, an antidumping petition is filed with the Department of Commerce and the International Trade Commission as required by statute. The petition alleges dumping margins of up to 87% on sales of virtually all types of widgets. Both agencies accept the petitions and initiate investigations. Pursuant to the statute, the Taiwanese respondents are required to answer long complicated questionnaires requiring comprehensive responses and back

up data in an electronic format different from their regular accounting or computer systems. Later their responses are audited in-person by Commerce Department personnel. At the completion of the full investigation, trivial dumping margins of less than 2% on a handful of sales are found and the petition is dismissed without the imposition of any antidumping duties.

Despite “winning” the case, the Taiwanese lost numerous sales from nervous clients, spent millions on legal fees and related economic experts, and spent countless hours of management time working on the case and its many demands for documents and information responses rather than working on management tasks. As a result, the introduction of next generation widget technology desired by US customers was delayed for over eight months.

You are an attorney with the foreign commerce section of the Antitrust Division of the Justice Department. Based on the facts set forth above, would you recommend bringing an antitrust case against the WMA or its members? What other information would you want before making your final decision?