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Joint Export Trade Provisions in Antitrust Laws: A Supporter's Perspective

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The April 2004 issue of the *Journal of World Trade* (pages 331–359) included a thought-provoking article by Aditya Bhattacharjea of the University of Delhi, entitled "Export Cartels—A Developing Country Perspective". The article focuses mainly on a policy, in force within many national and regional antitrust regimes around the world, relating to joint export trade (JET). This policy, effectuated by different legal means in different jurisdictions, treats joint and coordinated offshore sales activities by exporters as being exclusively a matter for importing country, not exporting country, antitrust regulation.

The present article briefly responds to Bhattacharjea's in two areas: (1) the policy justification for JET-friendly antitrust rules in exporting countries, and (2) the relevance of certain factors that may be cited when an importing country's antitrust law is invoked against perceived misconduct by a JET organization.[2]

I. Policy Justification for JET Rules

The policy issue, briefly stated, is which government (importing country or exporting country) should be responsible for supervising the pricing/marketing behavior of exporters and JET organizations. Data presented by Bhattacharjea[3] show very broad agreement on the current allocation of responsibility—it rests with importing country competition authorities, who have reason to care if their consumers are being wronged. Bhattacharjea reviews arguments for and against this policy, but presents only a partial list. What considerations underlie the current, widely applied, approach?

First, JET itself benefits exporters and their customers; it is a win-win proposition. The cost sharing and economies of scale achievable through joint marketing of exports often yield dramatic savings. Companies serving international markets can reduce costs by pooling marketing expenses and sharing distribution infrastructure such as port

[1] The author, a Washington, DC-based attorney specializing in international trade and international aspects of competition law, represents clients in connection with the policy issue discussed in this article. The views expressed are, however, personal.

[2] "JET organization" and "export association" are preferable to the pejorative (used by Bhattacharjea and others) "export cartel", which assumes that JET participants are engaging in anticompetitive behaviour.

[3] Pp. 336–340, discussing Australia, New Zealand, Japan, Spain, United States, Canada, Greece, Mexico, India, South Africa, the EU, and the United Kingdom, and citing broader studies by Evenett (2001) and the OECD (2003). The OECD Secretariat had previously noted in a 1999 paper, DAFFE/CLP/WP3(99)6, that, for one reason or another, "most competition agencies would lack authority to prosecute" export associations whose actions "do not affect the national market".

facilities and ships. They can also share the cost of gathering and analyzing trade information concerning, for example, foreign credit and market conditions, transportation opportunities and shipping requirements. These reduced costs result in market growth and lower final costs to consumers around the world. Risk sharing is important as well, as many areas of the world are simply too risky for individual producers—particularly small firms—to make the sustained investments necessary to sell there. In emerging markets, political, credit, currency, regulatory, and other risks often must be shared in order to be sustainable. Even setting aside governmental issues, the infrastructure necessary to deliver, unload, store, market, and physically distribute a product in overseas markets can require a huge up-front investment unachievable for many companies.

Second, the existing policy on JET allocates enforcement responsibility sensibly. When concerns arise over the conduct of export associations, the responsibility for acting properly belongs where the incentive is—with the government whose consumers' interests are at stake. Persuasive evidence that importing-country competition regimes are structurally unable to address anticompetitive behavior by export associations might give some pause—but no such evidence has ever surfaced. On the contrary, the "case study" presented by Bhattacharjea[4] seems to show that importing countries at all levels of development are quite capable of defending their own consumers in the JET context. Thus, there is simply no basis for a sprawling expansion of national antitrust regimes, under which governments would assume responsibility for policing the offshore marketing behavior of their exporters.[5]

Third, the positive impact on export trade is undeniable. In the United States, the Webb Pomerene Act and the Export Trading Company Act have helped many of the most effective US export industries compete successfully in world markets. Billions of dollars move annually through export associations organized under these laws. An article posted at the Office of Export Trading Company Affairs (OETCA) website estimated that as of 1998, ETC Act users were logging more than $30 billion in annual export trade.[6] Moreover, the more than 5,000 firms successfully using this program include many small and medium sized enterprises which individually might not be able to reach any export market, much less some of the more geographically remote

[4] Pp. 340–347 (soda ash) (investigations by the EU, India, South Africa and Venezuela). In most of these cases, the authorities concluded the JET could benefit consumers. For example, the Indian Supreme Court, in rejecting on jurisdictional grounds a challenge by local competitors, noted that consumers could benefit from the JET activities and that the complainants themselves might have violated Indian law by attempting to block competition from imports. *Haridas Exports vs. All India Float Glass Mfrs. Assn.*, 2002 SOL Case No. 350, 75, 79. The Venezuelan case was likewise resolved on terms allowing JET to continue because of its recognized benefits to Venezuelan consumers. *Procompetencia Resolution No. SPPLC/018-99* (1999). In the case of the EU, following its initial fact-based decision, the Commission adopted a further regulation that would allow efficiency-producing JET (OJ 2001/C3/02), while in South Africa, whose Competition Appeal Court appears out of step with the approach of other jurisdictions, an appeal is still pending (Appeal Case No. 554/2003).

[5] A useful contrast can be noted here with offshore bribery, which, experience has shown, can be successfully controlled on a global basis only through criminalization/active enforcement by exporting country governments.

[6] Chris Gillis, *Shipping Security*, American Shipper (March 2000). More recent (unpublished) data compiled by OETCA show that export trade certificate of review holders and their members exported $14.5 billion worth of goods and services in 2003, $13.3 billion in 2002, and $15.7 billion in 2001.

emerging markets. The ability to work collectively helps exporters to approach foreign purchasing associations on a more equal footing, and to survive in a world where competitors may benefit from large subsidies, operate in state-controlled economies, and/or be effectively free from antitrust scrutiny in all of the markets where they operate.

A partial list of "pluses", then, includes efficiency-enhancing collaborations, logical allocation of enforcement responsibility, and terrific export performance. Bhattacharjea discusses the possibility that developed country governments might consider bargaining away this highly beneficial *status quo* in exchange for something else of value (perhaps increased market access in developing countries).[7] I can see no serious prospect of such a bargain materializing; there are other things developing countries would rather receive, and other things developed country governments—reluctant to expand their already-considerable supervision of exporters—would much rather give. More fundamentally, just as JET is a win-win proposition, curbing JET, as such a bargain surely would, is a lose-lose proposition, and for that reason also is difficult to envision. Bhattacharjea's own policy proposals involve importing country actions.[8]

II. Importing Country Enforcement—Developing Countries

The primary role assigned to importing country antitrust regulation in the JET context does not, of course, give importing country authorities and courts *carte blanche* to do whatever seems politically expedient in responding to complaints about the behavior of an "export cartel". Rather, the essential character of their task—faithful and fact-based implementation of their national antitrust instruments—and of what constitutes "good antitrust" in light of lessons learned over many years in this complex field—is unaffected.

Bhattacharjea makes an objectionable point in this area. After discussing the possible presence, in some developing countries, of a "j-shaped" social welfare curve indicating that supply increases via importation may temporarily reduce aggregate (producer + consumer) welfare in the importing country, Bhattacharjea suggests that this circumstance might justify concluding that trade should be restricted when the antitrust law of an importing country is invoked against an "export cartel".[9]

I respectfully disagree, for the simple reason that the legal result suggested does not seem to depend on any sort of misconduct by the exporter(s) in question. Taken to its logical conclusion, this approach would leave exporters facing antitrust remedies simply for showing up in the wrong market at the wrong time, based on harm (unrelated to any "predation" theory) which their shipments may naturally cause to competing local producers. The conditions yielding a "j-shaped" welfare curve described by

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[7] E.g., pp. 334 (citing proposal by Hoekman and Mavroidis), and 353 (discussing efforts to "model" such a bargain).

[8] Pp. 355–357.

[9] Pp. 351–354.

Bhattacharjea may—if they exist—be a reason why some developing countries should resist negotiated trade liberalization. But that is another matter entirely from saying that foreign products should be blocked under antitrust law (something that, as Bhattacharjea recognizes, requires a highly nuanced and fact-based analysis).

III. Conclusion

There are good reasons why most sophisticated antitrust regimes around the world have JET-friendly rules, whether implicit or explicit. Charges that these rules are "parochial" typically have a "sound bite" quality; they rarely grapple in a meaningful way with either (1) the practical implications of an expanded supervisory role for exporting country governments, or (2) the legal impediments to such a role given the jurisdictional limits, under international law, within which national antitrust regimes must operate. Complaints that JET-friendly rules impede international harmonization in the antitrust field ignore the fact that, as Bhattacharjea usefully documents, harmonization on this particular point has already been largely achieved.[10]

An especially bizarre variant of the critique is that while the current policy on JET (placing responsibility with the importing country) may be acceptable, it should not be effectuated through explicit statutory carve-outs and registration systems such as the US Webb Pomerene/ETC measures. Adherence to this view would reduce transparency[11] and would probably destroy JET altogether, as many participants would feel compelled to desist from JET absent the legal certainty provided by a clear statutory safe harbor.

As for when and how importing country antitrust instruments should be brought to bear in the JET context, that is a hugely complex question which would benefit from more study of the kind Bhattacharjea has initiated. In the meanwhile, global antitrust discussions can much more usefully focus on what importing countries do (under their antitrust laws) to limit imports, rather than on what exporting countries do not do (under their antitrust laws) to limit joint exports.

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[10] Notably, the OECD, in a recommendation on coordinated antitrust enforcement activity, has excluded JET from the definition of "hard core cartels". OECD Recommendation C/M(98)7/PROV 925, March 1998.

[11] Bhattacharjea notes at p. 354 that "implicit exclusion" is for this very reason less desirable than "explicit registration".