



c/o IBC
818 Connecticut Ave, N.W. 12th Floor
Washington, DC 20006

January 13, 2006

Deborah A. Garza, Chair
Jonathan R. Yarowsky, Vice Chair
Antitrust Modernization Commission
1120 G Street, NW, Suite 810
Washington, DC 20005

RE: JETA Response to AMC's Request for Comments

Dear Ms. Garza and Mr. Yarowsky:

The Joint Export Trade Alliance ("JETA")¹ responds to the U.S. Antitrust Modernization Commission ("AMC") request for comments (70 Fed. Reg. 69,510) on the following issue:

The adoption of competition or antitrust laws by over 100 jurisdictions around the world, as well as the globalization of commerce and markets, has given rise to the potential for conflict between the United States and foreign jurisdictions with respect to enforcement actions taken and remedies sought. Are there multilateral procedures that should be implemented, or other actions taken, to enhance international antitrust comity? In commenting, please address the significance of the issue, what solutions might reduce that problem, and how such solutions could be implemented by the United States.

I. Summary of JETA's Position –

- JETA applauds the efforts of U.S. antitrust authorities to promote a culture of competition around the world, and the success of these efforts as reflected in, for example, the adoption of new antitrust laws.
- There is no reason why the adoption of foreign competition laws should lead to conflicts with the United States, so long as reasonable jurisdictional limits are respected. "Conflict ... with respect to enforcement actions taken and remedies sought" can only arise when two or more authorities assert jurisdiction over the same parties and conduct. By definition, the likelihood of such conflict is reduced when authorities observe reasonable limits in asserting subject matter jurisdiction and when they focus, like U.S. law, on competitive restraints that produce "direct,

¹ JETA is a coalition of agricultural, industrial, and service sector organizations that are users of, or otherwise knowledgeable about, the U.S. joint export trade ("JET") provisions (the Webb-Pomerene Act and Export Trading Company Act). Contact: John McDermid, Executive Director; Phone: (202) 872-8181 Email: [REDACTED]

substantial and reasonably foreseeable effects” on protected domestic welfare/export promotion interests. Competition regimes that appropriately focus enforcement actions and remedies on the protection of the internal domestic market and export opportunities should rarely come into conflict.

- Joint export trade safe harbors pose no impediment to international antitrust cooperation and comity. To the contrary, they promote transparency and codify a sensible allocation of enforcement responsibility among national authorities – one that promotes harmony, not friction. Indeed, the U.S. government historically has been charged with offending comity, and has elicited uncooperative behavior from other governments, for being too aggressive, not too passive, in dealing with off-shore conduct. Certainly, national joint export trade (“JET”) safe harbors pose no comity concerns of the kind that in the past have been associated with U.S. antitrust extraterritorial enforcement. The limits in the JET laws precisely match those in the Foreign Trade Antitrust Improvements Act; a U.S. government that failed to honor those limits might well face conflict and poor cooperation in the world, which is one of many arguments against such a radical change.

- Of course, even when jurisdictional limits are being respected, conflict can arise when a nation’s competition laws are misused to restrict rather than promote competition, such as by blocking imports. As exporters, JETA’s members know only too well the risks of such a scenario. JETA therefore appreciates the U.S. agencies’ focus on quality – on promoting sound, modern and pro-consumer competition policies world-wide.

- Finally, given JETA’s view that primary international antitrust enforcement responsibility against trade restraints should be in the hands of local enforcement authorities whose domestic protected interests are most affected, it logically follows that if a particular national joint export trade activity, while consistent with its own national JET safe harbors, contravenes protected competition interests in another antitrust jurisdiction, that jurisdiction can, as has been the case, take action to protect its proper consumer welfare interests.

II. Discussion

Subject matter jurisdiction and cooperation/comity. While the spread of competition regimes around the world has posed risks for conflict among antitrust enforcement regimes, this risk of conflict can and will be reduced if these regimes, like those of the United States, limit the subject matter reach of their competition laws in dealing with trade restraints in international commerce.

For the United States, these basic boundaries on U.S. antitrust laws are set forth in the Foreign Trade Antitrust Improvements Act of 1982 (“FTAIA”) (15 U.S.C. 6A). The FTAIA makes clear that the U.S. antitrust laws do not apply unless an international trade restraint has a direct, substantial and reasonably foreseeable effect on protected **U.S.** interests -- U.S. domestic competition (protection of U.S. consumer welfare) or U.S. export trade (protection of U.S. export opportunities). In discussing this issue in its amicus brief to the Supreme Court in the *Empagran* case, the Department of Justice characterized these limitations on U.S. antitrust subject matter

jurisdiction as a “fundamental proposition,”² citing basic principles of international comity. JETA submits that this “fundamental proposition” of limited antitrust jurisdiction is an appropriate paradigm for other jurisdictions to follow.

Conflict arising from misuse of antitrust law. Antitrust laws are sometimes hijacked and used to achieve anti-competitive outcomes. Conflict can ensue – with the United States if U.S. enterprises are among the victims. There is nothing wrong with this kind of conflict; indeed, it is important that the government, including antitrust enforcement officials, be prepared to stand up for affected American enterprises in this scenario. This is part of the broader process by which U.S. antitrust diplomacy seeks to promote high-quality (pro-consumer) competition policies around the world. Although these interventions are not always successful, it is difficult to imagine how a “multilateral procedure” could deliver better results.

JET safe harbors and cooperation/comity. The advocates for greater international cooperation and comity should focus their efforts on assuring that local antitrust regimes around the world have sufficient power and resources to police these local markets and sufficient antitrust expertise and sophistication to ensure that they act for the benefit of consumers. Certainly, U.S. advocacy of competition principles around the world has not been hampered in the slightest by its support for appropriate limits to the jurisdictional reach of its antitrust laws. The contrary appears to be very much the case, as reflected in the ever-increasing prosecutorial efforts against hard core cartels, which are universally recognized as posing the most serious threat to consumers.

Some have hypothesized that the JET safe harbors may be a threat to international cooperation, to comity, and to U.S. competition advocacy. They argue that these JET safe harbors should be repealed because it is somehow inconsistent with antitrust public policy considerations. The most generous thing that can be said for this theory is that no evidence for it has ever surfaced. Certainly, the U.S. antitrust enforcement agencies have never demonstrated that JET safe harbors in any way threaten their competition advocacy efforts. More specifically, there is no evidence that the external U.S. antitrust agenda is coming up short on any dimension, and no evidence suggests that the JET laws would be responsible even if problems did exist. But the theory suffers from three problems even more serious than that.

First, there is no logical basis to maintain that U.S. JET safe harbors threaten competition advocacy, when U.S. JET safe harbors promote transparency and are essentially co-extensive with the provisions of the FTAIA limits on U.S. jurisdiction, which limits are universally supported by the enforcement community. Specifically, the same protected interests that are the focus of the FTAIA’s jurisdictional limit are found in the Webb-Pomerene Act and the Export Trading Company Act. Plainly, if a Webb-Pomerene association or an export trading company publicly registered with enforcement agencies and subject to their scrutiny is determined to have restrained domestic competition or the export trade of a domestic competitor, such restrictive conduct is not sheltered from U.S. antitrust liability. The full range of public and private enforcement mechanisms – criminal and civil government remedies as well as private treble damage relief – is available. The same should be true under that laws of other jurisdictions that

² Brief for the United States as Amicus Curiae Supporting Petitioners at 14.

follow the limited FTAIA jurisdictional model, if based on a rule of reason analysis its protected interests are substantially affected.

Second, the United States cannot logically be paying a diplomatic price, in the form of reduced cooperation or otherwise, for following a JET policy that is adhered to as well by virtually every other jurisdiction with an advanced antitrust law. Indeed, the U.S. policy of the limited jurisdictional reach of its antitrust laws is increasingly mirrored by the approach taken by many other jurisdictions overseas which as well limit their antitrust law regimes to restraints in their respective domestic trade, leaving to the effected jurisdiction the responsibility to address international trade restraints that threaten protected domestic interests. Many countries, including, but not limited to Canada, Mexico, Australia, India, South Africa, Israel and Taiwan, have explicit exemptions for export trade similar to the U.S. exemption.³ Others, like the competition laws of the European Community, for example, are explicitly limited and proscribe only restrictive practices that affect competition within the jurisdiction.

Third, observing appropriate limits to the jurisdictional reach of the U.S. antitrust laws is a positive internationally, not a negative, as will be appreciated by anyone conversant with the history of acrimony over assertions of U.S. jurisdiction that were seen as overly aggressive.

U.S. competition advocacy seems to be succeeding famously; but if its progress slows, a culprit other than JET safe harbors will have to be found.

JETA believes that U.S. competition advocacy focused on international cooperation and comity should, as a part of its mission to promote the international enactment of modern antitrust/competition laws, advocate respect for export trade safe harbors pursuant to a rule of reason analysis. JET safe harbors can serve, without undue competitive consequences, to permit firms to create efficiency-enhancing joint ventures in international trade, whether through reduction of transportation and logistics premiums; consolidation of market research and administrative costs; mitigation of risks; and leveling the competitive playing field from abuses by dominant buyers and government-imposed trade restraints.

³ See Canada Competition Act, §45; Mexico Federal Antitrust Law (1992), Art. 6; Australia Trade Practices Act, 1974 §§ 6-7; India Competition Act, 2002 § 3(5); South Africa Competition Act, No. 89 § 10, Israel Restrictive Trade Practices Act, 1998 No. 5748 § 10(7); and Taiwan Fair Trade Law, 2000 Art. 14(4).