COMPETITION TRIBUNAL

REPUBLIC OF SOUTH AFRICA

Case Numbers: 49/CR/Apr00 and 87/CR/Sep00

In the matter between:

The Competition Commission	First Applicant
Botswana Ash (Pty) Ltd	Second Applicant (Intervening)
Chemserve Technical Products (Pty) Ltd	Third Applicant (Intervening)

and

American Natural Soda Ash Corp	First respondent
CHC Global (Pty) Ltd	Second respondent

AND

American Natural Soda Ash Corp — First Applicant
CHC Global (Pty) Ltd
Second Applicant

and

Botswana Ash (Pty) Ltd
First Respondent
Chemserve Technical Products (Pty) Ltd

Second Respondent

Reasons and Order

INTRODUCTION

Section 3(1) of the Act, which is the application section states:

> *This Act applies to all economic activity within, or having an effect within, the Republic*
>
> .

We have to decide whether the word '*effect'* must be interpreted as meaning adverse effect. If the answer to that question is in the affirmative then it has implications for the manner in which allegations are made in the pleadings and for the type of evidence that becomes admissible.

HISTORY OF THE LITIGATION

In October 1999 Botash, a Botswana based producer of Soda Ash, launched an application for interim relief in terms of section 59 of the Competition Act[1] against Ansac, an association of five US soda ash producers. Botash alleged that Ansac was operating in South Africa in contravention of section 4(1)(b)(i) and (4)(1)(b)(ii) of the Act and engaged in predatory behaviour in contravention of section 8. Ansac opposed this application and also launched its own application for interim relief against Botash in December 1999, alleging that Botash was engaged in predatory pricing against it.[2]

On 10 February 2000 after deliberations between the Commission, Ansac and Botash, the parties agreed to withdraw their respective interim relief applications provided the Commission finalised its investigation into Botash's complaint by 22 March 2000 by which date it had to either refer the complaint or issue a notice of non-referral. If the Commission referred the complaint Botash would have the right to intervene and fully participate in the Tribunal's proceedings, including the right to file a separate statement of particulars of complaint. The conditions were set out in an agreement between the parties that was made an order of the Tribunal.

On 23 March 2000 the Commission filed its complaint referral with the Tribunal. Ansac, responded by filing an application to request further particulars to the referral. The Commission, subsequent to this, decided to withdraw its referral and filed a fresh referral on 14 April 2000. The Tribunal published a notice of this referral in terms of section 51(3) of the Act in

1 Although the Competition Second Amendment Act, No. 39 of 2000 and new Tribunal Rules came into affect on 1 February 2001 we will be referring to the Competition Act and Tribunal Rules, as they were immediately before that date unless otherwise indicated.

2 We have, except where the context suggests otherwise, referred to the respondents collectively as Ansac and the intervenors collectively as Botash and have for convenience referred to them in the singular. For the purpose of the decision the distinction is not pertinent

Government Gazette No. 21145 on 12 May 2000.

On 25 May Botash served intervening particulars of complaint on both Ansac and the Commission. However, the Competition Commission objected to this on grounds that neither the Act nor the Rules of the Tribunal permitted Botash to file such particulars. Ansac approached the Tribunal for an order seeking declaratory relief and the Tribunal granted Botash leave to intervene on 7 September 2000 after hearing the matter on 10 August 2000.

Ansac subsequently filed answering affidavits to both the Commission's complaint referral and to Botash's particulars of complaint. We then convened a pre-hearing conference on the 12 October 2000. At this hearing the Tribunal member presiding suggested, inter alia, that a number of preliminary legal issues referred to in the papers should be determined initially. These included determination of the meaning of Section 4(1)(b) of the Act. In summary ANSAC argued that in order to sustain a charge under Section 4(1)(b) it was incumbent upon the complainant to prove that the horizontal agreement that forms the basis of the charge generated anti-competitive effects. Moreover, argued ANSAC, the defendant was entitled to adduce evidence purporting to prove that the conduct in question generated efficiency gains that outweighed the anti-competitive consequences arising from the same conduct.

The Tribunal heard this argument, in tandem with a number of other interlocutory matters, on the 27th of February 2001. It handed down its decision on the 27th of March 2001. The panel held that Section 4(1)(b) required no showing of anti-competitive effect and that it permitted of no efficiency defence - the mere fact of the agreement was sufficient to condemn it. Expressed in the language of US antitrust jurisprudence, agreements falling foul of the provisions of Section 4(1)(b) were held to be condemned *per se.*

We have referred to the panel's decision on the interpretation of section 4(1)(b) as Ansac argues that it is in consequence of this decision they have to make the argument in relation to section 3(1) which we consider now.

THE APPLICATIONS BEFORE US

This decision will dispose of four exception applications before the Tribunal.

Three of these applications pose an identical question, namely the meaning of Section 3(1) of the Act.[3] These are:

3 The decision is also likely to have a bearing on an application that was brought by Ansac to consolidate the Commission and Botash's complaint referrals against it with their complaint referral against Botash. At the commencement of our hearing of these exceptions on the 9th October 2001, Ansac advised that it would not move the application to consolidate until we had decided the exceptions as success on the application to consolidate was predicated on the success of the exception

1. The exception by Ansac to the Commission's complaint referral and to the particulars of claim filed by Botash, concerning the ambit of the Competition Act as set out in section 3(1).

2. The exception raised by the Commission to Ansac's averments in par. 18.5.2 of its *Answering Affidavit to the Applicant's Complaint referral* where it relies on a pro-competitive defence.

3. The exception raised by the Botash to Ansac's defence that Ansac is a legitimate, transparent and efficiency-enhancing joint venture, which is contained in paragraphs 18.1, 20.1 – 20.3, 20.4.1, 20.4.3 and 20.5 of Ansac's statement of defence.

As we shall demonstrate there is an intimate connection between these applications and the previous enquiry into the meaning of Section 4(1)(b) – in essence Ansac argues that a prerequisite for exercising the extraterritorial jurisdiction provided for in section 3(1) is a showing of anti-competitive harm which, by extension, then permits the introduction of evidence by Ansac purporting to demonstrate countervailing pro-competitive gains. These applications will henceforth be referred to as the Section 3(1) exceptions and, it was common cause between counsel, could be dealt with collectively.

The fourth exception application is filed by Ansac and it purports to challenge Botash's *locus standi* in the complaint filed by the Commission against Ansac. This application is intimately connected to the agreement concluded in February 2000 between the Commission, Ansac and Botash and made an order of the Tribunal and which purports to provide, inter alia, for Ansac's status in these hearings and which is confirmed in the Tribunal's order of 7 September 2000. This application will henceforth be referred to as the *locus standi* exception and is dealt with below after consideration of the section 3(1) exceptions.

Part A

SECTION 3(1) EXCEPTIONS

1) Introduction

Section 3(1) specifies the application of the act. Subject to three exceptions that are not relevant for our purpose, it simply provides that

> *This Act applies to all economic activity within, or having an effect within, the Republic. (Our emphasis)*

in relation to the interpretation of section 3(1).

It appears to be common cause between the various parties that this 'activity', given that it originates in an agreement concluded in the US, has an extra-territorial dimension. All the parties agree that the Act has some measure of extra-territorial reach. However, argument centres on the precise extent of that reach.

Section 3(1) contains two legs on which to found jurisdiction. Either it is economic activity 'within', or it is economic activity having an 'effect within', the Republic. The debate in this case however is confined to an interpretation of the second leg i.e. the meaning of 'effects'. It is not obvious from a perusal of the pleadings and from at least the Commission's argument that they confine their assertion of jurisdiction only to this second leg.[4] However it emerges, at least from Ansac's argument in reply, that the parties interpret 'economic activity' differently.

According to Ansac in the context of this case 'economic activity' is the conclusion of the agreement between the members of Ansac. Thus, and although they did not express it in this language, economic activity is equated with the consummation of the prohibited practice. There is no economic activity within the Republic as the conclusion of the agreement took place within the USA. Thus, in order for Ansac's conduct to be justiciable within the Republic, the Commission and Botash will have to show that Ansac's activity had an effect within SA.

For the Commission 'economic activity' has a far broader meaning and, whilst including the conclusion of the agreement, extends beyond that to other conduct on the face of it neutral, but nevertheless constituting economic activity in ordinary parlance. Thus they argue that conduct by Ansac, that they will seek to prove, took place within the Republic, such as the soliciting of business, conclusion of sales, and receipt of payments, constitutes 'economic activity'.

Nevertheless, Ansac consider the case against them to be confined to establishing jurisdiction through the 'effect' leg only and hence they have confined their exception accordingly. [5]

Whilst we have been asked to confine ourselves to the 'effect' leg, and we do

---

4 Paragraph 6.3, page 25 of the Commission's Heads of Argument states: "*In interpreting effect, in this case, as the implementation of the agreement in South Africa, also accords with the application of objective territorial jurisdiction.*"

5 The pleadings show that Botash alleges both economic activity in and effects within see amended referral par. 16 pg 6 of bundle). The Commission's allege "economic activity having an effect within" see par. 9.2.5.1 at p. 129.

so, we want to make it clear that this does not mean we have accepted Ansac's contentions as to the proper meaning of 'economic activity'.[6] But since the interpretation of 'effect' not only has a consequence for the adequacy of the present pleadings, but more significantly from the practical point of view may entail the leading of substantial evidence which might otherwise be inadmissible in these proceedings, resolution of what seems a very fine point of law at a preliminary stage, is by no means academic.

Ansac argues that since the allegation of negative or deleterious effects within South Africa is not made in either the pleadings of the Commission or of Botash, and both have made it clear that they do not need to rely on these allegations, the pleadings are excipiable. Botash and the Commission contend that likewise Ansac's pleadings, which deny the anti-competitive effects of their conduct in South Africa are themselves excipiable as such evidence is irrelevant to an enquiry in terms of section 4(1)(b).[7]

2) Summary of the parties arguments

a) Ansac

Ansac argues for a reading down of the word 'effect'[8]. In essence it argues that the Competition Act is concerned only with conduct that is deleterious in its 'effect', conduct that prevents or lessens competition. A threshold requirement or a jurisdictional prerequisite is that a complainant in a competition matter, in order to invoke the provisions of the Competition Act, must establish that the act complained of impacts negatively upon competition. This presupposes a balance between anti- and pro-competitive effect, with the onus, presumably, on the complainant to introduce evidence establishing the anti-competitive consequences of the act complained of and the onus, presumably, on the defendant to introduce evidence of pro-competitive gains attributable to the conduct in question. The adjudicator would then, in order to determine jurisdiction, balance the evidence of anti- and pro-competitive effect and would only accept jurisdiction if the net balance proved to be deleterious in its consequence.

This is, on the face of it, an ambitious reading into the word 'effects'. However Ansac claims support for its argument based on three approaches that lead to

6 "We will be arguing that there is no economic activity within the Republic such as is relied on, on the pleadings, but what is effectively relied on, on the pleadings, is economic activity having an effect within the Republicc." (Ansac opening argument Record page 7) And later on: *"We are not here concerned with the implementation of the agreement as such, because section 4(1) is concerned with the conclusion of an agreement…. We are concerned with the effect of a conclusion of that agreement within South Africa"*. (See Ansac argument in reply at page 212-3 of the Record.)

7 See par. 31-33 of Ansac's Heads of argument, section 3: par 4.6 and 7 of Botash's Heads and par 5.13-5.16 and par.6 and 7 of the Commission's Heads.

8 Botash have quibbled with this characterization and insist that what Ansac is contending for amounts to a 'reading in', not a 'reading down'.

the same conclusion; namely that the word 'effect' in section 3(1), at least in relation to foreign-based concerns, must mean a deleterious effect.[9]

The first approach is based on the textual meaning of the word 'effect'. Interpreting effect requires a purposive interpretation within its context i.e. one that connotes negative effects because the object of the Act is to regulate and govern anti-competitive action. This, it claims, has also been the interpretation of the term effects in other jurisdictions.

The second is a policy-based argument that the legislature could never have intended the statute to reach foreign conduct whose 'effect' is benign. To the extent that this may lead to discriminating between the conduct of foreign and domestic firms such a distinction is justified.

The third requires one to interpret section 3(1) within the context of international law. In international law, it argues, harm is an essential element of what is termed the "effects doctrine".

b) Commission and Botash

The Commission and Botash argue that-

1) A purposive interpretation is not required when the meaning of a statutory provision is clear. Section 3(1) is unambiguous and warrants no secondary interpretation;

2) Ansac is unable to justify a policy for distinguishing between the foreign and domestic treatment of cartels. On the contrary such a policy would lead to schemes to defeat the clear intent of the legislature;

3) In relation to its international law arguments Ansac fails at the threshold requirement of establishing a clear and consistent rule of international practice. Secondly the Constitution requires that the rule of international law be the preferred interpretation of a statute, provided it is reasonable. If it is not reasonable, which Botash suggests is the problem with the Ansac approach, then we are not required to follow the international rule, assuming of course it can be established. They argue that the Ansac interpretation would lead to a double inquiry; first to establish jurisdiction and secondly to establish the existence of the prohibited practice. Furthermore, it is impractical because without jurisdiction the Commission cannot investigate, and if it cannot investigate it cannot do its job hence frustrating the purposes of the Act.

9 See par.9 of Ansac's Heads of argument.

3) Legislative framework

Before we turn to an analysis of the three respective arguments it might be appropriate to first consider the relevant sections of the Act and Constitution. The arguments put forth by the parties refer to the following sections in the Act:

Section 3 (1) of the Competition Act states that:

> *This Act applies to all economic activity within, or having an effect within, the Republic, except….*

This section should be interpreted according to Section 1(2) of the Competition Act, which states that:

> *This Act must be interpreted-*
>
> a) *In a manner that is consistent with the Constitution and gives effect to the purposes set out in section (2); and*
>
> b) *In compliance with the international law obligations of the Republic.*

Section 2 of the Act states:

> *The purpose of this Act is to promote and maintain competition in the Republic in order –*
>
> a) *To promote the efficiency, adaptability and development of the economy;*
> b) *To provide consumers with competitive prices and product choices;*
> c) *To promote employment and advance the social and economic welfare of South Africans;*
> d) *To expand opportunities for South African participation in world markets and recognize the role of foreign competition in the Republic;*
> e) *To ensure that small and medium-sized enterprises have an equitable opportunity to participate in the economy; and*
> f) *To promote a greater spread of ownership, in particular*

to increase the ownership stakes of historically disadvantaged persons.

This case concerns Ansac's alleged violation of section 4(1)(b), which states:

> *4(1) An agreement between, or concerted practice by, firms, or a decision by an association of firms, is prohibited if –*
>
> *(b) it involves any of the following restrictive horizontal practices:*
>
> *(i) directly or indirectly fixing a purchase or selling price or any other trading condition;*
> *(ii) dividing markets by allocating customers, suppliers, territories, or specific types of goods or services; or*
> *(iii) collusive tendering.*

Sections 232 and 233 of the Constitution state:

> *232. Customary international is the law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.*
>
> *233. When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.*

4) Analysis

a) Textual approach

Ansac argues that the word 'effect' is ambiguous. One meaning consistent with the approach of the Commission and Botash is that an effect is simply a result, outcome or consequence[10]. On this meaning the word shorn of any accompanying adjective means that the effects can be neutral. But, argue Ansac the word can also mean negative effects. Once the word is at least capable of textual ambiguity then we need to interpret the word in its proper context, which leads Ansac to argue that in the context of the statute's policy and international law that means negative effect.

We find no ambiguity in the use of the word 'effect' in section 3(1). 'Effect'

10 See Black's Law dictionary for this formulation.

bears its ordinary meaning of 'a result, consequence or outcome'.[11] Ansac offers no authority for its creative colouring in of a neutral word. This of course does not end the matter.[12] Ansac argue that we must approach the interpretation of the word purposively and, in the context of a statute concerned with the regulation of anti-competitive activity, the word 'effect' should be interpreted to refer to a negative effect.

In support of the purposive approach we were referred to the well know dicta of Schreiner JA in Jaga v Donges NO and Another; Bhana v Donges No and Another 1950 (4) SA 653 (A) at 664E – H, where he:

> "warns against the Sirenic perils of words, whilst repeating that there are bounds to legitimate interpretation"[13]

He goes on to state:

> *"Seldom indeed is language so clear that the possibility of differences of meaning is wholly excluded, but some language is much clearer than other language; the clearer the language the more it dominates over the context, and vice versa, the less clear it is the greater the part that is likely to be played by the context.*
>
> *Ultimately, when the meaning of the language in the context is ascertained, it must be applied regardless of the consequences and even despite the interpreter's firm belief, not supportable by factors within the limits of interpretation, that the legislator had some other intention. But the legitimate field of interpretation should not be restricted as the result of excessive peering at the language to be interpreted without sufficient attention to the contextual scene.*

Yet quoted equally often[14] is the judgment of Innes CJ in Dadoo Ltd and Others v Krugersdorp Municipal Council, [15] where he remarked:

---

11 See for instance De Villiers v Maursen Properties 1983 (4) SA 670 (T) where in considering the use of the word in the Insolvency Act, the court concluded that *"Effect" as used in s 8 (c) means "result" or "consequence". (Cf Shorter Oxford Dictionary on Historical Principles, "effect")*

12 Botash argue that it is where we could end the matter as once we have decided that the language is unambiguous no further enquiry into it's meaning is necessary. Tempting as such an approach may be it would ill serve our adjudicative role if we did not apply our minds to the remaining arguments lest we are wrong on this point.

13 Quoted in this manner in Standard Bank Investment Corporation v The Competition Commission and Others 2000 (2) SA 797 (SCA)

14 Also referred to in the Standard Bank case at 810.

15 1920 AD 530 at 543.

"*Speaking generally, every statute embodies some policy or is designed to carry out some object. When the language employed admits of doubt, it falls to be interpreted by the Court according to recognised rules of construction, paying regard, in the first place, to the ordinary meaning of the words used, but departing from such meaning under certain circumstances, if satisfied that such departure would give effect to the policy and object contemplated. I do not pause to discuss the question of the extent to which a departure from the ordinary meaning of the language is justified, because the construction of the statutory clauses before us is not in controversy. They are plain and unambiguous. But there must, of course, be a limit to such departure. A Judge has authority to interpret, but not to legislate, and he cannot do violence to the language of the lawgiver by placing upon it a meaning of which it is not reasonably capable, in order to give effect to what he may think to be the policy or object of the particular measure."*

Thus we must, following these cases, strive for an interpretation that constitutes neither "excessive peering" nor "violence to the language of the law giver".

Now Ansac's argument for a purposive approach starts with the sensible observation that the word 'effect' requires some limit, which must be read into it otherwise the statute could be applied to all economic activity no matter how remote its effects. According to Ansac once you start asking questions about remoteness that leads one inevitably to a more purposive interpretation i.e. the quality of the 'effect' is therefore not an irrelevant consideration as Botash and the Commission suggest.[16]

The purpose is then discerned in the light of the purposes of the Act, which states the Act's prime purpose is to *promote an efficient economy and to provide consumers with competitive prices and product choices*. This suggests that where there is ambiguity one should favour a reading that permits of the leading of evidence that furthers these values, as opposed to the *per se* approach, that favours the suppression of this evidence in the interests of quasi-judicial expediency.[17]

---

16 The Commission relies on the establishment of the intent of the legislature as the classical rule of interpretation. The words of the legislature must be given their ordinary and normal meaning, and if necessary regard can be given to the context within which such words are used. They say that in interpreting "*all economic activity*" and "*effect*" there is no reason to limit these words or indeed extend them because we are dealing with a Competition statute. Section 3 merely establishes jurisdiction and the conduct still has to be measured against the provisions of the Competition Act.

17 This is because Ansac characterizes per se prohibitions as a trade-off between the efficiency of having curtailed hearings (where no evidence of justification is allowed as opposed to say section 4(1)(a) where such evidence is permissible) as against permitting a more protracted, but entirely sound in economic terms, enquiry premised on evaluating any pro-competitive gains; albeit that cases where

Thus Ansac arrives at the one leg of its argument concluding that 'effect' must be construed as connoting negative effects. This approach is later to be shored up by the interpretation suggested by the policy approach and the international law argument both of which Ansac says leads us to the same conclusion.

We consider the latter two legs of the argument below. It is convenient now to examine whether the adoption of even the most expansive purposive approach should lead us to the Ansac conclusion about 'effects' meaning negative effects.

The structure of the section with its broad sweep chapeau followed immediately by exclusions suggests the legislature's purpose was to assert jurisdiction as widely as possible. Botash argue that if the legislature had intended 'effect' to have some more limited meaning they would surely have stated this more explicitly as the design of all the substantive provisions of the Act shows that when anti-competitive effects or a lessening of competition is intended, the legislature has said so expressly.[18]

They also point to case law where courts have suggested that clauses, which limit a court's jurisdiction, will be strictly construed. Since, this is what Ansac's interpretation effectively does it should not be followed in the absence of express language to require it. Botash also argue that our Act differs in an important respect with the Sherman Act of the United States as the latter Act, unlike our own, does not have an application clause and hence the courts needed to develop a doctrine of application leading to the "effects doctrine. "[19]

We agree with this. If one examines the various jurisdictional establishment clauses in the Act, all are widely cast.[20] The policy compromise was to allow wide ranging defences since jurisdiction could be assumed with minimum threshold requirements. Granted that may be of small comfort to those faced, as Ansac is, with a *per se* prohibition, but that does not detract from the clear legislative intent to bring a wide range of conduct under the Act 's scrutiny and then at the stage of substantive enquiry to asses the harm done. The fact that the latter enquiry is curtailed when it comes to a *per se* contravention does not mean that we should pervert the clear legislative intent with respect to jurisdiction.

b) Policy argument

---

such evidence will prevail will be few.

18 See sections 4 (1)(a), 5 (1) and section 8 where we find this language repeatedly used.

19 We discuss this doctrine below in the section on international law.

20 See for example section 12 which defines when a transaction constitutes a merger and is thus subject to Chapter 3 of the Act and our observations on the intentional broadness of this section in the Distillers case on page 18 of Tribunal Case No's: 94/FN/Nov00 and 101/FN/Dec00.

Ansac argues that once you have established that the word 'effect' requires qualification, policy requires that this be applied differently to parties who are aliens and who conduct their operations abroad. In the context of section 4(1)(b) the implications of its *per se* application to domestic cartels is understandable as it is a rule premised on efficiency in legal proceedings. But, argues Ansac, that rule should not be applied to foreign companies who might need to lead evidence of the pro-competitive effects of their activities.

Yet Ansac would want to lead evidence to establish that without the horizontal relationships between its members that the Webb-Pomerene[21] agreement affords, they would not achieve the economies of scale necessary to enter the S.A. market and hence they would exit leaving Botash with a monopoly. They allege that their agreement is pro-competitive and they would want to be able to prove it – the inquiry as to threshold jurisdiction in terms of section 3(1) is the only opportunity they would have to do to establish its benign effect given the per se nature of section 4(1)(b), which does not permit evidence going to justification.

The reason for the differential treatment of foreigners, it argues, is based on principles of international law and comity. We might, if we adopt an inflexible approach, act against firms, which are compelled in terms of their domestic legislation to form agreements, which our law prohibits. They are thus in the unenviable position of being unable to comply with the exigencies of two different legal systems.

Yet apart from an argument based on a hard conflict, which might be recognised as a gesture to comity, even on the Hartford Fire[22] approach, no other legal principle for such a distinction was advanced, nor any economic one.[23] Indeed it is easier to appreciate the dangers of making such a distinction. Those who wished to collude in the local market would simply find themselves an offshore cartel haven and collude to trade in the Republic knowing that evasion would be simpler than if they were located domestically. Secondly it seems unlikely that the legislature could have intended to favour foreign firms with a defence not available to domestic firms. [24]

---

21 The Webb-Pomerene Act, 15 U.S.C. § 61-65 (1982), provides a limited antitrust exemption for the formation and operation of associations of otherwise competing businesses to engage in collective export sales.

22 Hartford Fire Insurance Company v California 509 US 764 (1993). We deal with this case below.

23 The respondents initially advanced the proposition that the United States had provided for Webb-Pomerene associations in order to further their foreign trade interests and that comity required us to acknowledge this in our treatment of Ansac. This argument does not seem to have been advanced anywhere else let alone accepted notwithstanding and not surprisingly was not persisted with.

24 Where discrimination has been intended the Act is express on the point. See for example in relation to merger control section 12 A (3) (d) which talks of the ability of national firms to compete in international markets.

iii.International law argument

As we have seen Ansac argue that the word effect can also mean a negative effect and this interpretation, they say, is strengthened when coupled with the notion of ‘substantiality’ and ‘direct connection’, which the international law cases suggest is frequently employed when judges interpret effects.

They contend for the thesis that central to the effects doctrine in international law is the notion that the effects are harmful. The legislature could not have intended to reach foreign conduct whose effects in SA are benign.

It is common cause between the parties that notwithstanding the fact that we are a domestic tribunal interpreting a domestic statute we must have regard to international law. That this is so appears not only from section 1(2) of our Act which points us in that direction and reminds us of our obligation to the Constitution, but also the provisions in the Constitution which deal with international law. We have cited these provisions earlier in our section on the legislation and need not repeat them here.

There is also no dispute over how these provisions should be interpreted. Let us deal with them briefly for they form the framework for the application of the international case law.

Section 232 of the Constitution says that customary international law is the law of the Republic unless it is inconsistent with the Constitution or an Act of Parliament. This is an important qualification and means that if section 3(1) of the Act is inconsistent with customary international law, the Act nevertheless prevails.

However the more important provision in the Constitution for our purposes is section 233 which says where a statute is susceptible to different interpretations a court must prefer the interpretation that is consistent with international law as opposed to any other interpretation. However the section contains an important proviso. The interpretations have to be reasonable. Thus even if there is an interpretation consistent with international law that is at variance with another interpretation that is inconsistent, we must not prefer the former to the latter unless it is reasonable.

At this stage the parties part ways. Ansac argues that it can prove a customary law practice that favours its interpretation, that this practice is reasonable and therefore we are bound to prefer it.

Their opponents argue that not only have they not established a customary law practice that meets the requirements for recognition, but even if they have, this interpretation is not reasonable and hence we are not bound in

terms of section 233 to prefer it. Indeed on the contrary both constitutional values and the common law rules of statutory interpretation require us not to interpret a statute even if ambiguous in a manner that would lead to an unreasonable result.

In the present case it is not disputed that we are dealing with customary international law and not an international agreement. How then do we know when a rule is to be regarded as customary international law in the Republic?

Dugard[25] says our courts have identified two main requirements for the existence of a customary rule: settled practice (usus) and acceptance of an obligation to be bound (opinio juris sive necessitatis).[26] According to Dugard our courts now hold the view that universal acceptance is not necessary, general acceptance suffices.[27]

In the Asylum[28] case the International Court of Justice held that a practice must constitute, "constant and uniform usage" before it will qualify as custom.

> Accordingly, we examine the case law to establish if it sets out a constant and uniform usage that has been generally accepted.

As Oppenheim has indicated;

> "international problems of jurisdiction arise almost exclusively when a state tries directly or through proceedings in its courts to exercise its jurisdiction over persons, property or circumstances which (at least arguably) are or occur abroad."[29]

In this complaint referral we are concerned with the issue of territorial jurisdiction. That a state may exercise jurisdiction over matters within its own territory is uncontroversial. However as Oppenheim points out the territoriality principle cannot be applied in a straightforward manner. Attributing territorial jurisdiction is particularly difficult when one is dealing with conduct. For this reason two bases for establishing territorial jurisdiction have developed in international law, the 'objective' and 'subjective'. Oppenheim explains the distinction:

> *"The subjective application of the principle allows jurisdiction over*

---

25 See John Dugard, International Law – A South African perspective (2nd ed 2000) on page 28.
26 According to Black's Law Dictionary the opinio juris is "*the opinion that an act is necessary by rule of law*" Black's goes on to state that it is *" the principle that for a country's conduct to rise to the level of international customary law, it must be shown that the conduct stems from the country's belief that international law (rather than moral obligation) mandates the conduct*."
27 Dugard op cit pg. 30.
28Colombia v. Peru, 1950 ICJ Reports 266 at 277.
29 See Oppenheim's International Law, Ninth Edition Volume I Longman (1992) pg. 457.

offences begun within the state but not completed there; objective territorial jurisdiction allows jurisdiction over offences having their culmination within the state even if not begun there." [30]

However the basis for the exercise of territorial jurisdiction can be taken further as states will sometimes exercise jurisdiction over conduct that has taken place abroad that has effects within the state. This basis for jurisdiction is referred to sometimes as the "effects doctrine".

The "effects doctrine" is frequently confused with circumstances where jurisdiction is in fact being exercised on the basis of objective jurisdiction. Oppenheim maintains that there is a distinction between the two, which he explains thus:

"the 'effects' basis for jurisdiction, which is to be distinguished from the objective territorial basis for jurisdiction in that with the latter, but not the former, the consequences taking place within the 'objective' jurisdiction are essentially a constituent part of the offence. This important distinction may be obscured when consequences which are constituents of the offence are referred to as 'effects', as indeed happened in the Lotus case."[31]

Thus we have a to make a distinction between effects or consequences which are part of the offence and consequences which are not.

Ansac argues that 'effects' that are mere consequences cannot found a proper basis for jurisdiction for otherwise one may be risking intruding upon the sovereign rights of other nations. To the extent that the US Sherman Act is interpreted as embodying an "effects doctrine" on this basis, it is considered to be in violation of international law. To the extent that our section 3 may seem to emulate this doctrine we must be wary of the extent it should be so understood.

Since we have found that section 4(1)(b) does not permit the leading of evidence of benign effects the only way one can interpret a so-called per se offence in a manner consistent with international law is to interpret 'effects' as meaning negative effects.

They then, having established this platform go and examine the US cases in an attempt to distil a limit on the concept of 'effects'. They suggest that this case law must be regarded as international customary law and hence more authoritative and binding upon us than

30 Oppenheim op cit pg. 460.
31 Oppenheim op cit pg. 460 fn 14.

comparative law might otherwise be, since the foreign courts are pronouncing upon international customary law and not their domestic law.

We will now go on to examine the United States case law to see whether it supports Ansac's reading.

The leading authority for the "effects doctrine" in US law is Alcoa.[32] *The case concerned whether an agreement to set import quotas was intended to effect the United States.*[33] *The Court held:*

> *"It is settled law ... that any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the State reprehends; and these liabilities other states will ordinarily recognise.*[34]

The Court went on to identify two situations. One is where an agreement made beyond the borders of the United States is not intended to affect exports or imports within the United States but does so. The other is where the agreement is intended to affect the United States but in fact does not do so. In neither of these cases was the Court certain whether it would have jurisdiction. Thus the dichotomy is between intention and effect. It was this context that led to the formulation of the 'Alcoa rule', which is that the United States only had jurisdiction over conduct, which has an intended effect within the United States.

The court found that the intention was to effect trade in the US. In that sense the word effect was used and there was no separate consideration of whether the 'effects' were harmful. There is thus nothing in this language which suggests that the 'effects' must be harmful to found jurisdiction. Ansac, however, latch on to the language of reprehends and deduce that the case is authority for the proposition that 'effects' must be reprehensible to found jurisdiction. In doing so they confuse a part of the judgement where the court is considering the justification for exercising extra-territorial jurisdiction with the test for founding such jurisdiction. It is the latter, which the court decided was the intended 'effects test'.

The case properly understood is not authority for the proposition that 'effects' must be reprehensible to found jurisdiction.

---

32 United States v Aluminium Company of America 148 F.2d 416 (1945)

33 Foreign companies had agreed amongst themselves that each company would pay royalties to the other companies if its production of aluminum exceeded a certain level: the result was to discourage production of aluminum beyond that level, and it was possible that the resulting shortage of aluminum had affected levels of imports into the United States. (Summary is from Akehurst page 193)

34 Alcoa decision at 443-444.

The Alcoa decision was seen by other countries to be an aggressive assertion of jurisdiction by the United States particularly as the case was followed by similar decisions in the U.S. courts over the next three decades. In reaction to this growing criticism the U.S. courts "sought to temper the exercise of jurisdiction with consideration of 'comity' factors".[35]

The case that best exemplifies this 'tempering' approach is the 1976 decision of the 9th Circuit in Timberlane.[36] *There the court held that 'effects test' enunciated in Alcoa was incomplete because it failed to consider the other nation's interests. The court went on to criticize Alcoa for not expressly taking into account the relationship between the actors and the country wishing to assert jurisdiction. It then devised its own doctrine in the form of a three-part test, in terms of which a court would ask the following -*

1) was there an intended or actual effect on American commerce
2) is it of such a type and magnitude so as to be cognisable as a violation of the Sherman Act; and
3) is it appropriate to exercise jurisdiction in the light of considerations of comity and fairness (this itself is subject to a test of eight factors to be weighed up)

The third part of the test, known as the 'jurisdictional rule of reason', became the subject of controversy in later cases.[37] Although we detail the content of this rule in a footnote the one comment that Ansac rely on is the language;

> *"The extent to which there is explicit purpose to harm or affect American commerce."*

Ansac argues that this choice of language evidences a consistent approach to couple the concept of harm with 'substantial' and 'significant' effect.

Our reading of the case is a more limited one. When the Timberlane court is

35 See Joseph P Griffin, Extraterritoriality in U.S. and EU antitrust enforcement, 67 Antitrust Law Journal 159

36 Timberlane Lumbar Co v Bank of America National Trust and Savings Association 549 F.2d 597 (1976)

37 "*The elements to be weighed include the degree of conflict with foreign law or policy, the nationality or allegiance of the parties and the locations or principal places of business of corporations, the extent to which enforcement by either state can be expected to achieve compliance, the relative significance of effects on the United States as compared with those elsewhere, the extent to which there is explicit purpose to harm or affect American commerce, the foreseeability of such effect, and the relative importance to the violations charged of conduct within the United States compared with conduct abroad."* (at 614)

referring to harm it is doing so not in the context of founding jurisdiction, but in the context of setting out a balancing test for comity. It is not in itself an independent leg of the courts' test.

Whilst the Timberlane approach was followed in some circuits, in others it was expressly disavowed in no uncertain terms.[38]

The legislative response was the 1982 Foreign Trade and Antitrust Improvements Act which stated that jurisdiction would only exist when the challenged conduct had a *direct, substantial and reasonably foreseeable effect*.

In 1987 the Restatement (Third) of the Foreign Relations Law of the United States adopted the Timberlane balancing approach:

> "consequences within the territory must be ***substantial*** *and occur as a* ***direct and foreseeable*** *result of the conduct outside the territory."*(Our emphasis)[39]

In 1993 the United States Supreme Court was to revisit the issue of extra-territorial jurisdiction in the case of Hartford.[40]

Briefly the case concerned the Sherman Act's reach over a British reinsurance scheme where British firms had agreed not to make a type of reinsurance available unless subject to certain exclusions. This agreement although made by foreign firms in the United Kingdom was alleged to have had an effect on the United States market. The British firms moved to dismiss the complaint on the grounds of international comity as the conduct in question was by British firms and was lawful in the U. K. despite effects in the United States.[41]

In Hartford the court split 5-4. The majority found there was no true conflict with the British law and therefore the Court did not need to consider whether it should decline jurisdiction on the basis of comity. In so doing the Court reaffirmed the effects test and according to most commentators relegated the jurisdictional rule of reason to obscurity. Note that in Hartford although effects

38 As Griffin has noted the Third, Fifth and Tenth circuits adopted similar tests whilst the D.C. and Seventh circuits questioned their validity. For instance in the Laker case the court observed that the Timberlane factors are not useful in resolving the controversy (See Griffin op cit page 161 footnote 14.)

39 Section 402 (2)

40 Hartford Fire Insurance Company v California 509 US 764 (1993)

41 The Hartford case had come to the Supreme Court after a District Court and a circuit court had differed on the application of the third part of the Timberlane test viz. whether jurisdiction should be declined on the basis of comity. In both lower courts and in the judgment of the majority in the Supreme Court it was assumed that the conduct in question was intended and had produced a substantial effect in the United States.

are referred to as needing to be 'substantial' the court did not require the additional element of 'directness'.

Post Hartford the test seems to be this; is the foreign conduct intended to produce and does it produce a substantial effect in the United States? Secondly, is there a true conflict between the domestic and foreign law? In Hartford the court said that since the British defendants could comply with both laws at the same time there was no conflict with British law.

Ansac relies heavily on the judgment written for the minority in Hartford by Scalia J. In his dissent he finds that it is well established in US law that the Sherman Act applies extra-territoriality. However a second canon of interpretation is that an act of Congress should never be construed to violate the law of nations if any other possible construction remains.

This is implicit in the notion of comity. Since the notion of comity is important to an understanding of the cases to follow we digress briefly in our discussion of Hartford to consider it here.

Comity may be described as the recognition that one nation allows within its territory to the legislative, executive or judicial acts of another. However, like extraterritorial jurisdiction, comity is one of those slippery concepts that evade concise definition. Black's Law Dictionary in defining 'comity' quotes an extract from the literature where the authors complain that:

> "A great deal of misconception about the nature of conflict of laws is due to the loose use of the term 'comity'."[42]

What Scalia J does in Hartford is to identify that comity seems to be used in two respects. One in relation to the courts, so–called 'judicial comity', that is where judges prefer to not exercise jurisdiction they otherwise have over cases they consider may be more properly adjudicated elsewhere. The second is what is sometimes described in the United States cases as 'prescriptive comity'. This is the respect that legislatures afford each other by limiting the reach of their laws.

---

42 See Black's Law Dictionary, quoting H.Goodrich and E Scoles *Handbook of the Conflict of laws*. Black's also quotes Macalister- Smith who says the term is misleadingly used as a synonym for international law. According to Griffin the European Commission believes that comity is a matter for prosecutorial discretion rather than a legal prerequisite for jurisdiction. See Griffin op cit, page 77 footnote 88.
In Laker Airways Ltd v Sabena, Belgian World Airlines, 731 F.2d 909 (D.C. Cir. 1984), comity is described as the *" degree of deference that a domestic forum must pay to the act of a foreign government not otherwise binding on the forum"* The Laker decision goes on to say on the same page that *" When the foreign act is inherently inconsistent with the policies underlying comity, domestic recognition could tend either to legitimise the aberration or to encourage retaliation, undercutting the realisation of the goals served by comity. No nation is under an unremitting obligation to enforce foreign interests which are fundamentally prejudicial to those of the domestic forum"* at 937 para D.

Thus when a court is approaching a comity problem it needs to be clear if it is applying the first or second kind. With judicial comity a court is saying – it has jurisdiction but asks whether it should decline to exercise it because of comity to another nation. With prescriptive comity a court is asking whether its legislature has given it jurisdiction in the first place. That question it resolves by determining whether its legislature, having regard to the comity it is presumed to have extended to other sovereign nations, has given to the statute an extraterritorial dimension. It will thus only conclude that it has jurisdiction if it is satisfied that was the lawmaker's intention.

But the distinction amounts to more than a fine academic point. For as Scalia J points out, practice has shown that when exercising judicial comity, courts are generally reluctant to give up a jurisdiction which has been conferred upon them. With prescriptive comity this reluctance may be less apparent since they have to decide whether jurisdiction has been conferred on them in the first place. [43]

Scalia J concludes that the issue in Hartford is one of prescriptive comity. The Court had to decide how far Congress had intended the Sherman Act's extraterritorial reach to extend. Based on the Restatement he argues that:

> *" a nation having some basis for jurisdiction should nonetheless refrain from exercising jurisdiction when that exercise would be unreasonable."*

Ansac argues that in interpreting section 3(1) we are faced with the task of determining prescriptive not judicial comity.

What Ansac seeks to take out of the dissent in Hartford is that a statute must be interpreted in such a way that the legislature's assertion of extraterritorial jurisdiction is reasonable. When Scalia J considers what reasonableness entails he refers to various factors, which need not be repeated here, but amongst which he mentions " the character of the activity to be regulated", and the "extent to which the activity takes place within the territory of the regulating state".

But again this is stated in the context of comity or prescriptive comity as Scalia J preferred to characterise it. The Court in Hartford was grappling with

---

43 See page 652 of the judgment of Scalia J fn 9 *" Some antitrust courts, including the Court of Appeals in the present cases, have mistaken the comity at issue for the 'comity of the courts,' which has led them to characterize the question presented as one of abstention that is, whether they should 'exercise or decline jurisdiction'….As I shall discuss, that seems to be the error the Court has fallen into today. Because courts are very reluctant to refuse the exercise of conferred jurisdiction, confusion on this seemingly theoretical point can have the very practical consequence of greatly expending the territorial reach of the Sherman Act".*

the issue of exercising jurisdiction over a reinsurance regulatory regime governing London markets. Scalia J makes his remarks in the context of one nation respecting the sovereign rights of another by limiting the reach of its laws. It is far removed from the facts of this matter where such a conflict does not arise.

The debate in Hartford is about the application of a hard conflict based on adjudicative jurisdiction versus prescriptive comity based on a reasonableness test. None of this supports or is pertinent to the rule that Ansac commends us to follow, as it does not lead to the conclusion that effects must be deleterious before a state can assume jurisdiction.

The case that comes closest to the approach commended by Ansac is a decision of Ninth Circuit in Metro Industries v Sammi[44]*. Ansac stresses the fact that this is a post-Hartford decision. Here the court was faced with considering whether a practice amongst Korean firms, constituting a private system of mutual intellectual property recognition which firms were bound by commercial practice to accept, amounted to a system of market division which although occurring in the Korean market should be treated as a naked market division agreement and hence to be treated as a per se restraint under US law in terms of the Sherman Act. The court held:*

> *"Because conduct occurring outside the United States is only a violation of the Sherman Act, if it has a sufficient negative impact on commerce in the United States, per se analysis, is not appropriate. Indeed, when the alleged illegal conduct occurred in a foreign country, we must examine the impact on commerce in the United States before we can determine that we have subject matter jurisdiction over the claim."*[45]

Later on the court went on to conclude that:

> *"Foreign conduct cannot be examined under a per se rule…Application of the per se rule is not appropriate where the conduct in question occurred in another country"*[46]

Ansac argues that this case is authority for three propositions in relation to conduct that takes place outside a court's jurisdiction –

a) one has to show a negative impact

---

44 Metro Industries v Sammi Corporation 82 F.3d 839 (9th Cir. 1996)
45 at page 843 of the judgment
46 at page 845 of the judgment

b) *it has to be a sufficiently negative impact*
c) one has to distinguish between per se rules as they impact domestic firms and foreign conduct.

Whilst Ansac concedes that our statute allows less flexibility in the classification and continual reclassification of conduct as falling under the per se and rule of reason approach that characterises the US courts approach to the Sherman Act, it argues that under section 3(1) we are allowed such an approach.

Botash and the Commission urge us not to follow the Metro case. Firstly the case is hardly authoritative as it reflects the views of one Circuit and there is no indication it has been followed elsewhere. Given that it appears to contradict the Supreme Court's approach in Hartford that is not surprising. They also argue, more importantly, that the approach in the case is conceptually flawed as the court muddles comity (an international law issue) with substantive issues (the content of which is the subject for the domestic law of the state asserting its jurisdiction). Furthermore it creates a distinction between foreign based and domestic cartels without applying any principle to justify the distinction.

It is certainly true that Metro has not received much support from leading commentators. Eleanor Fox says of the approach taken in Metro[47]*:*

> *"Some jurists feeling bound to apply Hartford but sensing an illegitimacy in American condemnation of certain acts abroad, have shifted to second best grounds, perversely creating a different substantive standard for foreign defendants and US defendants".*

She cites Metro's holding that the per se rule is inapplicable to foreign conduct as "contrary to most authority."[48]

Nippon Paper Industries [49] is the most recent example of the US courts exercising extra-territorial jurisdiction. There the First Circuit held that activities abroad having substantial and intended effects within the US could form the basis of a prosecution under section 1 of the Sherman Act. The facts were that Japanese firms were part of a conspiracy to fix paper prices in the US.

> " *We see no tenable reason why the principles of comity should shield NPI from prosecution. We live in an age of international commerce,*

47 Eleanor M. Fox: *National Law, Global markets, and Hartford: Eyes wide shut.* Antitrust Law Journal, Vol. 68, page 77
48 Fox op cit page 78, footnote 14.
49 United States v Nippon Paper Industries Co Limited 109 F.3d 1 (1st Cir. 1997)

where decisions reached in one corner of the world can reverberate around the globe in less time than it takes to tell the tale. Thus, a ruling in NPI's favour would create perverse incentives for those who would use nefarious means to influence markets in the United States, rewarding them for erecting as many territorial firewalls as possible between cause and effect."[50]

Its conclusion is that comity:

> " is more an aspiration than a fixed rule more a matter of grace than a matter of obligation. In all events its growth in the antitrust sphere has been stunted by Hartford Fire…. "

The leading case in point in Europe is the Woodpulp[51] decision of the European Court of Justice in 1985.

A number of woodpulp producers established outside of the EC (as it was then known) had created a price cartel eventually charging their customers within the EC. The Commission found them to have infringed Article 85 (now 81) of the Treaty of Rome.

The producers involved were exporting and selling in the EC either directly or through the medium of agents. The matter came on appeal to the ECJ. One of the points the Court had to decide upon was an argument by the producers that it would be contrary to international law to regulate conduct restricting competition adopted outside the EC merely because of the economic repercussions produced within the EC.

The Advocate General urged the Court to find the producers liable on the basis of the ' effects doctrine', which had not been formally recognised in EC law as a basis for jurisdiction[52]. According to the Advocate General the only criteria for jurisdiction is the *"direct, substantial and foreseeable effect."*[53]

The Court said the infringement of Article 85 consisted of two elements – 1) the formation of the agreement and 2) its implementation.

Since the implementation element had taken place within the EC the conduct was covered by the territoriality principle. Recall that in our earlier discussion we had pointed out that the distinction between the effects doctrine and the

50 See Nippon Case, page 8.
51 Official Journal of the European Communities No L 85/1 – Woodpulp IV/29.725.
52 He said *" Although the court has not, in its decisions to date formally upheld the effects doctrine with regard to the application of competition law to undertakings outside the Community it does not imply that it rejects this doctrine."* At page 918-9.
53 See pg 932

objective territorial principle was that in the latter an element of the offence had to take place in the territory of the state exercising jurisdiction. By classifying the contravention of Article 85 into an agreement and an implementation element the Court was making use of the objective territorial principle, one that is widely accepted in international law, and avoided following the invitation of the Advocate General who hoped the court would utilise the opportunity to recognise the more controversial effects doctrine.

After Woodpulp an American Assistant Attorney- General observed that as a practical matter the Woodpulp decision was very close if not indistinguishable from the so –called effects test as applied by the US courts. This contention was hotly denied by Sir Leon Brittan, the then Competition Commissioner who said that the Court of Justice did not endorse the effects doctrine. Brittan goes on to say that the specific use of the word 'implementation' rather than 'effects' suggested to him that implementing conduct has to be 'direct, substantial and foreseeable' for jurisdiction to be engaged.[54]

Griffin remarks that any practical effect between implementation and 'effects' is likely to be limited to a few rare situations such as concerted refusals to buy or sell from the EU. Yet there are those who argue that implementation could include omissions within the EU such as refusals to supply.[55]

However in contrast Alford argues that the territorial principle means that a state can exercise jurisdiction only where a consummating act within a states territory was a constituent element of an agreement made abroad.

> "With omissions there is no consummating act within the Community that can justify the assertion of jurisdiction on objective territorial grounds. Thus for the implementation approach to remain faithful to the Community's professed desire to assert jurisdiction solely on the basis of the Territorial principle, it appears necessary to exclude certain traditional antitrust violations from its jurisdictional purview." [56]

Thus the European Union has not followed the effects doctrine instead opting for a form of objective territorial jurisdiction that many think is little different to the "effects doctrine".

Closer to home we have the Zimbabwean case of S v Mharapara.[57] Here a

54 See Griffin op cit page 186. Some writers felt the decision not to adopt the effects doctrine was motivated by Europe's long and antagonistic conflict with the United States over the ambit of the latter' antitrust laws. It would have been awkward if Europe had gone the same route. (See Christoph Wedder , A Survey for Principal decisions of the European Court of Justice Pertaining to International law, European Journal of International Law Vol 11 No 1.

55 Griffin op cit page 187

56 Griffin op cit page 187 quoting Roger Alford footnote 130

57 Sv Mharapara, 1986 (1) SA 556(ZS)

Zimbabwean official had stolen an item from a Zimbabwean embassy in a foreign country. On appeal it was argued for the accused that the Zimbabwean courts had no jurisdiction over the offence since it had taken place wholly within a foreign territory. The Zimbabwean Supreme Court rejected this and stated that:

> "Thus a strict interpretation of the principle of territoriality could create injustice where the constituent elements of the crime occur in more than one State or where the locus commissi is fortuitous so far as the harm flowing from the crime is concerned. Any reluctance to liberalise the principle and adopt Anglo-American thinking could well result in the negation of the object of criminal law in protecting the public and punishing the wrongdoer. A more flexible and realistic approach based on the *place of impact, or of intended impact, of the crime must be favoured."*[58] (Our emphasis)

An inconsistency in approach in the case law might be resolved if there was consistency amongst the academic writers. Regrettably there is not.

Dugard, [59]*Oppenheim and Brownlee suggest different theories for the exercise of extra-territorial jurisdiction. Dugard and Brownlie both refer to the direct and substantial test.*[60] *Oppenheim prefers to speak of a "sufficiently close connection." However Oppenheim also states that there are numerous bases on which extra territorial jurisdiction may be exercised. These are identified as " a sufficiently close connection, or some substantial interest or a direct and substantial connection or exceeding effects which are only incidental and insubstantial. "*

Mann 's test is a close connection; Akehurst's is which state feels the primary effects as opposed to the secondary effects.[61]

It is thus clear that there is no consistent approach to extraterritorial jurisdiction, either in the case law or amongst the writers. What common thread might be identified amongst those who refer to 'effects' is some

58 At 563-4

59 Dugard for instance refers to Mharapara as authority for jurisdiction because of the place of impact.

60Prof Akehurst warns against the use of direct by referring to the example of a cartel in country A using a middle man in country B to export to country C where the effects are felt (See British Yearbook of International Law, Volume: 1972 to 1973, page 197)

61 Prof Akehurst submits on page 154 "*that jurisdiction can be claimed only by the State where the primary effect is felt. In order to determine whether the effects are primary or secondary, it is necessary to take two factors into account: 1) Are the effects felt in one State more direct than the effects felt in other States? 2) Are the effects felt in one State more substantial than the effects felt in other States?"* He refers to another leading authority, Prof Mann, on page 182 and says: "*Mann adopts a more sophisticated approach since he considers that the principle of territoriality is too crude He argues that a State may not apply its law unless there is a close connection between the State and the person, thing or event to which the law is to be applied; two or more States may sometimes have concurrent legislative jurisdiction, but lex fori should not apply where it has no substantial connection with the facts.*

attempt to limit the notion, but even then they are divided as to how this should be achieved. Most seem to see this limit as quantitative hence language such as 'substantial' or 'not incidental'. Some see a causal link necessary hence direct or sufficiently close or the use of primary or secondary. Others regard intention as an essential element. What seems to be lacking throughout is authority for Ansac's interpretation that the effect must be harmful.[62]

This is not surprising because the Ansac approach, by requiring one to attribute a harmful aspect to effect, leads to a situation where a rule of international law as to the parameters of extraterritorial jurisdiction becomes a rule of substantive law dealing with the content of the domestic law. International law on jurisdiction cannot be employed to do this.

If the test for a customary law obligation is constant and uniform usage then Ansac has failed to establish this. Not even those cases in United States law, which might be given the most sympathetic reading for Ansac come close to advancing its interpretation[63]. Moreover these judgments do not enjoy support in the United States let alone a wider audience. In Timberlane the Court itself acknowledges the absence of a consensus. Yet this is the case that Ansac relies upon as a cornerstone of its argument.[64]

> Most of the cases in which language to limit 'effect' is utilized concern cases where the relative rights of states are concerned. It is in this context that language to limit effects is utilised not as a basic concept of jurisdiction as is pointed out by Brownlie:
>
> *"..the sufficiency of grounds for jurisdiction is an issue normally considered relative to the rights of other states and not as a question of*

---

62 *Botash says if there is a consistent international rule then the most that can be said is that where there is only a slight effect or where the effect is wholly remote from the jurisdiction of the state seeking to exercise it, then jurisdiction would be declined. This they argue is a much weaker test than 'direct and substantial' as it is a negative test. They also argue that on the facts of this case the implementation of the Ansac agreement might well constitute a substantial connection and therefore we do not need to choose between the tests. (Record pg 182)In the intervenors' amended papers they allege in par. 22 the extent of Ansac's supply of the SA market in 1998-99. This approximates to 33% of the market in '98 and 29% in '99, which is not materially disputed by Ansac who in answer only suggest that Botash enjoys 75% of the market.*

63 The closest of course is the Metro decision on the need to distinguish between local and foreign cartels. Yet that case as we have stated cannot be elevated to establishing a rule of international law.

64 "Even among US courts and commentators, however, there is no consensus on how far jurisdiction should extend." See Timberlane pg 610

basic competence."[65]

The case law and literature offer no support for Ansac's view that 'effects' must be interpreted as negative effects to comply with international law.

d) Comity

The argument on international law cannot end here on a finding that there is no clear international rule to support Ansac's interpretation of 'effect'. We must also consider whether comity, be it of the judicial or prescriptive variety, requires us to come to a different conclusion.

Before we do so it is necessary to consider briefly the provisions and history of the Webb-Pomerene Act as in our view an evaluation of it indicates that comity considerations are not implicated on the facts of this case.

The Export Trade Act, more commonly known as the Webb-Pomerene Act was enacted in 1918. It exempts from the Sherman Act, co-operation agreements and/or associations between independent firms in relation to exports from the United States provided their activity has no anti-competitive effect on commerce within the United States.

The legislative history of the Act indicates that its purpose was to protect American firms trading overseas who had to compete in foreign markets against domestic cartels. In US v. Concentrated Phosphate Export Association[66] *Judge Marshall, who delivered the majority opinion, said:*

"The Webb-Pomerene Act was passed 'to aid and encourage our manufacturers and producers to extend our foreign trade'…. Congress felt that American firms needed the power to form joint export associations in order to compete with foreign cartels."

That this was intended and understood to be a cynical policy to allow firms to do in someone else's backyard what they could not do at home is apparent from the comment of Senator Pomerene who bluntly said:

"(W)e have not reached that high plane of business morals which will permit us to extend the same privileges to the peoples of the earth outside of the United States that we extend to those within the United

65 See Brownlie – Principles of Public Law- pg. 298-9.
66 U.S. v Concentrated Phosphate Export Association, 89 S.Ct. 361 U.S. 199, 21 L.Ed.2d 344

States"..[67]

What emerges is that there is nothing in the Webb-Pomerene Act that requires the members of Ansac to trade as an association, and Ansac rightly concede this. Furthermore, the Ansac membership agreement permits the association to exclude territories from its ambit of operation.[68]

Members of Ansac are therefore under no legal compulsion to trade in the Republic as a Webb-Pomerene association.[69]

There is thus no need for us to find a hard conflict in the manner contemplated by the majority in the Hartford case. Nor do not need to decide which view of comity to prefer in interpreting the Act. Even under the test of Scalia J for the minority in Hartford, which is not to exercise jurisdiction if that exercise would be unreasonable, we see no reason to decline.

> On the facts of this case as pleaded there is nothing unreasonable in the exercise of jurisdiction over the Ansac agreement if it has economic effect within the Republic. The conduct sought to be impugned is ordinarily unlawful in the United States and hence the need for it to be exempt and restricted to foreign trade.

Indeed the cases where courts have declined jurisdiction on the basis of comity are rare.[70] *As the court in the Laker case put it:*

> *" when push comes to shove, the domestic forum is rarely unseated."*[71]

---

67 Extract from the Congressional record which is quoted in the Phosphate Export Ass'n judgment .Also see page 366 of the judgment where Congressman Charles C. Carlin of Virginia is quoted as saying: "*I am frank to say that personally I have no sympathy with what a foreigner pays for our products; I would like to see the American manufacturers get the largest price possible. But if by indirection we are going to set up a system which is going to fix a higher price eventually at home, through a combination as suggested in this bill, I think you can very well see that such a system is a very dangerous one."*

68 Clause 3(d) of the Membership agreement: *Exclusion of Sales or Territories: The Board of Directors may exclude from any or all Ansac procedures such specific Export Sales or Export Sales Territories as shall be specified by and pursuant to resolution adopted by affirmative vote of directors representing all of the Members; any such resolution shall be rescinded, amended or modified only upon affirmative vote of directors representing all of the Members.*

69 Furthermore, as stated on page 1456 of the Antitrust Law Developments Volume II, (fourth edition), Section of Antitrust Law, American Bar Association: "*Nor does it provide any immunity from prosecution under foreign antitrust laws.*"

70 *Botash indeed asserted they could find no such case and Ansac did not controvert this. Botash conclude that the case law suggests that comity plays a limited role in limited circumstances and that states have considerable latitude in the extra-territorial application of their national law and this is wholly consistent with the Lotus case.*

71 *In Laker Airways v. Sabena, Belgian World Airlines, 731 F.2d 909 (1984) on page 948 par 40 of the case the court expressed the scepticism about whether courts were best qualified to perform the balancing act required in comity: "Interest balancing in this context is hobbled by two primary problems (1) there are substantial limitations on the court's ability to conduct*

5) Conclusion

It is commonly accepted that domestic legislation and law enforcers are entitled to assume extraterritorial jurisdiction. It is equally commonly conceded that fundamental economic factors – the object of antitrust regulation – give antitrust a powerful extraterritorial dimension. Professor Eleanor Fox, the noted antitrust and international law scholar, expresses it pithily:

> " Competition Law is national, markets are global, and there is the rub."[72]

In its reading of the case law Ansac has confused two issues. One is the basis on which one may 'assume' jurisdiction over extra-territorial conduct and the other is the 'justification' for the extra-territorial reach of legislation. Clearly in the case of the latter, countries through the mouths of their courts justify such legislation in international law because the 'effects' on them are harmful. This language is to be found in Alcoa, Laker and the opinion of Advocate Darman in Woodpulp[73]. What the courts are stating is the trite

---

a neutral balancing of the competing interests, and (2) the adoption of interest balancing is unlikely to achieve its goal of promoting international comity." The court says the tests for balancing usually consist of a long list of national contacts to be weighed against those of the foreign country. Their usefulness breaks down when deciding to select one forum's jurisdiction over another. It categorises these contact in three ways. (1) those that one already takes into account when deciding whether a court has jurisdiction and thus take the matter no further (2) those that allow one to identify the fact that respective sates may have an interest but don't allow enable one to decide which to prefer and are thus neutral and (3) those that allow one to distinguish between competing claims. It is these latter which the court suggests "incorporate purely political factors which the court is neither qualified to evaluate comparatively nor capable of properly balancing. One such proposed consideration is the degree to which the desirability [of restrictive practices] is generally accepted. We doubt whether the legitimacy of an exercise of jurisdiction should be measured by the substantive content of the prescribed law."

72 Eleanor M. Fox: *National Law, Global markets, and Hartford: Eyes wide shut.* Antitrust Law Journal, Vol. 68, page 73.

73 In Laker in a most eloquent passage the court explains, *" Even if invisible, the radiating consequences of anti-competitive activities cause economic injuries no less tangible than the harmful effects of assassins bullets or thieves telephonic impulses. Thus legislation to protect domestic economic interests can legitimately reach conduct occurring outside the legislating territory intended to damage the protected interests within the territory. As long as the territorial effects are not so inconsequential as to exceed the bounds of reasonableness imposed by international law, prescriptive jurisdiction is legitimately exercised....." Certainly the doctrine of territorial sovereignty is not such an artificial limit on the vindication of legitimate sovereign interests that the injured state confronts the wrong side of a one-way glass, powerless to counteract harmful effects originating outside its boundaries which easily pierce its 'sovereign' walls, while its own regulatory efforts are reflected back in its face."* (See Laker pg 923)

proposition that one does not seek to prohibit activity that is not harmful or in the language of Alcoa 'reprehended'. That is a completely different proposition to the notion that harms must be established to found jurisdiction. The first proposition relates to justification the second to procedure and confusing the two leads to an error in analysis and the absurd result for which Ansac contends.

> We utilize section 3(1) to establish whether the conduct is economic activity having an 'effect' within the territory. Once we establish evidence of 'effect' we do not inquire into its nature, as that is a substantive issue that takes place when we evaluate whether a prohibited practice has been established.
>
> The issue of harm is dealt with in the substantive provisions of the Act. This is the logical place for it to be addressed since one does not stand convicted simply because a tribunal assumes jurisdiction. That being the case the foreign respondent is in the same position as the domestic one.

It is by no means clear that the 'effects test' is an exception to extra-territorial jurisdiction. Competition infringements are not easily categorised into constituent elements, as might be a criminal offence so that we can determine whether one of the elements took place on the asserting states territory. On the other hand it is arguable that the 'effect' is always part of the transgression of a restrictive practice and that to dissect it away from the restrictive practice to which it adheres is artificial. On this basis the "effects doctrine" does not differ from the assertion of objective territorial jurisdiction.

But even if that argument is considered unorthodox, there are sound reasons in competition law for adopting the 'effects' based jurisdiction as our legislature has done in section 3(1). Without such a doctrine one can easily have a situation where the offenders reside in country A and plot to 'effect' the market of country B. If we require that the restrictive practice has to have some element in Country B before we can found jurisdiction there, we would fail, but the anti-competitive effect would still be felt there leaving only country A to exercise jurisdiction. There is no reason why it should do so when it has no interest in prosecuting conduct not affecting its markets. [74]

The 'effects test' seeks to avoid a juristic lacuna where restrictive practices cross borders. We accept the doctrine is open to abuse by states exercising jurisdiction when their connection to the conduct is only tangential. This does not mean throwing it out. It means limiting it sensibly to avoid the de minimus

74 There is also academic support for this approach. Akehurst states from page 195 to 197 that: *"Moreover it is often difficult to say what the constituent elements of a breach of antitrust law. Restrictive practices can take so many different forms that laws do not attempt… Businessmen could escape the jurisdiction of the State where the real effects of the transaction were felt, by making their contracts, taking delivery of goods and making payments in some 'antitrust haven'."*

case. We do not need now to set that test out, as it is not relevant to the facts of this case as the 'effects' if proved are not trivial. All we need to conclude is that the requirement of harm or a deleterious effect is not the limitation that the legislature intended.

Not only is there no basis in international law to support Ansac's reading, but also there is no practical foundation for it either. In effect it leads to a double inquiry. First, one will have to inquire into whether the Tribunal has jurisdiction. This entails a net balancing of pro- and anti-competitive effects. Then if a net harm is shown one proceeds with the substantive enquiry, which might in a rule of reason case involve extensive duplication of the evidence. In a per se contravention it would mean the leading of evidence in the jurisdiction enquiry, which is then inadmissible in the substantive enquiry.

> That aside from the other practical consequences already mentioned such as the fact that the Commission has no jurisdiction to investigate an alleged prohibited practice until it has been determined whether the Act applies. Yet in order to determine whether the Act applies it needs to establish the preponderance of harm over the pro-competitive considerations asserted by a respondent. This is a task the Commission would have to perform, on Ansac's reading, without the aid of its investigative powers, which could only be assumed once it is decided that the Act applies to the conduct in question.
>
> We have little doubt that the legislature could not have contemplated such a perverse outcome.

Ansac may wish to quarrel with the legislature's decision to create a per se prohibition in section 4(1)(b), but that does not justify re-engineering the interpretation of the Act to admit through a side door a defence of justification which the legislature has pertinently banned from entering through the front door.

The word 'effect' is used in our legislation in conjunction with the words 'economic activity'. This language is itself neutral and indicated that what the legislature sought to distinguish by the distinction between activity within and effects within was the distinction between conduct of an economic nature that took place within the Republic and conduct that took place outside the Republic and which has an 'effect' within the Republic such as a boycott.[75]

> Recall that earlier in this decision we identified the fact that section 3(1) establishes two bases for jurisdiction 'economic activity within' and 'economic activity having an effect within'. If harm is to be read into 'effect' it must also be read into 'economic activity within.' It would be

75 Hartford would be an example of this. The behavior of the British firms amounted to a boycott of United States firms except on certain terms.

illogical to have two different standards. That being so it would seem curious that the legislature would choose to use neutral language both in relation to economic activity and effect when it intended negative connotations for both.

FINDING

We find that on an ordinary interpretation the word effect in section 3(1) is not limited to adverse effects. Whilst the language may require some qualification it is not a qualification related to the nature of the 'effects' but their extent. What that extent should be we do not need to decide in this case save to suggest they should not be trivial.

> We further find that the interpretation contended for by Ansac is not predicated upon a sound policy approach and that even if we felt inclined to interpret the statute purposively that the purpose contended for subverts rather than enhances the legislative intent.

We further find, that in any event, that Ansac has failed to establish a rule of customary law that it supports its contentions as a matter of 'constant and uniform usage'[76]*.*

> Accordingly Ansac's exceptions must fail and the exceptions by the Commission and Botash are upheld.

Part B

LOCUS STANDI EXCEPTION

The remaining exception that we have to deal with is Ansac's exception to Botash's locus standi to claim the relief it seeks in its particulars of claim.

Ansac state that in order to be able to claim the type of relief it seeks Botash must allege and prove that it was adversely affected by Ansac's conduct. This is premised on the fact that at common law an applicant seeking relief by way of an interdict for the breach of a statutory duty must allege and prove it has suffered special damages unless the applicant falls within a class of persons for whom the statutory duty was specifically intended. Since no such allegation is made, Botash has not established its locus standi and

76 See Asylum case quoted earlier.

accordingly the pleadings are excipiable.

It is common cause between the parties that Botash 's pleadings lack such an averment .We have to decide whether they need to for Botash to have locus standi to seek the type of relief it does.

> It is further common cause that the exception relates only to the relief sought because it is in the form of an interdict, and not to Botash's participation as an intervenor.

The relief sought by Botash is: [77]

> *a) An order declaring that the first respondent is party to an agreement, alternatively an arrangement, further alternatively, a decision to fix selling prices, trading conditions and to divide the market, according to customers and territory, for the export of soda ash in South Africa contrary to section 4(1)(b)(1) and (ii) of the Competition Act ("the prohibited practices");*
> *b) An order that the first respondent desist from engaging in the prohibited practices;*
> *c) An order that the second respondent shall not act as the agent of the first respondent whilst the first respondent engages in the prohibited practices;*
> *d) In the alternative to b) above, an order that the first respondent cease the supply of soda ash, directly or indirectly, to the South African market and desist from soliciting orders for soda ash in the South African market;*
> *e) In the alternative to c) above, that the second respondent shall not act as the agent of the first respondent to supply soda ash or solicit orders on behalf of the first respondent in the South African market;*
> *f) Further or alternative relief;*
> *g) Costs to suit.*
>
> (Note that the relief that the Commission seeks is different and hence this has become an issue.)

Ansac argues that absent a showing of adverse effect Botash has not made out a case for relief either at common law or in terms of the Act. If one has not established harm to oneself one has no interest, in the legal sense, in the outcome of a proceeding.

> Botash has several responses to this. It denies that it was not adversely affected by Ansac's conduct, however for the purpose of

77 Page 9, par. 30 of the First and Second Intervening Applicants' Amended Particulars of Claim

these proceedings, a prohibited practice complaint in terms of section 4(1)(b), it is not relevant for it to make such an allegation.

Secondly, Botash argues that even in terms of the common law test it falls within the category of persons entitled to relief.[78]

Thirdly it states that in terms of an agreement with Ansac regarding intervention, the latter is deemed to have consented to its locus standi either by operation of waiver or estoppel.

Finally Botash argues that as an intervenor in terms of the Act, it is entitled to seek relief in the manner it has, because its right to intervene is a statutory one derived from the Competition Act and not the common law. On this argument whatever the requirements of the common law are they are irrelevant to these proceedings.

We will only consider this final argument for if Botash succeeds on this point we need not decide the others.

However before we consider if they have locus standi based on a statutory right it is useful to examine the common law.

The common law requirements for an interdict for breach of a statutory duty are succinctly expressed in the Verstappen case[79]:

"*In order to determine whether a member of the public has locus standi to prevent the commission of an act prohibited by statute, the first enquiry is whether the Legislature prohibited the doing of the act in the interests of any particular person or class of persons or whether it was merely prohibited in the general public interest. If the former, any person who belongs to the class of persons in whose interests the doing of the act was prohibited may interdict the act without proof of any special damage. If not, the applicant must prove that he has suffered or will suffer such special damage as result of the doing of the act. These principles are clearly set forth, inter alia, in Patz v Greene & Co (supra); Roodepoort-Maraisburg Town Council v Eastern Properties (Pty) Ltd 1933 AD 87 and the Jacobs case (supra).*"

The rationale for this rule emerges in one of the early cases where Wessels J, as he then was, in Dalrymple and Others v Colonial Treasurer[80], held:

78 It argues that as a competitor of firms who are party to an alleged prohibited agreement, it falls within the class of persons section 4(1)(b) is intended to protect.
79 Verstappen v Port Edward Town Board 1994 (3) SA 569(D) at 574.
80 1910 TS 372 at 390.

'The person who sues must have an interest in the subject matter of the suit, and that interest must be a direct interest . . . .

Courts of law . . . are not constituted for the discussion of academic questions, and they require the litigant to have not only an interest, but also an interest that is not too remote.'[81]

The case law thus establishes two categories of persons who may have locus standi. The first, who can show that they are a member of a class the legislature intended to specially protect need not show proof of damage, the second, if the legislation is enacted not for the protection of a special class but in the interests of the general public, must prove special damages.

Ansac argues that the Competition Act was enacted in the public interest and not in the interest of any particular class of person. Accordingly Botash may only establish locus standi if it makes the necessary averment that it sustained damages as a result of the conduct complained of.

Botash argues that as a competitor of Ansac in the relevant market implicated in the complaint referral it has locus standi as a member of a particular class hence it falls into the first category and proof of damage or injury is unnecessary. We need not examine the validity of this contention because we are able to decide this matter on another ground.

Botash's principal argument as we have seen, is that their locus standi is derived from the Act. The common law rules only become relevant if the Act is silent on this aspect.

Botash is the complainant in this matter. After having instituted proceedings by way of interim relief by agreement between all the parties this relief was abandoned and both the Commission and Botash filed complaint referrals.

---

81 Although the traditional common law formulation has been followed by many courts the rigidity of its application has more recently been moderated or questioned. In Jacobs en 'n Ander v Waks en Andere 1992 (1) SA 521 (A) the following was said at 533J - 534E:
'In die algemeen beteken die vereiste van locus standi dat iemand wat aanspraak maak op regshulp 'n voldoende belang moet hê by die onderwerp van die geding om die hof te laat oordeel dat sy eis in behandeling geneem behoort te word. Dit is nie 'n tegniese begrip met vas-omlynde grense nie." According to Prest " The broad based and flexible approach adopted by the Appellate Division in Jacobs' case is likely to herald an era in which the courts will be less astute to deny locus standi and more ready to enquire into the merits of what might turn out to be unlawful conduct; in other words, to deal with the issue of locus standi in a practical manner rather than a formalistic one." In Steel and Engineering Industries Federation And Others v National Union of Metalworkers of South Africa (1) 1993 (4) SA 190 (T) Myburgh J remarked obiter
"..I have doubts whether such a formalistic approach is acceptable in today's circumstances. For the purposes of this appeal, however, I will adopt that approach."

Botash thus enjoy locus standi as an intervenor in our proceedings and this status was formalised in our Tribunal decision of 7 September 2000 (Case No 49/CR/A/Jul00). [82]

Tribunal Rule 46 (1) states:

> *46(1) At any time after an initiating document is filed with the Tribunal, any person who has a material interest in the relevant matter may apply to intervene in the Tribunal proceedings by filing a Notice of Motion in Form CT 6, which must –*
>
> > *(a) include a concise statement of the nature of the person's interest in the proceedings, and the matters in respect of which the person will make representations;*

The requirement in the rule is thus the existence of a 'material interest'. The same language is to be found in section 53 of the Act which regulates the right to participate in a hearing. It states:

> *53(1) The following persons may participate in a hearing, in person or through a representative, and may put questions to witnesses and inspect any books, documents or items presented at the hearing:*
>
> > *a) If the hearing is in terms of Part C –*
> >
> > > *(i) the Commissioner, or any person appointed by the Commissioner;*
> >
> > *(ii) the complainant, if –*
> >
> > > *aa) the complainant referred the complaint to the Competition Tribunal; or*
>
> *(bb) in the opinion of the presiding member of the Competition Tribunal, the complainant's interest is not adequately represented by another participant, and then only to the extent required for the complainant's interest to be adequately represented;*
>
> > *(iii) the respondent; and*
> >
> > *(iv) any other person who has a material interest in the hearing, unless, in the opinion of the presiding member of the*

82 At no stage did Ansac object to Botash's *locus standi* to seek the kind of relief it sought notwithstanding that at the time of our order the complaint referrals of both parties had been served on it.

Competition Tribunal, that interest is adequately represented by another participant, but only to the extent required for the complainant's interest to be adequately represented;

Botash has demonstrated that it has a material interest. It is a competitor of Ansac and has a substantial share of the market in which the alleged restrictive practice is being perpetrated. As the United States Supreme Court pointed out in Socony, if collective behaviour interferes with the price mechanism in the market then this in itself is harmful. As a competitor they clearly have an interest in ensuring that market forces operate freely and without unlawful private restraint[83]*.*

There is nothing in the language of the provisions we have cited to suggest that a complainant or an intervenor must show damage or injury to establish locus standi at a hearing.

The requirements for qualifying, as a complainant, are even less exacting. A person is a complainant if that person:

"has submitted a complaint in terms of section 49B(2)(b)"

That section simply states:

49B(2) Any person may –
(b) submit a complaint against an alleged prohibited practice to the Competition Commission in the prescribed form.

What is also clear from the Act is that a complainant can bring a complaint referral at its own instance if the Commission has issued a notice of non-referral. (See section 51(1))

The content of a complaint referral is contained in the Tribunal's rules and forms. Form CT 1(3) which is the form required when a complainant as opposed to the Commission institutes the complaint referral says the complainant must set out a concise statement of the relief or order sought. (See page 2 of the form)

83*The Court stated:"Any combination which tampers with price structures is engaged in unlawful activity. Even though the members of the price fixing group were in no position to control the market, to the extent that they raised, lowered or stabilized prices they would be directly interfering with the free play of market forces. The Act places all such schemes beyond the pale and protect that vital part of our economy against any degree of interference…It [Congress] has no more allowed genuine or fancied competitive abuses as a legal justification for such schemes than it has the good intentions of the members of the combination ." See United States v Socony- Vacuum Oil Co US 150 (1940)*

It is clear that there is nothing in the Act that requires a complainant to have suffered damages in order to have locus standi to bring a complaint referral in terms of section 51and Ansac concede this.

That being so the only question that remains is whether a complainant who is an intervenor to seek relief must make such a showing.

Is there any policy reason why a complainant not granted a non-referral, but granted the right to intervene, should be burdened with a greater requirement? Ansac argues that section 53 deals only with the rights to participate in a hearing in the manner contemplated in sub-section (1) viz. questioning of witnesses and the inspection of documents. This subsection does not provide for the right to claim relief. It does not as counsel for Ansac expressed it ”create a roving right for busybodies to come before the Tribunal”

We do not agree that section 53 is exhaustive of the procedural rights of intervenors. The permissive language of sub-section (1) suggests that it is descriptive of, but not exhaustive of, these rights. The section deals with procedural rights at a hearing and does not purport to deal with the right to claim relief of any party let alone of intervenors.

Section 21(4) of the Act read with section 27(2) provides for the Tribunal rules to deal with the manner and form of participation in Tribunal procedures. That section is the authority in terms of which Rule 46, which provides for intervenors' rights, is formulated. Rule 46 places no limitations on intervenors' rights and leaves the Tribunal with a large measure of discretion in this regard. Subrule (2) of the Rule is perfectly clear in this regard. It states:

46(2) No more than 10 business days after receiving a motion to intervene, a member of the Tribunal assigned by the Chairperson must either –

a) make an order allowing the applicant to intervene, subject to any limitations –
   i) necessary to ensure that the proceedings will be orderly and expeditious; or
   ii) on the matters with respect to which the person may participate, or the form of their participation;

Thus an intervenors rights are set out in both section 53 and in Rule 46. They are complementary to one another and there is no contradiction between the two. Thus we find that reading the Act and

rules there is:

1. no impediment to an intervenor seeking an order for relief; and

2. no requirement that it can only seek relief if it has alleged special damage.

This then deals with the textual issues. However, as important, is that Ansac's submissions do not fit within the policy of the Act for a number of reasons.

In the first place to equate relief being sought from an administrative tribunal in a proceeding that is inquisitorial in character to that of the court in a common law adversarial suit is erroneous. The reason is that unlike the common law court, which grants relief to the private litigant the Tribunal, grants relief that is in the public, not private interest. As the CAC has observed in a case concerning interim relief:

"The Tribunal is the statutory body which has been entrusted by the Legislature with the duty, inter alia, of identifying, adjudicating and remedying practices by Chapter 2 of the Competition Act. The decisions, which it takes must reach the outlawed behaviour wherever it is identified. Where the evidence shows that the 'prohibited practice' is applied to and affects a wider group than just the complaining parties then the Tribunal would, if it were to limit the application of its order, be exercising its discretion without taking all the circumstances into account."[84]

The fact that public and private interests may often coincide does not detract from the importance of the distinction. Nor is the Tribunal bound to give the relief sought by parties in their pleadings. The wording of section 27(1)(a) and 58(1)(a) is that the Tribunal may make an appropriate order in relation to a prohibited practice:

27(1) The Competition Tribunal may –

(a) adjudicate on any conduct prohibited in terms of Chapter 2, to determine whether prohibited conduct has occurred, and if so, to impose any remedy provided for in this Act

58(1) In addition to its other powers in terms of this Act, the Competition Tribunal may –

84 See Glaxo and others v Terblanche D and others, Competition Appeal Court Case No: 03/CAC/Oct00, on page 30.

a) make an appropriate order in relation to a prohibited practice, including-

(i) interdicting any prohibited practice;
(ii) ordering a party to supply or distribute goods or services to another party on terms reasonably required to end a prohibited practice;
(iii) imposing an administrative penalty, in terms of section 59, with or without the addition of any other order in terms of this section;
(iv) ordering divestiture, subject to section 60;
(v) declaring conduct of a firm to be a prohibited practice in terms of this Act, for the purposes of section 65;
(vi) declaring the whole or any part of an agreement to be void;
(vii) ordering access to an essential facility on terms reasonably required;

If the Tribunal has the discretion to grant relief not sought by the referring party then it is less significant as to whether a party seeking relief has suffered special damage or not.[85]

The Tribunal in ordering relief is considering redressing the harm created by the restrictive practice in general terms; it is not remedying the private loss of any party. To characterise the Tribunal's function in this regard properly we need to observe that it is not granting relief to any party, it is granting relief appropriate to redressing a restrictive practice.

Furthermore an intervenor is not someone who originates an action. An action is either brought by the Commission or the complainant in the case of a non-referral. The rights of the intervenor are then ancillary and dependant on the pre-existence of a complaint referral. That being so, concerns about 'busy bodies' or the Tribunal resolving issues only of an academic nature, the very policy concerns that inform the common law policy, are less compelling in our proceedings. Granted an intervenor can prolong a matter, but that can be controlled by

85 This is of course subject to the caveats contained in the Competition Appeal Court's Glaxo decision see footnote 67 above where the Court held "*While it is clear that the Tribunal is not necessary limited to granting the exact relief set out in the notice of motion, it was only permitted to grant alternative relief where*

- *a case was made out for that relief on the papers;*
- *appellants were apprised of the alternative relief contemplated; and*
- *appellants are granted a full hearing in respect of such alternative relief.*

limiting the ambit of its involvement, as Rule 46 and section 53 both provide.

The legislature's policy far from being concerned to protect the institutions of the Act from 'busy bodies' seems to be to encourage as much participation in deliberations as this is considered to be healthy for arriving at optimal decisions. To understand what happens in a market one must hear from its participants– customers, suppliers, competitors etc.[86] *To come to conclusions about market behaviour without their participation can only impoverish the process of adjudication.*

The legislature has clearly adopted a policy of low threshold requirements for locus standi in relation to a number of procedural rights the Act affords. This is noticeable in:

1. The low threshold requirements to qualify as a complainant (section 49B)
2. The recognition of a party's rights to intervene on the basis of 'material interest'. (Section 53(1)(a)(iv))
3. *Persons can appeal against the grant of an exemption application if they have a 'substantial financial interest'.* [87] *(Section 10(9))*

It is also difficult to see why a party should be allowed to intervene and be afforded the procedural rights that section 53(1) affords and then not be entitled to argue for the imposition for relief at the end unless it has shown damages.

Furthermore no showing of damages is required in Tribunal procedures either as a matter of substantive or procedural law.[88] *The only exception is section 49 C(b)(i) which in interim relief procedures requires the Tribunal in deciding whether to grant interim relief to have regard to the "need to prevent serious or irreparable damage to the applicant"*

The reason for this is the fact that the Tribunal is not competent to award damages. It is thus unlikely that the legislature would have regarded the common law test for locus standi for breach of a statutory duty contingent on a showing of special damages to extend to relief in a body not competent to award damages.

If Ansac is correct we would need to hear evidence that Botash had sustained damages to decide locus standi. This despite the fact that we have

---

86 See section 8 for the reference to all these, and section 5,and 9

87 Material interest and financial interest are less exacting than proof of special damage.

88 The award of damages is expressly reserved for civil courts .See sections 62(5) and 65(6).

no jurisdiction to award damages or need to hear evidence that a complainant has suffered damages in order to make a finding on the substantive issue of whether there is a prohibited practice. It would impose upon us an entirely superfluous enquiry premised on the application of a common law rule whose justification, paradoxically, is the elimination of adjudication of matters that are academic.

> Ansac are however not prejudiced by the intervenors' prayer for relief in the form of an interdict. If we should find that a prohibited practice has been established then Ansac is still entitled to be heard on the subject of relief. Relevant to such an enquiry is whether the relief sought by Botash is appropriate relief. To deny Botash the right to argue for such relief and for Ansac to dispute it would be to deny the Tribunal the opportunity to consider the appropriateness of a possible remedy. Allowing our procedures to be used to air such a debate is a proper exercise of our discretion in arriving at what is 'an appropriate order'. Foreclosing the possibility of such a debate as a gesture to a formal rule, lifted out of common law adversarial proceedings, is neither consonant with the objectives of the Act nor with our duties to perform a public function.

We find accordingly that Botash has locus standi to seek the relief it does in terms of the Act. Accordingly we do not need to consider whether it has established its locus standi in terms of the common law as in the alternative it does, nor do we need to consider whether Ansac has waived its rights to object.

The Ansac exception based on locus standi is dismissed with costs.

ORDER

We make the following orders:

1) The exceptions by Ansac to the Commissions and Botash's pleadings in respect of section 3(1) are dismissed.
2) The Commission's and Botash's exceptions to the answer in Ansac's respective pleadings are upheld.
3) *Ansac' exception to Botash's locus standi to apply for relief by way of an interdict is dismissed.*
4) Ansac is to pay Botash's costs in respect of all these applications including the costs occasioned by the employment of two counsel.

30 November 2001

N. Manoim **Date**

Concurring: D. Lewis and D.R. Terblanche