68

Supreme Court of the United States

In the Matter of:

UNITED STATES OF AMERICA Appellant, vs. THE CONCENTRATED PHOSPHATE EXPORT ASSOCIATION, INC., et al. Appellees.	**Docket No.** 29

Place Washington, D. C.

Date October 24, 1968

ALDERSON REPORTING COMPANY, INC.

300 Seventh Street, S. W.

Washington, D. C.

NA 8-2345

C O N T E N T S

* * * * * * * * * *

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1968

United States of America, Appellant,	:	
v.	:	No. 29
The Concentrated Phosphate Export Association, Inc., et al, Appellees.	:	

Washington, D. C.
Thursday, October 24, 1968

The above-entitled matter came on for argument at 11:20 a.m.

BEFORE:

EARL WARREN, Chief Justice
HUGO L. BLACK, Associate Justice
WILLIAM O. DOUGLAS, Associate Justice
JOHN M. HARLAN, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
ABE FORTAS, Associate Justice
THURGOOD MARSHALL, Associate Justice

APPEARANCES:

WARREN CHRISTOPHER
Deputy Attorney General
Department of Justice
Washington, D. C.
Attorney for Appellant

APPEARANCES (continued):

SAMUEL W. MURPHY
American Cyanamid Company
2 Wall Street
New York, New York 10005
Attorney for Appellees

- - -

P R O C E E D I N G S

THE CLERK: Counsel are present.

MR. CHIEF JUSTICE WARREN: Mr. Christopher.

ORAL ARGUMENT OF WARREN CHRISTOPHER

ON BEHALF OF APPELLANT

MR. CHRISTOPHER: Mr. Chief Justice, may it please the Court:

This is a civil antitrust case which comes here directly from the Southern District of New York. The Court below dismissed the Government's complaint, which had charged that the defendant's activity violated Section 1 of the Sherman Act. The issue presented here is whether or not the antitrust exemption of the Webb-Pomerene Act extends to the procurement of goods under the United States Foreign Aid Program where the goods are shipped abroad and where the funds to pay for the goods come from the United States Treasury.

The facts are all stipulated here and they are not in dispute.

The defendants below "appellees" here are five major United States corporations which produce concentrated phosphate and the export association which they formed in 1961, which is called the Concentrated Phosphate Export Association. This association was organized in order to enable its members to act jointly in the overseas sales of phosphate which is used in the production of plant food or fertilizer.

The Concentrated Phosphate Export Association, Inc. is registered with the Federal Trade Commission under the Webb-Pomerene Act. The board of directors of this association determines the prices at which the corporate members of the association will sell their phosphate to the association and it determines the prices at which the association will sell the phosphate to others.

In addition, the board of directors of the association also allocates the available business among the members of the association.

Transactions here in issue involved some $43 million in sales to the Republic of Korea by the export association. These sales were all made pursuant to our United States Foreign Aid Program, indeed, under this program the United States through AID, the Agency for International Development, has been making grants to Korea since 1953.

Two basic methods of procurement are involved in this case. In two of the transactions which are before the Court, involving some $8 million, the procurement was handled by the United States General Services Administration. In that situation GSA issued a standard invitation to bid, accepted the low bid on behalf of the United States, paid the association, took the delivery of the phosphate, and arranged for its shipment to Korea.

In nine other transactions before the Court involving

some $35 million, AID authorized the Office of Supply to the Republic of Korea to handle the procurement of the phosphate. Each phase of this transaction, however, was rigidly controlled by AID. In these transactions the Phosphate Association was paid by the United States bank, which in turn received its funds from the United States Treasury. Whichever method of procurement was followed, either through GSA or through the Office of Supply of the Republic of Korea, AID supervised every aspect of the transaction until final delivery.

The AID retained the right to divert the shipment.

As indicated above in my comments, in both cases the funds for the phosphate came from the United States Treasury. The Court below said AID initiated, controlled and directed and financed the transactions involved.

Q Mr. Christopher, I may have missed this. When you were talking about the transactions, when it was GSA made the procurement directly, did you say GSA took delivery?

A Yes, and then transshipped to Korea.

Q What is the basis of that statement? GSA didn't take physical delivery, did it? Just what happened there?

A GSA did take ---

Q Excuse me for interrupting you, but I was troubled by the brief at this point in this case and that may have an important bearing on it.

A My understanding of the transaction, Mr. Justice Fortas,

is that the goods, the phosphate in each case was shipped from Florida to Korea, but in the GSA transaction GSA actually took legal control of the goods before they were shipped out from the country.

On the other hand, the Government makes no distinction between the two types of transactions. We do not argue that there is a legal differenc e between the two types of transactions.

Q You place no emphasis upon the possibility that if GSA did take delivery on those two transactions, there may be a difference in terms of this case?

A Mr. Justice Fortas, we think the crucial matter hare is the funds came from the U. S. Treasury and the transaction was controlled in every respect by AID. We do not think that the legal steps in procurement differ significantly to make a legal difference between the GSA procurement and the Republic of Korea procurement.

Q Do you contend in the two cases that the GSA took delivery? In other words, insofar as the bids are concerned, the contract was completely before them, within the United States?

A Yes, sir, and I believe the situation bears that out.

Q With respect to the other transactions the delivery was not affected until the phosphate arrived in the Republic of Korea, is that right?

A With respect to the other transactions, the Republic of Korea sought the bids in Korea, the bids were made there and

the phosphate was transferred, I believe, from the export association to the Korean Government in Korea.

Q But you nevertheless make no point about that difference?

A No, sir, I think that in all the transactions before the Court, all 11 of the transactions the United States should prevail because the funds came from the U. S. Treasury.

Under the stipulation Korea is under no obligation to repay the funds expended to the U. S. However, so the matter is fairly before the Court, I should say when Korea sells the phosphate purchasers in Korea the funds generated, which are not necessarily equal to the value in the United States, must be set aside as counterpart funds. These funds have been used in practice mostly to support the Korean defense establishment.

But, as I say, the stipulation makes it clear that Korea is under no obligation to repay the funds expended in these procurements.

In 1964 the United States filed a complaint in the Southern District of New York, charging that the activities of this association constituted illegal price-fixing and an allocation of business in violation of Section 1 of the Sherman Act. The Court below dismissed the complaint, holding that the transactions were within the Webb-Pomerene exemption.

In the view of the Court below because the goods were shipped to a foreign country, the District Court thought they

constituted export trade within the meaning of the act. However the District Court noted in its opinion that "It seems obviously unfair to the United States to permit the defendants to charge an artificially set price and to deprive the United States of the benefits which might come from price competition between the association."

Notwithstanding that statement, the District Court felt that the exports here were within the exemption of the Webb-Pomerene Act and therefore held that the Government's complaint must be dismissed.

Q Is there any contention here that there was not competition between the association and other bidders?

A Mr. Justice White, there was competition between the association and other foreign bidders and other bidders from the United States.

Q There were foreign bidders in this picture all the time?

A That is correct, Mr. Justice White. The extent of them can be indicated from the fact that they made less than 16 percent of the bids and got less than 18 percent of the business. But under our theory of the case, the presence of foreign competition, even to that limited degree, does not change what we regard as the proper result and that is where the United States pays the bill and where AID supervises the transaction, the Webb-Pomerene exemption should not apply.

Q This doesn't make any difference, the fact that one of the purposes of the act was to permit Americans to compete successfully with foreign bidders, that purpose is present here but nevertheless you think it should be limited when the U. S. pays the bill?

A That is correct.

Q Even though the purpose of the act would be satisfied, you would think the purpose was affected, it having to bid lower than foreign bids?

A The purpose of the act was to enable the American exporters to compete in foreign markets for what I would call traditional foreign business, where the foreign source pays the money. Now the framers of the act were very careful to make sure that there would be no injury to the American taxpayer, and I think it is that legislative purpose which illuminates the act and which makes it clear here that where Uncle Sam pays the bill and AID supervises the transaction, that the exception does not apply.

Now it seems to me that as we look at the Webb-Pomeren Act, we must look at the underlying reasons. We are not prisoners of the dictionary by any means. I think our obligation is to look to history and the purpose of Congress. As just indicated in my comments to Mr. Justice White, Congress was trying in this act to give the American exporters a better chance to compete against foreign monopolies, especially foreign buying

cartels.

The philosophy of the act was that U. S. businesses should be freed of antitrust restraints in their approach to foreign markets. Congress thought it was acting primarily to aid small companies which it thought could not compete effectively in foreign markets unless they could act jointly.

Now the purpose of the act, in my view, was frankly a very chauvinistic one. Both of the men for whom the act is named emphasized this point. In the House Congressman Webb indicated his willingness to allow a combination between any one or anything for the purpose of capturing export trade only so long as it did not punish the people of the United States.

In the Senate Senator Pomerene pointedly remarked we are not concerned about giving to the foreign consumer minimum price. Indeed, the FTC report from which the act sprung emphasized that the form of organization permitted must not operate to the prejudice of the American public.

Reflecting that chauvinism, this act authorized joint activity in circumstances where the resulting noncompetitive price would be borne by a foreign country or by the people of a foreign country, but the act and its legislative history make it clear, as we read it, that this joint activity was to be permitted only so long as there would be no adverse effect upon the American economy, only so long as the American people would not be punished.

The whole purpose of the act points out, we think, an

exclusion of those transactions whereas here the anticompetitive conduct, the joint activity that might be involved would be at the expense of the American taxpayer.

Congress was trying to strengthen the hand of the American exporter, too, to be sure, as Mr. Justice White said. But the export trade within the contemplation of the act, in our view, was the traditional export trade between American and foreign countries, American bids trying to get business in foreign countries that would be paid for by foreign sources or by foreign governments.

Now there are powerful reasons, we think, in addition to the legislative history supporting the construction that we have advanced here. The Webb-Pomerene Act is an exception to the broad mandate of the antitrust laws. It is a familiar principle that such exceptions are to be narrowly construed.

We think that this rule requires that the Webb-Pomerene Act be confined to its underlying purpose and not give them the expansive construction argued for here by the appellees, which would involve, as we see it, a potential burden on the American taxpayer. We think also that the history of Government procurement points in the same direction.

In all Government procurement it has been a strong policy of Congress that there should be no interference with normal competition. We think when the taxpayers are paying the bill, as they are inevitably in procurement situations, the

benefits of competition should be available.

Now, Mr. Justice White, one of the limitations of history is that it does not tell us what the circumstances would be under a different set of assumptions or under a different set of premises.

Q What was the assumptions Congress had when they drafted the Webb-Pomeren Act?

A I think the assumption that Congress had when it drafted the Webb-Pomerene Act is that they were going to be aiding small companies in getting together ---

Q Aiding American companies?

A Small American companies getting together and competing in the world markets. But I think it was an equally important intention of the Congress of 1918 that they should not permit any activity which would be at the expense of the American taxpayer or which would penalize the American people.

In the brief of the appellees they make a good deal of the point that the AID officials invited the defendant association to bid. That is certainly a fact, as borne out by the stipulation.

Q Not only that, hasn't AID itself been active in suggesting Webb-Pomerene associations to engage in AID bidding?

A Yes, that is correct, Mr. Justice White.

Q And encouraging their formation?

A As to that, I would only say that procurement officials

do not act as the final arbiters of the antitrust laws. They do not control the United States antitrust policy and frequently they tax actions which in the long run turn out to be in violation of antitrust laws. Indeed, the only other time that this Court, I think, has written an opinion on the Webb-Pomeren area was in the Alkali Exports Association Case in 325 U.S.

This Court made it clear that it was the responsibility of the Department of Justice to invoke the Sherman Act on Webb-Pomerene associations when the circumstances were appropriate. It is perfectly clear, I think, under all the precedents that the officials at AID had no power to weigh or suspend the provisions of the Sherman Act, no matter what they might have done to encourage the formation of the Webb-Pomerene associations or their bidding on these contracts.

Neither does it seem to me to be persuasive here that in the course of the legislative history there are indications that Congress was aware that there might be loans to foreign governments during the World War I period when this act was enacted or thereafter. The crucial difference is that the loans referred to in that portion of the legislative history were repayable and the burden of noncompetitive conduct, the burden of joint activity, would fall on the foreign governments or their citizens whereas in the case of the United States grants, which has been the familiar pattern under AID, the burden of noncompetitive conduct falls on the American taxpayer.

It is our position here that the framers of the act, although they wanted to encourage export trade and wanted to encourage small businesses in the United States to get together to compete in foreign markets, they were equally clear that this was not to be in any respect at the expense of the American taxpayer.

Now when you take five companies as large as these companies are, I think one might not unnaturally think that if they were competing against each other in this or comparable situations, that a lower price might be achieved. As I say, history and this transaction does not tell us that, but the whole premise of our antitrust laws is that competition will produce lower prices and its those lower prices than that competition which I believe the framers of the act would have wanted to preserve for the American taxpayer in those instances where there is Federal Government procurement.

Q Are you going to address yourself to the mootness problem?

A Pardon me?

Q Are you going to address yourself to the mootness problem?

A I would be glad to do so, Mr. Justice Fortas. There might be two possible grounds on which mootness could be suggested, neither of them persuasive, I believe, sir.

First, the Webb-Pomerene association here has been

dissolved, but it's a familiar rule of this Court that the right to antitrust relief cannot be undercut by the dissolution of an association or a corporation during the course of litigation, to go back I think to the Freight Association Case in 166 U.S.

The second problem on which mootness might be suggested was that on January 1, 1967, the AID officials adopted the regulation forbidding Webb-Pomerene bidding or bidding by Webb-Pomerene associations in those instances where there is procurement in United States sources only.

Now that is a limited type regulation. It would not, in turn, affect this case. Even if it did though, Mr. Justice Fortas, it seems to us that the fact that AID could change that regulation, modified, and go back to its own rules, makes it clear that this case is not moote and underscores the need for a determination here.

We are seeking a statutory determination of what we regard as a very important underlying question. It is a reconciliation of two important statutes, the Webb-Pomerene Act and the Sherman Act. The determination of that statutory question and the importance of it has not been diminished by anything that has transpired and for the reasons I have given, I believe the case is not technically moot.

Mr. Chief Justice, if I might, I will reserve the remainder of my time for rebuttal.

MR. CHIEF JUSTICE WARREN: You may do so. Mr. Murphy.

ORAL ARGUMENT OF SAMUEL W. MURPHY

ON BEHALF OF APPELLEES

MR. MURPHY: Mr. Chief Justice, if the Court please:

I think we would differ a bit with the Deputy Attorney General in studying the question presented on this appeal. We would state the question as being whether AID-financed export sales made in competition with foreign producers is export trade as those words are used in the Webb Act.

It seems to us of considerable importance on the stipulated facts of this record, important both in terms of the general significance of the case to the propositions the Government is putting forward and important in terms of the outcome of the case, that there was active foreign competition here in each of the transactions challenged by the Government, with one exception. That one exception was a transaction on which the defendants received no award of the business.

In the Webb-Pomerene Act in defining export trade, Congress went to particular care to outline, first, what export trade was to be covered by, the immunity of the Webb Act, defining it in terms of the export of goods from this country to another. It also defined export trade in terms of what it is not. It is not production, it is not manufacture, and it is not sale within the United States for resale or consumption here.

In addition, Congress attached a series of provisos in which it was stated that even though an act might be within

export trade, as literally defined, you would nevertheless be subject to the Sherman Act prohibitions if it resulted, in any event, artificial or intentional effect on the prices in the United States, any restraint of the export trade of domestic competitors in the association, or any restrain of trade in the United States.

This is stipulated in the record. It is stipulated here that the goods sold by the defendants were exported from this country not only to Korea, but to 38 other countries. It is stipulated that the defendants met all of the requirements of the Webb-Pomerene Act and it is conceded that they did not violate any of its provisos.

Consequently, that being so, it seems to us that the ultimate question presented to this Court by this appeal is whether the transactions challenged by the Government were so radically different from anything that Congress might have had in mind in 1918 as to justify or require a departure from the otherwise pretty plain English of that law.

Q If the sale in question were a sale to the United States and paid for by the United States and the merchandise were shipped by the United States, out of this country, would the transaction have the benefit of a Sherman Act exemption, an antitrust exemption?

A I think in a practical sense, Justice Fortas, that would depend on other facts not in your question. Our position

as a general proposition, the test of whether the Webb Act applies is the ultimate and intended destination of the goods. But I would believe that in a case where the sale were to the United States and for use by the United States someplace else, that one of the provisos attached by the act might well come into play as dependent on the fact of the situation.

Q You mean that transaction might not be entitled to the present exemption?

A Yes, sir.

Q Suppose with the same facts I indicated before and the United States, instead of sending it abroad for use by the United States, sent it abroad for use by another country?

A I think that transaction, given only those facts, would be entitled to the exemptions by the test which Congress has laid down.

Q So that what you are relying on here are two facts, perhaps: One that with the possible exception of the two transactions, purchases were made by an agency of the Republic of Korea, and, two, that although the merchandise was turned over to the Republic of Korea, it was intended for resale. Are those the two points on which you rely on to distinguish this from the last case I put to you?

A We also rely very heavily, Mr. Justice Fortas, on the presence of foreign competition. There is just no question that the Webb-Pomerene Act was designed basically to encourage

American companies to participate more extensively in export trade by allowing them to cooperate, not only for the purposes suggested by the Government, but also for the purposes of reducing costs and mustering greater resources.

Q Would you agree that, in a theoretical manner, if the procurement were by the United States for use by the United States abroad, the fact that there would be foreign competition would not put the transaction under the antitrust exemption umbrella of the Webb-Pomerene Act?

A No, I don't believe I would agree with that, Justice Fortas.

Q You think that if there is foreign competition, that fact standing alone, added to the export of the goods, of course, makes it a Webb-Pomerene transaction for the purposes of anti-trust?

A I would not agree that fact standing alone would determine it, but it seems to me one of the most significant facts. In our case, as I understand it, the Government's position comes down solely to the proposition that there was injury to the United States and an injury which they presume, as I understand their case, from applying to the sales of this Webb-Pomerene association Sherman Act principles which Congress has said are not to apply so long as that association is engaged in export trade.

That seems to us a peculiar avenue along which to approach the question of whether this was export trade. A reason

why we emphasize foreign competition here, even if you start down that avenue it is our further position that you find no injury, no injury in fact.

Now Mr. Christopher has emphasized in his argument, and the Government has in its brief, the point that the Republic of Korea bought concentrated phosphates in these particular transactions using grant funds and that therefore there was a burden on the United States.

I suggest the burden is far greater where a foreign competitor wins an award of that business, because that foreign competitor was just as eligible as were these defendants to win in AID dollars and every AID dollar paid to a supplier from Tunisia on account of his sale to the Republic of Korea was a dollar that was gone from the United States, whereas every dollar that these defendants obtained in this Korean market, as was true with the dollars it obtained in selling in 38 other markets, was a dollar kept in the United States.

To that extent on the facts of this case it seemed to me if there is a fiscal burden of any kind, we helped to reduce it.

Q I gathered from Mr. Christopher's statement that -- what percentage did he say of his trade had been obtained by foreigners?

A I believe he used the figure of about 16 percent.

Q Of the trade of the AID business or of the trade with Korea or what?

A I was not clear. There were 13 transactions with Korea.

Q I understand that. Which are involved in this?

A Two of which are not challenged in this case.

Q Which are involved in this case, would it be 16 percent of these transactions? None of these transactions? If foreign companies have been successfully bidding against this association, I gather it has been successful at times?

A Absolutely.

MR. CHIEF JUSTICE WARREN: We will recess now.

(Whereupon, at 12 o'clock noon the Court recessed, to reconvene at 12:30 p.m. on the same day.)

AFTERNOON SESSION

12:30 p.m.

MR. CHIEF JUSTICE WARREN: Mr. Murphy, you may continue your argument.

ORAL ARGUMENT OF SAMUEL W. MURPHY (resumed)

ON BEHALF OF APPELLEES

MR. MURPHY: Mr. Chief Justice, if the court please I should like to return briefly to two questions asked just before recess.

Mr. Justice Fortas asked a question of whether delivery was made on the two transactions in which GSA participated.

According to the agreement, Justice Fortas, between GSA and AID and the pertinent parties printed on page 288 of the Appendix, delivery was to be made to AID or to its destination, which in this case was the Republic of Korea. The papers on one of those transactions, which are printed in the Appendix beginning at page 293, show that in that transaction delivery of the commodities was made to a vessel in a Florida port consigned to the Republic of Korea.

As to the questions of Justice White about the success of foreign producers on these transactions, which I am not sure I answered too clearly, of the 11 Korean procurements financed by the Agency for International Development, foreign producers won 18 percent of the total amount of business

awarded on all 11 transactions.

Q How do two people participate in the same transaction?

A Korea invited tenders on and awarded very substantial tonnages. A particular bidder would also make a variety of bids, depending on delivery time, different prices for different quantities, different delivery periods, and in many of these transactions the awards were split - - so much to these defendants, so much to another American supplier, so much to a foreign producer.

Q Do you think in these 11 transactions they were really bidding head to head?

A No question about that. Now before getting back into the facts, which at least as we view them show that these were not totally different transactions from what Congress contemplated, I would also like to note in passing that Congress which enacted the Webb Palmerine Act in 1918 was itself very busy in foreign aid.

It was during that period that Congress was authorizing and appropriating very considerable sums of money for foreign assistance programs, so that certainly Congress had within its general contemplations, in adopting the Webb Act, that export trade associations would trade in foreign markets that were supported by the credit of the United States.

That recognition was expressed during the debates prior to the passage of the act, and at the end of World War 1

and immediately thereafter export trade associations did sell at that time to European customers, who were totally dependent on the financial assistance of the United States.

Export Trade Associations have continued to make those sales from time to time during the fifty years since the Act was passed, during war time and post war periods, and in the Lend-Lease programs stipulated, and in various of the modern foreign aid programs.

During that same period Congress has regularly reviewed the foreign assistance programs and has frequently reviewed the Webb Act, and has never at any time suggested that it intended in any way, in adopting the modern foreign assistance programs, to role back the Webb Act as the government now asks.

Mr. Christopher referred to a sentence in Judge Ryan's opinion below which does seem to me a good way to get into a more detailed discussion of some of the facts here. I refer to page 362 of the joint Appendix. Judge Ryan says, "It seems obviously unfair to the United States" in describing the situations in which Webb Associations sell to foreign aid finance customers.

It is quite clear to us that Judge Ryan in that sentence was describing the government's argument. He says, "Herein is the core of the government's argument. We cannot say that it does not have appeal", and then follows the sentence that

Mr. Christopher referred to.

Judge Ryan then goes on in the balance of his opinion to set forth his conclusions as to why the government's position, why the superficial appeal of unfairness in the government's position is simply not so, as a matter of fact.

In this particular case we rely quite heavily on the aspect of foreign competition as meeting any suggestions of unfairness, as well as two other aspects of the case.

First, the full disclosure to, and yet encouragement by officials of both the Korean and the United States governments of the defendant's participation in AID-financed business, and secondly, the stipulated facts which as we view them quite clearly demonstrate that there was no injury here to the United States as a matter of fact.

These defendants and their associations registered with the Federal Trade Commission. There is no question about that. They observed all the formal requirements of the Webb Act. They did what Congress intended Webb Associations to do.

The association went out and sold American-produced phosphates wherever they could find or created demand all over the world, in thirty-eight countries in addition to Korea, although Korea was the single most important consumer or purchaser of this association's products.

At all time it is stipulated, AID, GSA and the Office of Supply of the Republic of Korea knew what the defendants

were, knew how they did business, and at all times all of our bids to Korea were made in response to formal investigations in competitive public bidding procedures.

We do not suggest that those facts give rise to any kind of an anti-trust immunity. We do not suggest that AID's regulations and activities take the place of either the Webb Act on the one hand or the Sherman Act on the other.

But they are facts which do seem to us to be quite significant as they relate to the thread running through the government's cases suggesting unfairness on our part, and perhaps even more importantly we believe that they are significant to the question of injury.

Had AID officials believed that their program was being in any way burdened by the activities of these defendants, in any way injured or frustrated, as the government has suggested, I think it unreasonable to conclude that they would nevertheless have solicited bids from us, when AID did clearly possess the authority which it exercised on January 1, 1967 to shut Webb Act associations out of AID-financed markets.

A second important fact is this fact of foreign competition which already has been covered quite thoroughly.

That brings me to what I think is the quite clear fact that there is just no evidence in this stipulated record that there was any injury of any kind, that there was any burden of any kind on the United States, any harm either to Korea or to

the United States foreign aid program. This is a stipulated record.

During the hearing below before Judge Ryan, which took the place of a full trial, he probed quite carefully into this question, and in response to his question government counsel conceded that there was no suggestion here by the government that the defendants or their associations had in any way over-charged either AID or Korea, or had engaged in any way in any unfair or unreasonable or discriminatory prices.

There has never been any suggestion in this case of any damage, any injury, any burden, any unfairness, as a matter of fact. The only injury which is said to flow here is from applying to business activities which are exempt from the Sherman Act, principles which would apply only if the exemptions were lost.

Not only is there no injury but, if the court please, we think the record is quite clear that the evidence relating to that question is quite to the contrary.

Q However that may be, I think the problem is one of statutory construction and application here. Sales to the United States are not expressly outside of the coverage of the anti-trust exemption under the Webb-Palmerine Act. Do I understand you to agree that they are outside of that exemption on the basis of the doctrine that the sovereign is excluded unless otherwise specifically provided?

A. I had not thought of it on that basis, Justice Fortas, but I do agree that a sale to the United States for consumption by the United States is not included.

Q. So it seems to me that the question here is whether the various functions performed by the United States in these transactions convert this into,in effect, a sale to the United States by the associations involved here.

If it is considered a sale to the United States there may be some other questions which could be answered, but at least to that extent you take it out of the Webb-Palmerine exemption and I think you would say you would want to find out what the United States does with it. What is your answer to that unfortunately compound question of mine?

A. I would again say that I do not agree that a sale of commodities to the United States, which commodities the United States then gives away to a foreign consumer, is outside the Webb exemptions. I think that is within the Webb exemption.

Q. Why is that? You mean within the Webb Act?

A. That is right.

Q. Not within the Webb exemption?

A. That is right. That is export trade as the Webb Act defines it.

Q. So you think that the United States, sovereign United States, is affected by the anti-trust exemptions in the Webb-Palmerine Act, depending upon what the United States does with

the merchandise?

A. Quite frankly, Justice Fortas, I am unable to answer the sovereignty aspects of your question. I do not think that this is a position that we have to defend in this case.

Q. I am not sure that it is not. What is the basis of your statement that a sale to the United States for consumption by the United States in some foreign country is not covered by the anti-trust exemption? What is the basis for that? How do you arrive at that?

A. I must have misunderstood your question, Justice Fortas. My position would be and is that Congres set down a clear test in using the word "export" in the same sense that it had become settled in the law by that date in the sense of its ultimate resting place.

I believe that I responded to your similar question before the recess, Justice Fortas, by saying that in my view, on the facts you pose, that is a government purchase for government consumption abroad, that the provisos would come into play, and depending on the facts of the situation, it would be found that there was a kind of effect on domestic commerce which the Webb Act proscribes.

But in this case it has been stipulated that the United States was not the purchaser. On page 49 of the Appendix in our stipulation it states that AID did not itself procure any concentrated phosphates for Korea. And the record is replete

with the fact that - -

Q Yes, I know, but GSA is in the United States, too.

A The government, as I understand it, attributes no significance to the difference, and in our view GSA particip-pation did not alter the substance of this transaction at all. Now Mr. Christopher has suggested that this is a very signifi-cant case, in which the government needs a broad ruling. This brings one naturally to the question Justice Fortas also raised this morning about mootness. In the first instance we will emphasize the narrowness of this case.

The stipulated record, the fact that relates to AID-financed, only to AID-financed markets, in which there is foreign competition, the emphasis placed in the case by the government on the fact that Korea used grant rather than loan aid, whereas at the present time grants form a relatively small part of total foreign aid.

Now, finally, whatever significance this narrow case had was pretty well sucked out of it when, effective January 1, 1967, AID adopted a regulation which went directly to the question of the extent to which Webb Associations can deal in AID-financed markets, by providing that such associations would not be eligible to bid unless foreign suppliers were also eligible to bid.

The practical consequence of that regulation was to put this association out of business. The association ceased

all operations in June, 1967, has made no sale since then, and the association was formally dissolved and entirely abandoned at the end of last year.

The government's case, it seems to us, comes down to a policy argument that it is somehow a bad thing to allow export associations to sell to foreign customers being financed by the United States government. We suggest that that is an argument better addressed to the Congress than to this court, and in any event the narrow nature and the dead nature of this case will not support the weight of that kind of policy consideration, so that the judgment below should be affirmed.

Thank you.

CHIEF JUSTICE WARREN: Mr. Attorney General.

MR. CHRISTOPHER: May it please the court, I wish to make only three brief points in concluding.

First, the government believes that the presence or absence of foreign competition is not the determinative factor on this issue of statutory construction. The foreign competition which was present here was only that competition which was permitted by AID.

As paragraph 23 of the record indicates, page 49 of the stipulation, the only foreign companies that were able to participate in the bidding were those in countries which were authorized to bid under the AID regulations.

Basically, AID permitted companies in the under-

developed countries and the less developed countries to bid on this procurement. I think this demonstrates very well how irrelevant the presence or absence of foreign competition is to the determination of this statutory issue.

AID could tomorrow ban all foreign competition, and has frequently done so in connection with its procurement, or its supporting of foreign countries' procurement. In a situation where American companies had a monopoly there would be no foreign competition at all and yet the statutory question would remain the same.

So I think we would say that the procurement agency determines the extent of the foreign competition. The procurement agency is able to determine whether or not it wishes on a given procurement to permit foreign companies to participate in the bidding and thus to have some of our dollars go abroad.

To reflect on Mr. Murphy's concern, and that fact, the extent to which the procurement agency permits foreign competition, should not and cannot be controlling on the matter of statutory construction involved here.

Second: while we do not contend that there was any fraud on the part of the defendant appellee, at the same time we would not agree that there has been no conceivable injury to the government in this case.

The record shows that each of the defendant corporations which formed this association is a company of more than a

hundred million dollars in assets. One of them has four and a half billion dollars in assets.

To suggest that if they were bidding against each other the result would not have been different is, I think, to fail to look at the realities which lie behind the Sherman Act.

Four of the five companies that make up this export association are in the top five in this industry. All five are in the top ten, and I think when you look at those facts you have to recognize that if the bidding had been fully competitive if the American taxpayer had had the advantage of having American companies bidding against each other, you might have had a different result.

So I say, while we do not charge any fraud on the part of the defendant companies - we think this is a very pure question of statutory interpretation and an important one - nevertheless, the premise of the anti-trust laws, I think, is effective here to indicate that there should be bidding and full competition where government procurement dollars are involved.

And finally, I would like to go back to Mr. Justice Fortas' questions and the points he has been making, because I believe they illuminate the fact that the form of this transaction should not be controlling here. Rather what should be controlling is that this is government procurement. These are United States tax dollars and they ought to be spent under

circumstances where the American taxpayer has full benefits of competition. This has been the tradition in government procurement. This should be followed in the Webb-Palmerine Act as well.

Q What is the basis for excluding the sales to the United States from the anti-trust exemption?

A. The Webb-Palmerine Act, Mr. Justice Fortas, provides an exemption for activities done in the course of export trade.

It is the government's contention that when Congress used those terms it was referring to traditional export trade where American businesses sold in foreign countries to foreign purchasers who paid from foreign funds.

Now, we think that the legislative history makes it clear that Congress did not use those words in referring to American procurement.

Q In other words, you are not relying on any special provision in the statute, but by implication derived from the fact that the United States is sovereign in that doctrine and in legislative history.

A. Yes, Mr. Justice. I believe it could be argued that the proviso, taking out of the exclusion things that are in restraint of trade within the United States might be effective here because this conduct restrains trade in American procurement.

But the government believes that the sounder articula-

tion of the argument is that the history of the act and the intention of Congress excluded government procurement from the concept of export trade that they were trying to permit companies to get together on.

Thank you, Sir.