

THE EFFECTS DOCTRINE – ENFORCING EXTRATERRITORIAL JURISDICTION: A COMPARATIVE STUDY OF INDIAN AND US COMPETITIVE LAWS

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INTRODUCTION

The economies of the world have become increasingly globalised and with growing cross-border trade, attempts to monopolise markets and restrict fair competition cannot be effectively mitigated by national competition agencies in isolation. Post the economic reforms of 1991, the quantum of international transactions has increased for the Indian market, which also leaves it vulnerable to transnational anti-competitive behaviour. One way of countering it is ensuring extraterritorial jurisdiction of Indian laws over such practices, which is through the *effects* doctrine.

Meanwhile, the origin of competition law can be traced back to United States – the enactment of the Sherman Act in 1890. The US competition laws are considered to be comprehensive and effective and the Indian laws, particularly the Competition Act, is said to be modelled on similar lines. The US has recognised the *effects* doctrine and even otherwise has an effective mechanism for exercise of extraterritorial jurisdiction. In absence of an international agreement on an anti-competitive framework, the effects doctrine is seen as one of the ways of ensuring national interests are protected in face of international malpractices.

In this paper we examine the need for globalising competition law and the attempts made at the same. We further take the US laws as a model and examine the implementation of the doctrine in its legal framework. Further, we detail the competition laws in the Indian setup and the provisions made for extraterritorial jurisdiction. We conclude this paper with the possible lessons that India can take away from the vast repertoire of US cases and agreements on competition.

GLOBALISATION OF COMPETITION LAW

With the incoming of the twentieth century, trade has seen an explosive growth and has increasingly become a subject- matter of the world at large. This change in the nature of the trading activities, has made it a subject of international law.

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Even though trade has been recognised as a subject of international law, yet the principles of international law do not provide an answer to the perplex problems associated with the conflicts of jurisdiction of competition authorities. In addition to this, various nation States have adopted their own codes on competition law which further increase the problems.

As an example, in cases of transnational mergers, competition authorities of various States investigate the transaction. Due to the varied competition law codes, each authority would have a different perception of what should be permissible and what should not be.

However, competition authorities have recognised that international cooperation is the key to curb down anti-competitive practices which transcend national boundaries, and is possibly the only way to achieve a successful and effective solution.

DRAFT INTERNATIONAL ANTITRUST CODE

In 1993, a Working Group of Experts¹ and the renowned Max Planck Institute developed a comprehensive proposal for the internationalisation of competition law, the Draft International Antitrust Code. This Draft Code envisaged the creation of regime based on certain ‘_minimum standards’ that were considered to be crucial to the functioning of any code on competition law, and was presented to the World Trade Organisation and the Organisation for Economic Cooperation and Developed.²

The Draft Code was based on a two-pronged model- creation of two institutions. In this model, the first institution, the International Antitrust Panel, was entrusted with the adjudicatory functions and was to hear disputes arising out of the provisions of the Draft Code.³ Furthermore the International Antitrust Authority, the second body under the system, was to be vested with administrative and prosecutorial functions.⁴ Upon detailed analysis, the Antitrust Authority, was entrusted with the power to appeal National cases to which it was not a party. In addition to this, it had the power to raise claims before the International Antitrust Panel against domestic authorities which were not complying with their obligations

¹ The International Antitrust Code Working Group was comprised of: J. Drexl, W. Fikentscher, E.M. Fox, A.Fuchs, A. Heinemann, U. Immenga, H.P. Kunz-Hallstein, E.U. Petersmann, W.R. Schleup, A. Shoda, S.J. Soltysinski and L.A. Sullivan.

² Claudio Cocuzza & Massimiliano Montini, *International Antitrust Co-operation in a Global Economy*, 19 EUR. COMPETITION L. REV. 158, 160 (1998).

³ *Id.*

⁴ A. Neil Campbell, J. William Rowley & Michael Trebilock, *The Role of Monopoly Laws in the International Trading System*, 5 INT. TRADE LAW & REG., 175, (1995).

and duties under the Draft Code.⁵ It also was to guide the domestic States into complying with their obligations under the Draft Code.⁶

However, the Draft Code was faced with negative criticism at Marrakesh.⁷ As a consequence, due to a lack of consensus, the Draft International Antitrust Code was not able to form a part of the numerous treaties annexed to the WTO Charter.⁸ Unfortunately, the proposal of the minority group of the Working Experts which advocated for the progressive harmonisation of antitrust policies of States with the Draft Code failed to reach the required consensus.⁹

In the subsequent years, another attempt at the internationalisation of competition law was made at the First Ministerial Conference of the Parties to the WTO in 1996.¹⁰ The European Union was heavily in favour of such internationalisation and sponsored for the creation of such a framework within the workings of the WTO.¹¹ However, as was before, the Ministers were unable to reach a consensus on the substantive issues of such a code. Although, as a compromise, the Ministers did consent to the establishment of another working group to identify the overlaps and interaction of trade with the competition policy.¹² This working group, christened the WTO Working Group on Trade and Competition Policy presented its first report in November 1998 to the WTO's General Council¹³ and perseveres to keep the issue on the WTO Agenda.¹⁴

COMPETITION LAW IN UNITED STATES

BACKGROUND OF US COMPETITION LAW

To get a comprehensive understanding of the possible future of extraterritorial jurisdiction of Indian Competition law, it is imperative to look at its enforcement in the much developed US Competition Law. The origin of modern competition laws can be traced back to the end of the 19th Century as a knee-jerk reaction to counter the creation of trusts in the United States,¹⁵

⁵*Supra*, note 2.

⁶ Andrew D. Mitchell, *Broadening the Vision of Trade Liberalisation: International Competition Law and the WTO*, in *WORLD COMPETITION LAW AND ECONOMIC REVIEW* 358 (José Rivas ed., 2001).

⁷ OECD Committee Lacks Enthusiasm for Draft International Antitrust Code, (1993), 65 ATRR 771; and Antitrust Division Official Predicts Scant Prospect of International Code, (1994), 66 ATRR 181.

⁸*Supra*, note 2 at 161.

⁹*Id.*

¹⁰*Supra*, note 6.

¹¹ *Communication from the Commission to the Council, Towards an international framework of competition rules, COM(96) 284 final, 18 June 1996.*

¹² *1996 Singapore Ministerial Conference of the Parties to the WTO, Singapore Ministerial Declaration, 18 December 1996.*

¹³ *WT/WGTCP/2, of 8 December 1998.*

¹⁴*Supra*, note 2 at 161.

¹⁵ MASSIMO MOTTA, *COMPETITION POLICY: THEORY AND PRACTICE*, 1 (2004).

with the Sherman Act debates beginning in 1888.¹⁶ As will be detailed in the subsequent paragraphs, the United States has two agencies enforcing competition law at the national (federal) level.¹⁷

The Sherman Act, which is the main US anti-trust statute, makes its violations criminal in nature, and can be enforced at the instance of private parties as well, with private litigation of antitrust cases being far more common in US than other States.¹⁸ The *effects* doctrine around which most of the discussion on extraterritoriality aspects of competition law revolves has been propounded by American Courts.¹⁹

At the outset, it is pertinent to note that the Department of Justice and the Federal Trade Commission - both federal actors - are not the decision makers as the Sherman Act and other antitrust laws are enforced in ordinary courts unlike the European Commission.²⁰ The US Antitrust Statutes (Sherman Act, Clayton Act, and the Federal Trade Commission Act) all apply to commerce...with foreign nations.²¹

THE EFFECTS DOCTRINE: RECOGNITION IN AMERICA AND OTHER STATES

In accordance with principles of international law, the effects doctrine applies in cases where the action, though undertaken outside the country, has direct, substantial, and reasonably foreseeable effects within the domestic jurisdiction. Especially with regard to American Antitrust Law, the Sherman Act and the FTC Act are applicable over purely extraterritorial foreign trade activity only if the defendant's conduct has direct, substantial, and reasonably foreseeable effect on either United States' domestic trade, or, United States' import trade, or, export trade of a person engaged in United States' export trade.²²

The American courts have not always been comfortable in applying this doctrine to combat anti-competitive actions. In earlier cases, notably the American Banana Case²³, Justice Oliver Wendell Holmes exhibited unease in applying this doctrine: the general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done. However, the American courts in later cases have

¹⁶RUDOLPH PERITZ, COMPETITION POLICY IN AMERICA: 1888-1992: HISTORY, RHETORIC, LAW, 301 (1996).

¹⁷LENNART GORANSON, COMPETITION LAW TODAY, CONCEPTS, ISSUES AND THE LAW IN PRACTICE: THE EFFICIENT AND EFFECTIVE COMPETITION AUTHORITY, 215 (2008).

¹⁸ALISON JONES & BRENDA SURFIN, EC COMPETITION LAW, 1242 (2004)

¹⁹*Ibid*, at 1235.

²⁰*Ibid*, at 1236.

²¹DAMIEN GARADIN, GLOBAL COMPETITION LAW AND ECONOMICS, 1015 (2007).

²²WILLIAM C. HOLMES, ANTITRUST LAW HANDBOOK, 862 (2004).

²³American Banana Co v. United Fruit Co, 213 US 347, 356, 29 S. Ct 511 (1909).

retracted from this diffident position,²⁴ with Judge Learned Hand laying down the doctrine in the 1945 AlCoA Case.²⁵ The landmark AlCoA Case involved a cartel of Aluminium producers based in Switzerland which boosted their prices by fixing production quotas. The Second Circuit Court of Appeals upheld the applicability of the Sherman Act to a Canadian company which was a participant of the cartel on the principle that though such agreements were concluded outside the US, however they did affect American imports.

Such intrusion by American courts into domestic jurisdiction of other independent sovereign states had been at loggerheads with the well-established principle of ‘comity of nations.’ Until a few decades back, States were reluctant to accept the effects doctrine citing its incompatibility with public international law, especially with the principles of territoriality and non-intervention. However, with developments in international trade and an increasing flux of imports and exports, the ‘effects doctrine’ has garnered recognition in the last few decades.²⁶

In the decades subsequent to the AlCoA decision of 1945 by the US Court for the Second Circuit,²⁷ the effects doctrine has been subsequently upheld by the US Supreme Court in *Hartford Fire Insurance*.²⁸ In the case at hand, the US Supreme Court gave due regard to the principle of comity, however, it took a strong stand in applying the effects doctrine to insurers based in London, who allegedly, had agreed with American parties to boycott certain types of insurers. Consequently, Americans were excluded from certain types of insurance covers. The US Supreme Court, by a majority vote, upheld the applicability of US Antitrust Law, the Sherman Act, to the acts of British insurers. Justice Souter, in his majority opinion, cited ‘it is well established now that the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce substantial effect in the United States.’²⁹

Four years after *Hartford Fire Insurance*, the doctrine was applied by the Antitrust Division of the Department of Justice in *Nippon Paper*,³⁰ wherein they commenced criminal proceedings under the Sherman Act against a Japanese company for cartelising the price of fax paper sold in the United States. It is interesting to note that all the workings of the cartel, the meetings amongst members, those with distributors etc., took place not in United States but in Japan.

²⁴United States v. Sisal Sales Corp, 274 US 268, 47 S.Ct 592 (1927).

²⁵United States v. Aluminum Company of America, 148 F.2d 416 (2d Cir. 1945). [Hereinafter **Al CoA**].

²⁶ECJ 1 June 1999, case C-126/97 (*Eco Swiss China Time Ltd. v. Benetton International NV*), [1999] E.C.R. I-3055, paras. 36 to 39.

²⁷U. S. v. Aluminium Co. of America, 148 F. 2d 416 (2nd Cir. 1945).

²⁸*Hartford Fire Insurance Co. v. California*, 113 S. Ct. 2891 = 125 L. Ed. 2d. 612, 638 (1993).

²⁹*Supra*, note 18 at 1238.

³⁰United States v. Nippon Paper Industries co., 109 F. 3d (1st Cir. 1997).

The Nippon Paper Case was the first instance where the US took extraterritorial criminal jurisdiction under the Sherman Act.

After the United States, Germany had been the harbinger of its acceptance by incorporating the doctrine into §130(2) of the German Act against Restraints on Competition.³¹

However, the doctrine did not see immediate acceptance by other States. At the forefront of opposition was the United Kingdom, which made an attempt to block the applicability of American Law in 1952. Thereafter, under Common Law, in *Midland Bank Plc v. Laker Airways Plc*, the Court of Appeal ordered Laker to discontinue proceedings against Midland Bank in the US as it would have involved the extraterritorial application of American antitrust law.

In later years, many Commonwealth countries, such as the United Kingdom, Australia, and New Zealand, which were initially hesitant to accept the doctrine have adopted statutory rules in conformity. Trailing Germany, European States such as France, Italy, Denmark, Poland, Sweden, and Switzerland have also granted a similar statutory recognition. The Article does not delve into the intricacies of the application and enforcement of this doctrine by these numerous nation States, however, there is a general broad consensus amongst all these States that the national statutes would apply to anti-competitive policies and actions if it has ‘direct, substantial and foreseeable’ ramifications in the domestic sphere.³²

COMPETITION LAW IN INDIA

THE MONOPOLIES AND RESTRICTIVE TRADE PRACTICES ACT, 1969

The world economy has become increasingly globalised, with domestic markets seeing higher influx of foreign trade and investment. The economic effects of anti-competitive behaviour³³ such as cartels and mergers are not restricted by territorial boundaries. In absence of an international framework on competition law, questions with regard to extraterritorial application of domestic laws over anti-competitive undertakings in another

³¹ § 130 (2) of the German Act against Restraints on Competition (GW B) reads as follows:

“This Act shall apply to all restraints of competition having an effect within the area of application of this Act, also if they were caused outside the area of application of this Act.” (Translation taken from the German Law Archive.)

³² Cf. ECJ 27 September 1988 (*Åhlström Osakeyhtiö and Others v. Commission*), [1988] E.C.R. 5193, paras. 11 and 16; *U.S. v. Aluminium Co. of America*, 148 F. 2d 416 (2nd Cir. 1945).

³³ S. 3, Competition Act, 2002.

country and the need for laws to prevent excessive assertion of such jurisdiction remain unanswered.³⁴

An instance of applicability of extraterritorial jurisdiction arose when a complaint was filed by the All India Float Glass Manufacturers' Association and the Alkali Manufacturers' Association of India before the Monopolies and Restrictive Trade Practices Commission (MRTPC), seeking a temporary injunction against three Indonesian companies for selling float glass at predatory prices in India, as well as against the American Natural Soda Ash Corporation (ANSAC) for forming a cartel of American ash soda producers which was likely to have an adverse effect for India.

Post enquiry, the MRTPC passed an interim injunction (subsequently confirming it) directing ANSAC to refrain from cartelization in soda ash export to India. The injunction was challenged by M/s. Haridas Exports (on behalf of ANSAC and the Indonesian companies) before the Supreme Court.³⁵ The court passed the following orders:

1. MRTPC is entitled to take action with respect to restrictive trade practices carried out in India on imported goods – here the goods in question were not imported, thus not falling within the meaning of 'goods' as per the Act and therefore beyond MRTPC's jurisdiction.
2. The MRTP Act does not confer any power to restrain imports, nor does it confer any extraterritorial jurisdiction on MRTPC.
3. If a cartel is selling goods to India and still making profit then it is not in the interest of the general body of consumers in India to prevent the import of such goods.

Thus, even though the Supreme Court recognized the effects doctrine as giving jurisdiction to MRTPC over restrictive trade practices carried outside India but adversely affecting trade in India, the MRTP Act in itself was too narrow to deal with cross-border competition cases.

THE COMPETITION ACT, 2002

The Competition Act was a result of the recommendations by the Raghavan Committee, which was set up in 1999 to study the efficacy of the MRTP Act and propose measures for promoting competition over and above curbing monopolies. The Committee recommended

³⁴RICHARD WHISH, COMPETITION LAW, 427 (2003).

³⁵Haridas Exports v. All India Float Glass Mfrs. Association AIR 2002 SC 2728 at 2742.

repealing the MRTP Act and replacing it with the Competition Act, under which the Competition Commission of India was to be established.³⁶

CCI was established in 2003. It consists of a Chairperson and ten members as appointed by the Central Government.³⁷ S. 19 of the Act empowers CCI to inquire into contravention of the Act's provisions on a *suomotu* basis or on receiving information from any person, consumer or association, or on reference made by the Central or State Government. The Act also provides for search and seizure and leniency provisions.

The MRTP Act did not define cartels and thus an understanding of the same could only be drawn from restrictive trade practices, as defined under S. 2(o). In *U.O.I & Others v. Hindustan Development Corporation and Others*, three essential ingredients of a cartel were identified: parity of prices; agreement by way of concerted action suggesting conspiracy; monopoly, restricting or eliminating competition.

Cartels are explicitly defined under the Competition Act under S 2(c). They come under the broad heading of anti-competition agreements under S. 3, on the basis of a presumption that such agreements are bound to distort the competitive process. However, vertical agreements cutting across various levels of the manufacturing and distribution process are not covered under the Act. Exemptions to cartel enforcement are in the form of express notification by the government³⁸ and reasonable conditions observable under laws of copyright, patents, trademarks et al. as well as agreements for exports.³⁹

S. 32 of the Act confers extraterritorial jurisdiction over CCI. The proviso to S. 18 states that the CCI may enter into any memorandum of understanding or arrangement with any agency of a foreign country in order to exercise its functions under the Act, with the prior approval of the Central Government. S. 3 of the Act covers anti-competitive agreements, which authorizes the CCI to inquire into any agreement, even if entered outside India, by parties regardless of whether they are in India if such agreement -has, or is likely to have, an appreciable adverse effect on competition in the relevant market in India. ||

Thus both S. 3 and 32 provide for statutory recognition of the effects doctrine. However, the only regulations notified with respect to S. 32 are the Competition Commission of India

³⁶Dr.Alok Ray, *Globalisation and Competition: The Role of a Professional*, THE CHARTERED ACCOUNTANT, 1452 (March 2007).

³⁷S. 9, Competition Act, 2002.

³⁸S. 54, Competition Act, 2002.

³⁹S. 3(5), Competition Act, 2002.

(General) Regulations, 2009 – providing the procedure for enforcement of extraterritorial jurisdiction in accordance with the Code of Civil Procedure, 1908.

IMPLEMENTING THE EFFECTS DOCTRINE – LESSONS FROM US LAWS

Even though India has recognized the effects doctrine in the Competition Act, implementing it is not without its difficulties – no developing country has yet been able to successfully prosecute a cartel, which indicates the problems that India is likely to face in giving effect to its extraterritorial laws.

Section 32 of the Competition Act, 2002 gives the commission the power to enquire into any anti-competitive practice having effect in India, even if the same has taken place outside the territory of India, and pass such orders as it may deem fit in accordance with the provisions of the Act. However, the Act provides for no test or standards on which to judge the effects. India could follow the test as laid down in the Wood Pulp case – also followed by the American Tobacco⁴⁰ and the Sisal case⁴¹ in the US – that for an activity to have an effect, a physical link to the concerned country is not required. It is to be noted that the MRTP Act did list the implementation test within its definition of restrictive practices under S. 14, so the idea is not entirely foreign to Indian jurisprudence.

History is testimony to the fact that unilateral implementation of extraterritorial laws has never been successful. With regard to US, international cartels were successfully prosecuted only after bilateral treaties were enacted, with major trading partners like Canada and the EU. The US enacted the International Antitrust Enforcement Assistance Act in 1994, which authorizes US authorities to cooperate with foreign antitrust authorities in antitrust investigations pursuant to an antitrust mutual assistance agreement that stipulates reciprocity and protection of sensitive business information⁴² - thus facilitating exchange of confidential information. Prior to that, in 1991, the US-EC Antitrust Cooperation Agreement was enacted which obliged the authorities in the US and EC to account for the important interests of other parties at all times during enforcement and promote positive comity. It also provided for what information could be exchanged or was restricted under confidentiality conditions. The US since, has entered into several bilateral antitrust agreements with countries such as Australia,

⁴⁰ US v. American Tobacco Co., 221 U.S. 106 (1911).

⁴¹ US. v. Sisal Sales Corporation, 274 U.S. 268 (1927).

⁴²Roscoe B. Starek, *International Cooperation in Antitrust Enforcement and other International Antitrust Developments*, FEDERAL TRADE COMMISSION, 21 October 1996, available at: <https://www.ftc.gov/public-statements/1996/10/international-cooperation-antitrust-enforcement-and-other-international> (last accessed 25/10/2015).

Austria, Belgium, Brazil, Canada, EU, France, Germany, Israel, Italy, Japan, Mexico, Spain, South Korea Switzerland and UK.⁴³

An example of the efficacy of bilateral agreements is the prosecution of the vitamins cartel and the graphite electrode cartel, undertaken jointly by the US and the EU. Later when the cartels were being prosecuted by Korea, they were aided by the aforementioned authorities with relevant information. India would do well to negotiate agreements on the lines of the bilateral cooperation agreement between US and EU in 1998, with particular emphasis on positive comity.

Undoubtedly the bilateral cooperation agreements would give CCI more teeth in prosecuting extraterritorial entities, however such agreements do not harmonise conflicting national jurisdictions or be that effective against transnational cartels – a regional framework would be better suited in such instances. The benefits of such a framework entail more bargaining power and less diplomatic wrangling. The US, for instance, takes active interest in protecting its export cartels - the US Foreign Trade Antitrust Improvements Act provides that export cartels are not covered by US competition law unless it has a direct, substantial and reasonably foreseeable effect on the US markets or on the US exports.⁴⁴ This was highlighted during pendency of the ANSAC case, where it is alleged that the then US Trade Representative, Charlene Barshefsky and the US Secretary of Commerce, William A. Daley, sent a joint letter to the then Indian Minister of Commerce and Industry, Murasoli Maran and reportedly threatened that up to USD 1 billion of India's duty free imports of a variety of goods under the Generalised System of Preferences into the US could be jeopardised over the embargo on US soda ash.⁴⁵ Possibly, it was a result of this letter, that in the 2001-02 budget, the government reduced the import tariff on soda ash from 35% to 20%.⁴⁶

A mutual legal assistance treaty is also an effective means of facilitating cross-border investigation and exchange of information.⁴⁷ The US has enacted a MLAT with Canada, which covers criminalized anti-trust offences in both countries, and has seen success with recent US investigations. While India has MLATs with twenty two countries, the ambit of

⁴³Charles S. Stark, *Improving Bilateral Antitrust Cooperation*, DEPARTMENT OF JUSTICE, 23 June 2000, available at: <http://www.usdoj.gov/atr/public/speeches/5075.htm> (last accessed 25/10/2015).

⁴⁴*Sec 32 – An albatross around CCI's neck?*, available at: <http://www.competitionlawindia.com/> (last accessed 25/10/2015).

⁴⁵Id.

⁴⁶*Industrial policy and development*, MINISTRY OF FINANCE, Government of India, available at: <http://indiabudget.nic.in/es96-97/CHAPT7.HTM> (last accessed 25/10/2015).

⁴⁷P.J. LLOYD AND KERRIN M. VAUTIER, *PROMOTING COMPETITION IN GLOBAL MARKETS, A MULTI-NATIONAL APPROACH*, 1999.

such treaties are restricted to criminal matters and competitive activities are not criminalized in India.

CONCLUSION

The effects doctrine, laid down in the AICoA case, stands to be well recognised in US jurisprudence. India, in order to broaden the scope of its competitive laws, gave statutory recognition to the same under S. 32 of the Competition Act, 2002. But mere provisions will not suffice – there needs to be a mechanism for enforcement of such jurisdiction.

The means of achieving such enforcement are varied – through memorandum of understandings, bilateral agreements and regional frameworks. India would do well to adopt the US position on collaborating with other enforcement agencies, through bilateral agreements and mutual legal assistance treaties. However, at the same time, India needs to work towards some form of regional framework, in order to counter vested interests as were observed on part of the US during the ANSAC case. The developing countries are on a weaker footing in terms of enforcing competitive legislations, leaving scope for their economies to be easily subject to cartelisation and developed monopolisation. The South Asian Association for Regional Cooperation could be a good forum to start with, or an alternative framework with countries such as China and Russia, which also have their competition laws at the nascent stage, could be worked out.

Even in absence of instruments as abovementioned, US jurisprudence is witness to enforcement of extraterritorial jurisdiction on its own accord. The Indian provisions are yet to be tested on its implementation in isolation and it is contingent upon the will of the state to assert such jurisdiction – but this covers subject- matter jurisdiction alone. With respect to enforcement, the CCI must endeavour to negotiate bilateral agreements with other competition regulators, as per S. 18 of the Act.