COMPETITION TRIBUNAL
REPUBLIC OF SOUTH AFRICA

Case No: 49/CR/Apr00

In the matter between:

The Competition Commission	Complainant
Botswana Ash (Pty) Ltd	1st Intervening Complainant
Chemserve Technical bProducts (Pty) Ltd	2nd Intervening Complainant

and

American Natural Soda Ash Corporation	1st Respondent
CHC Global (Pty) Ltd	2nd Respondent

Panel	:	D Lewis (Presiding Member), N Manoim (Tribunal Member), and L Reyburn (Tribunal Member)
Heard on	:	4 November 2008
Decided on	:	4 November 2008

Order

The Tribunal hereby confirms the settlement agreement and the addendum to the settlement agreement, annexed hereto marked "A" and "B" respectively, as agreed to and proposed by the Competition Commission and the Respondents.

D Lewis

Concurring: N Manoim and L Reyburn

A

IN THE COMPETITION TRIBUNAL OF SOUTH AFRICA

Held at Pretoria

CC Case No: 1999OCT40
CT Case No: 49/CR/Apr00

In the matter between:

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

and

American Natural Soda Ash Corporation	First Respondent
CHC Global (Pty) Ltd	Second Respondent

SETTLEMENT AGREEMENT

BETWEEN THE COMPETITION COMMISSION, THE AMERICAN NATURAL SODA ASH CORPORATION AND CHC GLOBAL (PROPRIETARY) LIMITED IN REGARD TO ALLEGED CONTRAVENTIONS OF SECTION 4(1)(b) OF THE COMPETITION ACT, 1998 (ACT NO. 89 OF 1998), AS AMENDED

The parties hereby agree that application be made to the Competition Tribunal to confirm the settlement agreement described below.

1. **Definitions**

For the purposes of the settlement agreement the following definitions shall apply:

1.1 "Act" means the Competition Act, 1998 (Act No. 89 of 1998), as amended;

1.2 "Agreement" means this agreement duly signed and concluded between the Commission, ANSAC and CHC;

1.3 "ANSAC" means the American Natural Soda Ash Corporation;

1.4 "Botash" means Botswana Ash (Proprietary) Limited;

1.5 "CAC" means the Competition Appeal Court;

1.6 "CHC" means CHC Global (Proprietary) Limited;

1.7 "Chemserve" means Chemserve Technical Products (Proprietary) Limited;

1.8 "Commission" means the Competition Commission of South Africa;

1.9 "Complaint" means the complaint filed by Botash and Chemserve against ANSAC and CHC on 26 October 1999 in terms of section 49D of the Act , and referred by the Commission to the Tribunal on 14 April 2000 in terms of section 50 of the Act;

1.10 "Membership Agreement" means the agreement, as amended, concluded between certain United States producers and having as its purpose the promotion by ANSAC of export sales and to improve the competitive position of United States soda ash in foreign markets by creating a corporation for the sole and exclusive purpose of engaging in export trade and making export sales strictly in accordance with the policy and provisions of the United States' Webb-Pomerene Act.

1.11 "Parties" means the Commission, ANSAC and CHC;

1.12 "SCA" means the Supreme Court of Appeal;

1.13 "Tribunal" means the Competition Tribunal of South Africa.

2. Commission's investigation and findings

2.1 Following the submission of the complaint by Botash and Chemserve on 26 October 1999, to the effect that ANSAC and CHC had contravened sections 4(1)(b)(i) and 4(1)(b) (ii) of the Act, the Commission undertook an investigation into these alleged prohibited practices.

2.2 The Commission investigated the complaint and after such investigation found that:

2.2.1 ANSAC is an association incorporated in accordance with the provisions of the United States Export Trade Act, 1918, commonly known as the Webb-Pomerene Act.

2.2.2 The purpose of the Webb-Pomerene Act is to exclude the application of the Sherman Act of 1890 to United States associations engaged solely in export trade and whose activities do not restrain trade within the United States.

2.2.3 FMC Wyoming Corporation, General Chemical (Soda Ash) Partners, Solvay Soda Ash Joint Venture, OCI Chemical Corporation and IMC Chemicals Inc., as members of ANSAC, are obliged in terms of the Membership Agreement to sell soda ash for export exclusively through ANSAC to any country outside the United States other than Canada.

2.2.4 In terms of the membership agreement and its bylaws, ANSAC has a board of directors to which each member is entitled to nominate the appointment of two directors.

2.2.5 The board of directors is entitled to make certain decisions including the price at which soda ash is offered for export sale to customers, as well as trading conditions pertaining to such sales.

2.2.6 In respect of its sales of soda ash to South Africa, ANSAC had engaged CHC as its agent and in that capacity CHC gave effect to the decisions made by ANSAC.

2.3 Upon concluding its investigation the Commission determined that ANSAC, together with CHC as its agent, had contravened section 4(1)(b)(i) of the Act in that ANSAC had determined prices and trading conditions in South Africa in respect of the sale in South Africa of soda ash of its members.

Accordingly, on 14 April 2000, the Commission referred the Complaint under Case No 49/CR/APR00 to the Tribunal in terms of section 50 of the Act.

2.4 Botash and Chemserve were later joined as intervenors in these proceedings.

3. **ANSAC's defence**

ANSAC and CHC opposed the referral on the grounds, *inter alia*, that the challenged conduct constituted no contravention of the Act, and was not an improper agreement, but rather constituted, and was in pursuit of a legitimate, open and transparent corporate joint venture, validly created and existing under the laws of the United States for purposes of promoting export sales, and generating significant logistic efficiencies and reliability in the sale and shipment of soda ash to consumers, and whose impact in the South African market was pro-competitive.

4. **Proceedings before the Tribunal, CAC and SCA**

4.1 Between February 2000 and July 2008, the parties have been involved in extended litigation involving points in limine and appeals including *inter alia* whether the Tribunal has jurisdiction over ANSAC's economic activities in South Africa and whether ANSAC had contravened section 4(1)(b)(i) of the Act.

4.2 On 13 May 2005, the SCA directed that the matter be returned for further proceedings before the Tribunal in order for the latter to characterise the conduct of ANSAC and CHC for purposes of the application of section 4(1)(b) of the Act.

4.3 On 23 July 2008, hearings into the merits of the matter commenced before the Tribunal, during which evidence was led. On 26 August 2008, ANSAC and CHC closed their case. Closing argument is scheduled to take place from 4 to 6 November 2008.

4.4 On 16 September 2008, ANSAC and CHC approached the Commission to discuss settlement, stating that ANSAC had made a commercial decision to withdraw from the South African market, that in light thereof ANSAC and CHC wished to enter into an appropriate settlement agreement solely for purposes of settling the instant proceedings and avoiding further unnecessary litigation

and expense, and that as part of such agreement ANSAC was willing to make a limited admission to a contravention of the Act.

5. Admission

Solely for purposes of this settlement agreement to settle the instant proceedings, ANSAC admits that the Membership Agreement eliminates price competition between its members in export sales to South Africa in contravention of section 4(1)(b)(i) of the Act.

6. Undertakings by ANSAC

6.1 In settlement of these proceedings, ANSAC undertakes:

6.1.1 to make no further export sales to South Africa for delivery more than 6 (six) months after the date of confirmation of this agreement by the Tribunal;

6.1.2 within 30 (thirty) business days of confirmation of this Agreement by the Tribunal to:

6.1.2.1 make all modifications and amendments necessary to the Membership Agreement, so as to ensure that members of ANSAC, rather than exporting exclusively through ANSAC and/or its agents or intermediaries, shall be free in future to negotiate and contract directly with and make sales to South African consumers should they so choose;

6.1.2.2 file the amended agreement, duly signed by all the members, with the Competition Tribunal and with the Commission;

6.1.2.3 notify all members in writing that they are free to make export sales to South Africa on an independent basis;

6.1.3 to not in any way whatsoever influence or require its members to not make export sales to South Africa.

6.2 ANSAC will provide the Commission with documentary proof to the satisfaction of the Commission that it has carried out its undertakings in terms of clause 6.1.2 above.

7. Administrative Penalty

7.1 Having regard to the provisions of section 58(1)(a)(iii) read with sections 59(1)(a), 59(2) and 59(3) of the Act, the Respondents agree to pay an administrative penalty in the sum of R9 696 846,96 (nine million six hundred and ninety-six thousand, eight hundred and forty-six Rand and ninety-six cents) representing 8% of soda ash annual turnover in South Africa.

7.2 The penalty will be paid by the Respondents to the Commission within 30 (thirty) business days of the confirmation of the settlement agreement by the Tribunal.

7.3 The Commission will pay the aforementioned amount to the National Revenue Fund referred to in section 59(4) of the Act.

8. Full and Final Settlement

This Agreement is entered into in full and final settlement of all proceedings between the parties in relation to any alleged contravention of the Act under Commission Case No. 1999OCT49 and Tribunal Case No. 49/CR/Apr00 including all pending appeals arising out of these proceedings.

9. Variation

No contract varying, adding to, deleting from or canceling this Agreement, and no waiver of any right under this Agreement, shall be effective unless reduced to writing and signed by or on behalf of the Parties.

Dated and signed at New York on this the 31 day of October 2008

Signature:

Name: John M. Andrews

Designation: President & CEO

Duly authorized representative of **American Natural Soda Ash Corporation** and **CHC Global (Pty) Ltd**

Dated and signed at Pretoria on this the 3 day of November 2008

Shan Ramburuth

Commissioner

Competition Commission of South Africa

B

ADDENDUM TO SETTLEMENT AGREEMENT

IN CC CASE NO. 1999OCT40 AND CT CASE NO 49/CR/Apr00

1. The undertaking in paragraph 6.1.1 includes within its scope that ANSAC will not sell soda ash to any natural or juristic person, or through any entity, vehicle or trust ("person"), or otherwise transact with any person, in circumstances where ANSAC knows, or there are reasonable grounds for suspecting, that such person intends to sell, whether directly or indirectly, ANSAC soda ash into South Africa.

2. ANSAC undertakes that any utilisation made by an ANSAC member of ANSAC's logistical arrangements or capacity, including, but not limited to, any and all arrangements with providers of any logistical services, including, but not limited to, railway, shipping, handling, transporting, warehousing, storage, stevedoring, delivery and scheduling services, for export sales to South Africa shall not be used so as to engage in conduct prohibited by section 4 of the Competition Act 89 of 1998.

3. Ansac and CHC will be jointly and severally liable for the agreed, alternatively taxed, costs of three legal representatives (attorney and two counsel), together with such qualifying fees of experts employed by Botash for purposes of this litigation as are agreed, alternatively allowed on taxation.