

Where are Sherman and Clayton Acts rulings to avoid a lithium cartel from being born?

Facts

1. On December 2013 Tianqi and Rockwood (today Albemarle) formed a Joint Venture named Talison to develop Greenbushes lithium mine in Australia. The Joint Venture contemplated a 50/50 off take agreement between its two partners and, most importantly, a distribution of world lithium market, where Tianqi would serve China and Rockwood the rest.
2. This lithium concentrate distribution agreement was informed to the US Securities and Exchange Commission (US SEC) by Rockwood through its financial statements¹, but there is no evidence that such territorial or market distribution agreement was then informed to the US Department of Justice, nor is there any sign that it might have been approved or given an antitrust waiver by it. Regrettably, the complete agreement is not publicly available. Albemarle has not informed the US SEC through its financial statements about changes to this world distribution agreement agreed upon with Tianqi in 2013.
3. By the end of 2017 Albemarle and Tianqi explained 46% of 220.000 LCE tons per year of world lithium production, most of it coming from Talison and a lesser part from an operation Albemarle had in Salar de Atacama, Chile. Another 22% was explained by SQM, the main Salar de Atacama operation. Adding up Talison and Salar de Atacama, the two biggest and most efficient lithium mines in the world, a 68% of world lithium production would be reached (150.000 LCE tons per year).
4. By July 2018 Talison (Tianqi plus Albemarle), Albemarle and SQM had announced they would dramatically increase their lithium production within the next five years: Talison would go from 80.000 to 260.000 LCE tons per year and in Salar de Atacama operations Albemarle would go from 22.000 to 145.000 LCE tons per year while SQM would go from 48.000 to 180.000 LCE tons per year. Their added-up lithium production would quadruple to 585.000 LCE tons per year. By August 2018 FMC, under its Registration Statement in US SEC for its soon to be lithium division Livent IPO had forecast a global lithium consumption of 878.000 LCE tons by 2027 from 212.000 LCE tons in 2017.
5. Both mining operations in Salar de Atacama have a production and time limit: SQM's lithium extraction authorization given by CORFO - the Chilean state company that manages Salar de Atacama - lasts until 2030; Albemarle's, until 2043. After those dates, CORFO will be free to allocate these lithium extraction authorizations in accordance with its own interests, and those of Chile.

¹ Rockwood Holdings Inc., US Securities and Exchange Commission, FORM 10-K for Fiscal Year ended Dec 31st, 2013

6. On February 7th, 2018 US Federal Trade Commission finally approved of the merger between Potash Corporation and Agrium to form Nutrien, conditioned on the sale of two US fertilizer plants. In its ruling, there was no reference to lithium markets nor approval of any sale of a significant stake in SQM's equity to competitors. On the other hand, Chinese and Indian competition authorities did indeed require Potash Corporation to sell its stake in SQM, among other divestment conditions, to approve of said merger.
7. On May 2018 Tianqi announced it had agreed to buy a 24% stake in SQM from recently merged Nutrien, giving it the right to appoint 3 Board Members out of 8 – equaling those of the other major shareholder in SQM –, and publicly stated that it was interested in influencing in the strategic decisions of SQM, whose lithium operation already explains 60% of its EBITDA.
8. Last September 2018 Chilean Competition Court (TDLC) approved of an agreement between Chilean Antitrust Agency (FNE) and Tianqi that would put in place some remedies restricting Sensitive Commercial Information exchanges between Tianqi and SQM, for a maximum period of 6 years, after which they would cease to exist. There have been various appeals to this ruling that have not been reviewed yet.
9. During October 2018 Chilean Constitutional Court will decide if a constitutional case could be raised in relation to the approval process of the agreement between FNE and Tianqi. While this decision is pending, Chilean Competition Court cannot move forward reviewing the appeals to its own September ruling that approved of the FNE – Tianqi Agreement.
10. On October 17th 2018 CORFO announced it was beginning arbitration proceedings with Albemarle that would temporarily freeze this firm's lithium production growth plans in Chile. Before TDLC's last September approval of FNE – Tianqi Agreement, CORFO had already recognized that they were facing unexplainable delays in the implementation of its Albemarle lithium extraction authorization contracts.

Biased randomness?

11. Is world lithium market distribution between the Chinese firm Tianqi and the American company Albemarle truly independent both of their expansion plans under way via their Joint Venture in Talison and of the strategic investment in SQM by one of this two world lithium market distribution parties –ie. Tianqi -?

If Tianqi were successful in its attempt to end up as a relevant shareholder in SQM, would not be better in the interest of the three of them – Albemarle, Tianqi and SQM - to temporarily slow down Albemarle's production expansion plans in Salar de Atacama so as to better manage global growth in lithium supplies, considering that Talison and SQM had already started their own production increases plans? Could not arbitration proceedings be instrumental to avoid others from replacing Albemarle in Salar de Atacama operations while these legal arguments take place over some unpredictable period?

12. Given China's 50% world lithium consumption and its much advertised electro – mobility objective to replace fossil fuel combustion vehicles, and its well-known Chinese led joint venture requirements with foreign firms to have its domestic markets open, it should not be a surprise to witness the gradual emergence of a coordinated business structured under a Tianqi – Albemarle world lithium market distribution being consolidated by gaining a relevant foothold in SQM, which would allow them jointly controlling more than two thirds of global lithium production.
13. Silence from lithium consumers and potential ones should not be misinterpreted: most of them do have business in China, as foreign car firms could testify in a 28 million vehicle market – out of 97 million worldwide -, but do not risk them by denouncing a lithium cartel in the making led by China. Countries with strong two-way foreign commerce with China, such as Chile with 26% of its own and home to one of the two biggest lithium mines in the world or Australia with an equivalent 24% of its own and home to the other biggest lithium mine, have until now failed to oppose the increasing cartelization process led by China, perhaps under the wrong expectation that such inaction would help sustaining better economic relations with the second biggest country in the world. Are these countries really aware about the consequences of letting this process to continue unopposed and the mistaken signaling they are delivering to China and the rest of the world?

US Antitrust Laws

14. Section 1 of US Sherman Act begins with the following: ***“Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.”***
15. For the US Federal Trade Commission, ***“plain agreements among competitors to divide sales territories or assign customers are almost always illegal. These arrangements are essentially agreements not to compete”***.²
16. Under Section 7 of US Clayton Act, a firm cannot hold more than 10% of the outstanding voting securities of the issuer firm that competes with it, ***“purchasing such stock solely for investment and not using the same by voting or otherwise to bring about, or in attempting to bring about, the substantial lessening of competition”***.

² Market Division or Customer Allocation, Guide to Antitrust Laws, Dealings with Competitors, US FTC.

17. If there is a world lithium market distribution between two competitors, and one of the parties strategically invests in another competitor, is it not the case that the other party, given the existence of the distribution agreement, could also be considered the investor bringing a ***substantial lessening of competition***? It could be the case that Albemarle might be liable under this Section 7 of US Clayton Act clause, even if the second one was the formal investor in SQM, the other third relevant competing firm in world lithium market which incidentally is also publicly traded in US securities markets and consequently under US Laws.

Competition to prevail

18. Chilean Competition Court and US Department of Justice should require the full exhibition of the agreement existing between Tianqi and Albemarle, and of any others with other competitors if they exist.
19. If such an agreement, and eventually others with firms different to the ones here described, were to be as described to US SEC by Rockwood under its financial statements back in 2013, the immediate termination of such an agreement (s) would ensue.
20. Cross ownerships among Tianqi, SQM and Albemarle would not be approved, given the individual significance of each one in world lithium market. Only separate entities under full worldwide competition would be allowed to remain in place.
21. Chinese Joint Venture policies should be reviewed for its anticompetitive consequences. The lithium case is clearly one of them.

Manuel Cruzat Valdés

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