Department of Justice

COMPETITION IN THE FOREIGN COMMERCE OF THE UNITED STATES

Address

By

RICHARD W. McLAREN
Assistant Attorney General
Antitrust Division

Before The

SYMPOSIUM ON ANTITRUST AND RELATED ISSUES AND THEIR SOLUTIONS IN INTERNATIONAL TRADE AND PRODUCTIVE INVESTMENT

The American Society of International Law
and
The Marshall-Wythe School of Law
College of William & Mary

Williamsburg, Virginia

October 16, 1970

COMPETITION IN THE FOREIGN COMMERCE OF THE UNITED STATES

The activities of the Antitrust Division with respect to foreign commerce are not unlike its domestic activities. First, of course, is the Division's enforcement function. Second, is its advocacy function; the Division acts as an advocate for competition in various agencies -- in the Executive branch as well as the Administrative agencies -- who are responsible for dealing with problems in the foreign trade area. Our enforcement activities may perhaps be the more prominent and controversial, but our advocacy role is quite significant as well; witness, for example, our participation in the Cabinet Task Force on Oil Imports.

Today, I will try to touch on both of these aspects of our work. But first let me review with you for just a moment the basic theory which underlies our program.

I.

Competition, as we all know, is the cornerstone of our domestic economic policy. It is also an important feature of our foreign economic policy. We believe that

foreign as well as domestic trade should be conducted on a competitive basis, with free and open access to markets and with minimum restrictions on the flow of goods, services and investment between countries. Competition is a spur to productivity; to research and development; to the introduction of new technology and new ideas. A freely competitive international market provides equality of business opportunity; it contributes to higher standards of living; and it promotes better international relations.

We have encouraged other countries to follow our lead in a competitive philosophy. The present and past Foreign Assistance Acts have uniformly declared it to be our policy "to foster private initiative and competition" and "to discourage monopolistic practices" in international trade, and the Trade Expansion Act of 1962, for example, refers to our policy against international cartels.

II.

The starting point as far as enforcement in this area is concerned is that our principal antitrust

law, the Sherman Act, applies in express terms to restraints upon United States foreign commerce as well as interstate commerce. Justice Department enforcement has been directed entirely to protecting competition in such commerce.

Let me illustrate this policy with some concrete examples. From the standpoint of foreign firms as well as domestic firms, our antitrust enforcement seeks to provide free access to the American market, as well as free marketability of American goods abroad. The beneficial effects of foreign competition in the U.S. market have been illustrated, for example, in such situations as the introduction of small cars and stainless steel razor blades. We would lose a great deal if we did not have new and competitive products coming in from abroad. Our cases are designed to keep the channels open. A case we have recently filed against the American Society of Mechanical Engineers seeks to eliminate a certain kind of artificial barrier to boiler imports. The complaint in this case charges a restraint of imports

by the refusal of the Society and the National Board of Boiler and Pressure Vessel Inspectors to afford foreign manufacturers an opportunity to obtain their official stamps of approval. In this case, of course, we have no thought of any lessening of safety standards applicable to boilers and pressure vessels, but only of enabling foreign manufacturers to obtain stamps of approval when they have met all of the requirements exacted of American manufacturers.

We have also had cases where undue restrictions have been placed by American firms on our export trade. Examples include the Minnesota Mining case, decided by Judge Wyzanski some years ago, and Webb-Pomerene-type arrangements which exceeded the permissive statutory limitations.

From time to time, we also find situations in which foreign companies engage in activities, some of which may occur outside the U.S., which produce substantial competitive damage within this country. Usually, American firms are also involved, and the

activity is directed at the U.S. market. The recent Quinine Cases furnish an example. That price-fixing conspiracy was fashioned abroad, but the intended effect was on the American as well as the European market, and the injury here was substantial. Our Government not only filed civil and criminal charges, it sued for monetary damages and has already recovered nearly half a million dollars in fines and settlements. The European Communities Commission also brought suit for the effects in the Common Market and substantial fines have been imposed in those proceedings.

Another area of enforcement concern in foreign commerce involves the division of markets by agreement. Typically, this involves the exclusion of a foreign competitor, depriving the U.S. market of a competitive factor. Not infrequently, patent and know-how licenses are involved. The recent Westinghouse-Mitsubishi complaint, which has attracted so much attention lately, is a good example. It also illustrates the misapprehensions which often surround what are really classically simple cases in the foreign commerce area. One interpretation of the case which I am told is circulating in patent-antitrust circles is that it is aimed at the licensing of know-how with territorial restrictions, and is designed to obtain new law in this area. Another version is that the case stands for the proposition that if an American company licenses its foreign patents to a foreign company, it must also license any corresponding United States patents to that foreign licensee.

Both of these interpretations are incorrect. What we have in the Westinghouse case is not a simple know-how license with territorial restrictions. Neither

does it involve a simple license of a foreign patent accompanied by a refusal to license a corresponding domestic patent. Added to the Westinghouse patent-know-how licenses are these facts -- all of which are clearly alleged in the complaint:

1. Not only were patented products subject to territorial restrictions, but so also were a great number of products of the same general type covered by the license agreements -- even though such products might not incorporate any of the transferred technology.

2. The agreements -- with their territorial restrictions -- covered products as to which Mitsubishi did not desire to be licensed -- a clear mandatory package-licensing policy.

3. The agreements had been in existence for over forty years -- hardly a reasonable length of time by anyone's standards -- and yet had years to run.

Thus, this case follows the same general lines as the old ICI and National Lead market division cases. Two major manufacturers in different countries -- we allege -- exchanged patents and technology, in broad fields, with the intent and effect of precluding each from exporting the covered products to the other's

country. Such agreements in ICI and National Lead, also covering broad fields and not confined to patent rights, were held illegal.

I have been asked: If Westinghouse-Mitsubishi does not forecast a highly restrictive rule on know-how licensing, what is the rule which governs in this area? Actually, I think I have stated my views on this on at least one other occasion. The rule is derived from the doctrine of ancillary restraints, and embraces three principal elements. First, the restriction must be ancillary to carrying out the lawful primary purpose of the agreement. Second, the scope and duration of the restraint must be no broader than is necessary to support that primary purpose. And third, the restriction must be otherwise reasonable under the circumstances. In effect, the rule on know-how licensing is pretty much the same as the rule on patent licensing: Except as to certain well-known restraints which are per se unlawful, the standard is the rule of reason.

A description of our enforcement policy would hardly be complete without a word about mergers, acquisitions, and joint ventures.

Two recent cases involving foreign companies have been classified under the foreign commerce heading, but this may be somewhat misleading. The BP-Sohio merger, as I have indicated before, was analyzed solely as a merger between two domestic companies, since BP was at the time already a major competitor in the United States. Similarly, the Ciba-Geigy merger between two Swiss firms was of interest to us only because it also involved two major domestic subsidiaries engaged in horizontal competition in this country.

On the other hand, suppose a large foreign company merges with a major U.S. firm in the same line of business or in a related line. If the foreign firm is not already engaged in the U.S. market, the merger will not eliminate any existing competition. But the foreign firm may well have been one of the most likely entrants into the domestic market. Moreover, often the most practical means of injecting meaningful new competition into a concentrated American industry is through the entry of substantial foreign companies. When the foreign firm, instead of entering on its own, or making a foothold acquisition, joins forces by merger with a major factor in a concentrated American industry, the competitive

potential of that foreign company has been lost to us forever. Our suit against the Gillette acquisition of Braun, a West German manufacturer of electric shavers, was concerned with this very problem.

III.

I have tried to illustrate the implementation of our enforcement policy in foreign commerce. What of the possibility of conflict between U.S. and foreign law? Although we may well have some very real problems to deal with on this point, I think that the dimensions of the problem have been substantially exaggerated.

To some extent, we are dealing not with outright conflict but with problems of comity and communication between governments. I think on occasion in the past we may have been remiss in failing to explain, in advance, what action we proposed to take when it affected the interests of other countries. We have learned from these experiences. In Canada, for example, some initial misunderstandings resulted from our Radio Patents case concerning a Canadian patent pool, which was the subject of the Zenith-Hazeltine private antitrust suit at the last term of the Supreme Court. The

"Fulton-Rogers Antitrust Notification Agreement" of 1959 was designed to provide adequate notification, on both sides, of antitrust actions of either country affecting the other. It has worked exceedingly well; and in 1969 it was renewed and updated as the Mitchell-Basford agreement. It provides, on our side, for advance notice to the Canadian Government, with an opportunity for consultation, before we file an antitrust case affecting its interests. The OECD Council in 1967 adopted a Recommendation for International Cooperation calling for similar procedures among all members of the OECD. We find that as foreign governments come to understand what we are doing, their sensitivity to our actions diminishes. In addition to these international arrangements, there is our own liaison procedure between the Departments of Justice and State.

The point of all this is simply that much of the heat that has been generated in the past over international antitrust enforcement actions of the United States was the fault of inadequate procedures which have largely been rectified.

But what of the substantive differences and potential conflicts between American and foreign

antitrust laws? Here too, I think it important that we keep the question in perspective. As more and more countries adopt antitrust policies of their own, I think we are likely to see greater harmony develop between foreign and American law. Moreover, even when American law is presently more stringent than the foreign statute, conduct prohibited by U.S. law will rarely be required by the law of another sovereign; in other words, compliance with American law will not automatically involve violation of foreign law. And, of course, American law does not purport to supersede the law of another sovereign within the latter's territorial jurisdiction.

In those rare instances where true conflict appears unavoidable, I suggest the firms involved do two things. First, consult qualified antitrust counsel; I feel certain that competent advice can solve most of the problems that will arise. And second, before a firm assumes that it can justify activities which violate American antitrust law on the grounds of foreign compulsion, counsel should consult with either the Antitrust Division or the Department of State, and preferably both, before proceeding. Otherwise, they may find themselves running needless and costly risks.

IV.

I have tried to indicate to you some of our enforcement activities in the foreign commerce area and the rationale behind those efforts. Let me now say a few words about our role as an advocate for competition as it affects foreign trade.

It has long been the policy of the Federal Government to promote the principle of free competition, through diplomacy and persuasion, and by legislative policies designed to minimize restraints on competition. American efforts in this regard since World War II have been especially noteworthy. In the immediate post-war period, we insisted on the breakup of the worst features of cartelization in Germany and Japan. We believed that political democracy could not take root and grow in a society dominated by aggregations of private power. These nations later adopted competition policies for themselves. Today, German antitrust policy ranks among the most vigorous outside of the United States, while Japan accomplished considerable deconcentration -- at least in comparison with its pre-war economy.

Our policy has not been limited to the special cases of Germany and Japan. We have sought to persuade others

that economic development and prosperity, together with political liberty, would come most rapidly under conditions which impose minimum restraints on free competition.

The vehicle for much of our official effort to increase free competition in this period was a liberal trade policy. In fact, as we have seen in Europe, a desire to increase international trade was a major factor leading to the adoption of antitrust concepts. Reducing official barriers to trade would serve little purpose if private restraints could rise to replace them.

The progressive internationalization of business is making these matters more urgent than ever before. And enlightened business opinion surely prefers free international competition to retaliatory protectionism and the inefficiency which it fosters.

V.

Today the Antitrust Division is involved, as an advocate for competition, in many activities touching the interests of foreign commerce. Let me describe some of them briefly.

Tariff Commission proceedings are a central forum for the contest between competition and protectionism.

We participate in selected Tariff Commission proceedings to urge that restrictions upon competition be kept to a minimum. Let me emphasize that when we engage in such participation we do not merely expound general competitive philosophy. The proper discharge of the regulatory functions of the Tariff Commission and other bodies requires a very careful analysis and understanding of economic factors upon which to base a judgment. Our participation is designed to assist the regulatory body in making the kind of analysis which the law requires of it. We also expect to take part in forthcoming hearings scheduled by the Tariff Commission concerning the competitiveness of American business in the international marketplace.

The Division plans to appear in appropriate anti-dumping cases before the Treasury Department and the Tariff Commission. As you know, a special import duty may be imposed upon a finding that goods are being sold in the U.S. for less than "fair value" and are causing "injury" to a domestic industry. We hope that this procedure will be limited to its proper function and not be used simply as a means for avoiding competition.

I think we all appreciate the importance of free trade to a competitive economy. We have recently been concerned with evidence of a growing trend toward protectionism and a resort to quotas as a mechanism for regulating imports. Unlike the tariff, a quota poses an inflexible barrier to the importation of goods above a certain prescribed quantity, regardless of demand or price level, and the allocation of limited quota licenses almost inevitably provides some favored firms with a windfall. In connection with the current trade bill, it has been our position that any protective action should be strictly limited to that which is absolutely necessary to safeguard vital domestic interests. We shall continue to press for reducing administrative controls in favor of market mechanisms wherever possible.

Finally, I should mention what I consider to be our very important work in the OECD Committee on Restrictive Business Practices. In addition to providing liaison among member nations with respect to particular enforcement efforts, the Committee has made a special effort to disseminate the general experience of each of its members to all. This

has been a useful mechanism for conveying American antitrust principles to the increasing number of countries which have seen what a competitive economic policy has meant for the United States, and are beginning to recognize its merit for themselves. For our part, we have also profited by the experience of other nations which have tried out new and different antitrust concepts in their own laws.

VI.

In conclusion, I would say this: The role that antitrust and competition policy play in American foreign commerce -- exports as well as imports -- is a necessary one. Antitrust enforcement cannot ignore foreign commerce, because national boundaries have lost much of their relevance to business reality. Our enforcement efforts must be extended to unduly restrictive activities outside our borders whenever -- but only to the extent that -- U.S. commerce is affected, whether immediately or prospectively. We view foreign competitors, both actual and potential, as an important source of competition for concentrated industries within the United States. As they must accept the burdens of compliance with, so are they

entitled to the protection of, our antitrust laws. Beyond this, we seek to prevent the misuse of import restrictions as a shield from fair competition. And we hope, through our international efforts at the government-to-government level, to continue the very substantial progress that has been made since World War II in gaining acceptance abroad of the principle of free competition.