Department of Justice

ANTITRUST POLICY TODAY

An Address By

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Before The

National Industrial Conference Board, Inc.

The Waldorf-Astoria

Thursday, March 5, 1970

The invitation to address this Ninth Annual Conference on Antitrust Issues in Today's Economy brought back some rather fond memories of last year's meeting. My "mini talk" on that occasion -- my first after taking office -- was entitled, "Some Tentative Views on Antitrust Organization and Policy." It was subtitled, "Forty Days in the Hot Seat."

It has now been a year and about 40 days, and the seat is not noticeably cooler. However, the new team has gained confidence. We now make so bold as to drop the "Tentative" from the title of these remarks, and say it right out: "Antitrust Policy Today."

We in the Antitrust Division have not exactly been silent on the subject of antitrust policy during this past year. In fact, I am informed that my time log alone shows 28 speeches and 14 Congressional appearances on various aspects of antitrust policy. Making allowance for duplication,

I understand that our computer projects that a general review of current antitrust policy would take 21.1 hours. Fortunately for all of us, our hosts have forestalled any such talkathon by allotting me just thirty minutes. Accordingly, I will move very quickly from the general to the specific.

I

Our general policy over the last year has had four, fairly well defined objectives. First, we have sought to preserve a competitive market structure and to prevent markets and the economy in general from being subjected to undue economic leverage. Second, we have continued to proceed against anticompetitive business practices wherever we have found them. Third, we have sought to persuade regulatory agencies throughout the Government that, wherever possible, competition should be

allowed to operate as the regulator. And fourth, we have continued to pursue the idea that the antitrust laws can be used as a significant weapon in the fight against organized crime.

I think that we have pretty well covered each of these general areas in previous speeches, so I would like to address myself today to a specific area of our antitrust policy. That is our antitrust policy in the foreign trade field, and how this policy interacts with our objectives for the domestic economy. I believe that this subject fits very well into the overall subject of this program -- new technologies, competition, and antitrust.

I suppose it is rather trite to state that the size of the world we live in is shrinking at a rapid pace. But there are twelve men on this planet -- our astronauts -- who have already had the opportunity to see every point on earth within

the short space of a 24-hour period. Excellent transportation and communications networks link distant countries -- of the free world, at least -- very closely together.

Other developments now taking place, and some coming over the horizon, indicate that the world will be smaller still in the not too distant future.

As Peter Drucker has noted in his widely acclaimed book, The Age of Discontinuity, multinational companies are becoming more and more important as a new breed of institution. Increasingly, Drucker notes, the multinational corporation has a single top management, which does not limit its concern to the operations of the business in any one area. It tends to operate in terms of a world economy -- to be multinational not only in distribution but also in management, in research, in development, and in technological work. Indeed, it is becoming clearer all the time that technology knows no national boundaries and that product markets are becoming truly international.

I believe that these developments, especially the evolution of the multinational corporation, are rather significant in terms of our domestic antitrust policy. Perhaps most importantly, we need to recognize these developments and take them into account in our planning before they are upon us as accomplished facts. The ecologists stress that we should take into account the long-term consequences of the introduction of a product into the environment before the product is in fact introduced. I think that this principle of ecology is a pretty good idea for antitrust, too.

I believe that the emergence of the multinational corporation and the cosmopolitan nature of technology are vitally important in at least two of the areas of our general antitrust concern which I described a little earlier: our efforts to preserve a competitive market structure; and our efforts to keep the economy free of anticompetitive business practices.

II

Our efforts to preserve competitive market structures have been directed very largely toward preventing mergers which provide the opportunity for anticompetitive practices; which increase concentration in various markets; and/or which, taken in the context of a merger trend, increase concentration in the economy as a whole.

As part of its merger program, the Antitrust Division has had occasion during the past year to consider several proposed mergers involving the acquisition of foreign firms by domestic companies, or acquisitions of domestic companies by foreign firms.

Fairly typical of the problems posed by these mergers was the proposed union of the American operations of British Petroleum, including its Alaskan wells and the old Sinclair East Coast properties, with those of Standard Oil of Ohio.

Previously, we had welcomed BP's acquisition of the old Sinclair properties as introducing a substantial new competitor into the domestic oil market. When the union with Sohio was proposed, however, BP was in effect an American concern with a substantial business in the United States. We analyzed the merger proposal precisely the same way we would have analyzed a proposal to unite Sohio with another American company in the position of BP's American subsidiary. Since Sohio had about 30% of the Ohio market, and since we concluded that BP was one of the most likely potential entrants into the Ohio market, this seemed to us to involve a typical "big firm - leading firm" market extension situation, and we announced our intention to challenge the merger.

The results of this case, although reached through Government intervention rather than by the competitive process, provide an interesting example of how existing concentration may be reduced by the

entry of a foreign firm. In the settlement, Sohio agreed to divest itself of stations handling a total of 400 million gallons of gasoline per year, thus reducing its share of the Ohio market to approximately 21%. These stations are to be divested to purchasers which do not presently do any substantial business in Ohio. At the same time, a provision in the decree which provides that these stations may be traded for stations in other parts of the country will, in effect, enable Sohio-BP to expand toward a national distribution network more quickly than would otherwise have been possible. The net effect of the consent decree is to reduce Sohio's share of a very concentrated market, while at the same time introducing a substantial new competitor in a good portion of the nation. A similar result might follow from an entry de novo by a vigorous foreign firm -- without Government intervention.

About the same time as BP-Sohio, the proposed acquisition of International Salt Company, the number two salt firm in the U.S., by KZO, a substantial Netherlands company already in the salt business, was announced. It seemed to fit the same pattern. However, because in this instance our investigation showed that KZO was not a potential entrant into the U.S. market on its own, we concluded that the proposed acquisition should not be challenged.

Joint ventures, as well as mergers and acquisitions, may well affect market structure. In a relatively few instances, the Antitrust Division has found that joint ventures in the U.S. between American and foreign firms have an adverse competitive impact. The Mobay case of some years ago, involving Monsanto and Bayer of Germany, is one such example.

Of course, joint ventures are not necessarily illegal under United States law. In this one, however, two of the world's largest chemical companies joined forces to produce an important new chemical product, isocyanates -- a raw material for plastic foam, used, for example, as a lightweight lining for clothes. The complaint, filed under Section 1 of the Sherman Act, charged an unreasonable restraint of trade in that the companies were actual as well as potential competitors in the United States market, and they occupied, through their joint venture, 50% of the market. I suspect that few observers of the antitrust scene find it surprising that this joint venture received antitrust attention.

The outcome of the case was a consent decree under which the German company got the entire U.S. business, financed, I understand, by a loan from a New York bank.

These cases involving foreign firms have generated considerable comment in the foreign press. Charges of protectionism and discrimination have been levelled by some, and the bonds of international friendship have been strained. This is as unjustified as it is unfortunate, for I think that analysis clearly reveals that our antitrust rules hold benefits rather than detriment -- for foreign firms as well as for the U.S. economy.

Doing business in the United States does, of course, contemplate acceptance by foreign firms of our basic national policy of competition, and of the scheme of antitrust enforcement which is designed to translate that policy into reality in the marketplace. This fact, however, should not trouble the foreign businessman who is thinking about entering, or investing in, the United States market. He can hardly expect better treatment than domestic firms; Antitrust promises that he will receive no worse. Exclusionary or discriminatory business practices directed against foreign firms will be given no better treatment at the Antitrust Division or the Federal Trade Commission than when a United States firm is the victim.

By the same token, the American economy realizes substantial benefits -- in the way of vigorous new competition, new products, new technology -- which foreign and multinational firms are thereby enabled to offer. If we are honest with ourselves, we must admit the need therefor -- in a number of sectors of the economy.

Although economic concentration can be measured in several ways, there are American industries which, by any measurement, must be rated as overly concentrated. One study shows that there are thirty-nine American industries in which the top four firms hold over 60% of the market.

In many of these industries, no mergers have taken place for years, and yet these markets tend to become even more highly concentrated with the passage of time. Although generalization is always dangerous, I think that it can be said that the competitive vigor of these oligopolistic industries has not always been of the highest calibre. Indeed, it has been suggested that noncompetitive pricing by oligopolists is likely to occur even without what, in the traditional antitrust view, constitutes collusion. I think it can also be said that a lack of competitive pressure on prices tends to result in a softer attitude on the part of managements toward increased costs. Rising costs, in turn, lead to further rising prices.

From the antitrust standpoint, an attempt to break up the firms which comprise these oligopolies might seem to be the logical answer. Various students of the subject have expressed the opinion that this can be accomplished by means of Section 2 of the Sherman Act. But this approach involves dangers as well as problems. For example, where the aim is to create two companies where only one has existed before, there is no assurance that the end result will be two strong independent competitors. In addition, other interests -- those of shareholders and creditors, as well as those of labor, suppliers, and customers -- must be considered in any frontal assault on existing concentration.

Accordingly, what we have tried to do this past year is to hold the line on existing concentration through an alert merger program. Where an anticompetitive merger of two strong viable companies is prevented, one can be pretty sure that the end result of this action is going to be the maintenance of two strong and viable independent companies, and a pretty good chance that, sooner or later, they and their counterparts will venture

into new fields, either by de novo entry or by foothold acquisition. We believe that this approach, at the least, gives the forces of competition and technological innovation a chance to erode existing oligopolies.

But very much a part of our thinking here is the development of international trade and the multinational corporation. Where an existing domestic industry is highly concentrated, the main pressure on management to keep both costs and prices down may be the existence of actual or potential competition from foreign or multinational firms. It is for this reason that we should be especially wary of artificial barriers to the entry of foreign firms, or their products, into our domestic markets. We must be equally careful that the actual or potential competition posed by foreign firms is not eliminated through mergers or acquisitions. Indeed, in concentrated industries particularly, we should encourage potential foreign competitors to become actual competitors, either by selling here, or by producing and selling after entry de novo or by foothold acquisition.

III

Turning now to the subject of business conduct, I think it is fair to say that our need to develop international trade and the multinational corporation also has an effect upon the challenges we will make to anticompetitive business practices. As I have said earlier, we must guard against the unwarranted erection of artificial barriers to entry. In fact, considering the Antitrust Division's function as an advocate for competition, it would be surprising indeed if it did not take the position that, all other things being equal, barriers to entry, as for example, in the forms of tariffs or quotas, should be eliminated or lowered -- not created or raised.

Naturally, this does not mean we countenance "dumping" here by foreign firms. And it does mean we do assume that foreign nations for which we maintain an open door will reciprocate our free trade policy. In his recent foreign policy statement, President Nixon reconfirmed our free trade commitment. He said: "In an

ever more interdependent world economy, American foreign policy will emphasize the freer flow of capital and goods between nations." Assistant Secretary of State Trezise elaborated on this in a talk in Detroit last week. Discussing and rejecting the demands of certain groups that we change our free trade policy, he concluded that ". . . a restrictive policy would be gravely injurious to our own economy and our own people, and to our position in the world at large as well."

It is part of our antitrust policy to help implement the Nation's free trade commitment by seeking out and prosecuting anticompetitive international business practices and relationships affecting U.S. trade. We will be alert to challenge barriers to entry erected by private corporations by means, for example, of unduly restrictive patent, know-how, and technology licenses, as well as by outright cartel-type arrangements. Some have accused us of being rather naive in the licensing area. They suggest, for example, that we are unaware that many millions of dollars worth of commerce are affected by know-how licensing arrangements. I want to

assure you that we are aware of this fact. And we are aware, also, that some important foreign firms are entirely excluded from competing in the United States by territorial arrangements which had their genesis, 25 and 50 years ago, in patent and know-how licensing, and we are not unaware that some of these arrangements bid fair to be perpetuated forever.

We do not believe that this sort of anticompetitive arrangement can be justified in the guise of a know-how license. Where patent, technology, or know-how licenses prevent foreign or multinational competitors from competing in our domestic markets for an unduly long time, I think few will deny that there is solid precedent for a challenge under the antitrust laws. Indeed, some corporate counsel have written for publication, and others have acknowledged to me personally, that they have so advised their clients for, lo, these many years!

IV

To summarize, I hope that you have gathered that, on the whole, I regard the development of international trade

and the multinational corporation as a valuable and perhaps even an essential thing for the continued health and vigor of competition in the United States. This is not to say, of course, that this development will not pose serious legal, political, and diplomatic problems. In antitrust alone, there will be problems regarding the extra-territorial application of the laws, not only of the United States, but of other nations which have adopted restrictive business practice laws. There will be problems of jurisdiction over foreign parties and foreign acts involved in carrying on the business of multinational firms. There may be problems posed by multinational firms which lie outside the reach of the restrictive business practice laws of any nation.

What we should focus upon, however, is that continued expansion of international trade, and the travel and communication which attend it, while operating directly to stimulate and strengthen the U.S. economy, will at the same time forge closer ties between its people and those of foreign nations, promote the better life, and serve the long range cause of peace.