Department of Justice

ENHANCEMENT OF U.S. TRADE OPPORTUNITIES THROUGH

ANTITRUST ENFORCEMENT AND COMPETITION ADVOCACY

Remarks by

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Some people in this country argue that the antitrust laws are an impediment to American exporters. I believe quite the opposite is true; that the antitrust laws are neither harmful nor even neutral; that instead these laws can and do positively enhance the export opportunities of American business. Let me tell you how.

In foreign commerce, the antitrust laws serve two principal purposes. The first is to promote competition in American markets so that exporters to the United States, as well as domestic enterprises, do not engage in collusive behavior that undermines open markets. In this way the antitrust laws are perhaps the principal consumer protection law - aiding not only the homemaker but also intermediate enterprises using imports in production or distribution. Second, and equally important, the antitrust laws in foreign commerce are designed explicitly to protect exporters against efforts to injure or limit their exports by anti-competitive conduct. Thus, the antitrust laws are intended to aid exports, to protect and encourage the competitive exporter.

Let me illustrate with two recent cases, one brought by the Department of Justice and one brought by a private plaintiff.

Just a year ago, we filed a criminal information against a major member of an international commodity cartel, alleging that the cartel members had conspired to prevent American firms from exporting the valuable commodity after processing. These exporters, we alleged, were the victims of a boycott to close down their supplies of raw material. The defendant entered a plea of no contest and paid a fine. Without antitrust enforcement, the effect of this kind of conspiracy could have been to choke off a vital segment of American exports. It also could have been disastrous to the individual enterprise.

American businessmen don't necessarily have to rely on the government. By utilizing the private treble damage remedy, an American exporter can exercise the right to use the antitrust laws for self-protection. Thus, the exporter, in a recent case, alleges that its competitor fraudulently procured patents in 26 foreign countries for a commercially important vinyl floor covering, thereby foreclosing the exporter from these markets in violation of the antitrust laws. The appeals court has explicitly decided that this kind of conduct could justify treble

damage relief by an American court applying American antitrust laws.

Without the application of the antitrust laws to United States export trade, American exporters such as these would lack a remedy when victimized by discriminatory conduct. These two cases also illustrate that individual firms do not just suffer from anticompetitive activities by foreign enterprises. It is a surprising fact that some of the greatest private threats to aggressive United States exporters have in the past come from other United States enterprises.

I gather, however, that the greatest single concern today is a perception that the United States antitrust laws prevent American firms that compete with each other in the United States from forming joint ventures in order better to compete abroad. The concern is, quite simply, unfounded. It is time, once and for all, to lay this myth to rest.

In January 1977, the Antitrust Division issued an Antitrust Guide for International Operations. The Guide presents a general statement of the Department of Justice's view of the practical application of the antitrust laws in United States commerce. This is followed by 14 hypothetical problems, most of which were put forward by leading representatives of the

American business community in response to an invitation to identify the specific situations which they felt raised the greatest uncertainties for American businessmen seeking access to international markets. The Guide was drafted, in large part, to respond to their concerns.

The Guide contains a specific discussion of foreign joint ventures. Because the principal purposes of the antitrust laws in foreign commerce are to protect consumers in United States markets and to protect exporters in export markets, we have stated in the Guide that:

> Normally the Department would not challenge a merger or joint venture whose only effect was to reduce competition among the parties in a foreign market, even where goods and services were being exported from the United States.

This is illustrated by a joint venture involving the only three American companies manufacturing certain hydro-electric equipment. These companies are direct competitors in United States markets. They proposed a joint bid to construct a large hydro-electric project in Latin America. The project involved a considerable capital outlay, significant risks and strong bid competition from foreign consortia. In the Guide, we state that such a joint venture would almost certainly not violate the antitrust laws. The hypothetical is quite similar to an actual joint venture proposal

approved by the Department in 1976 under its Business Review Procedure. The Business Review Procedure provides that firms contemplating a course of action raising possible antitrust issues may seek a statement of the Antitrust Division's enforcement intention as to that activity. The Business Review Procedure is described in the Code of Federal Regulations. We will happily send you a copy if you write to the Legal Procedures Unit of the Antitrust Division. Many companies find it a useful aid to business planning. It is virtually unique in that it represents a statement of enforcement intentions by a law enforcement agency in advance.

Over the period 1968 to September 1978, the Division acted on 16 requests for Business Review clearance of proposed joint ventures and stated a present intention not to bring an enforcement action in 11, or 69% of the time. The figures for those joint ventures involving research or development activities should be even more reassuring; the Division "cleared" 90% of the 17 such proposals presented to it between 1968 and December, 1978. Indeed, as President Carter noted in his September statement announcing a new export promotion policy, export-related joint ventures have not been

challenged by the Department of Justice in more than 20 years. Nevertheless, to the extent reassurance is sought, while these Business Review letters do not prevent the Division from acting on changed facts in the future, it is significant that, to date, we have never brought suit to challenge any activity previously cleared through this procedure. In short, these Business Review letters can and do give practical guidance upon which the business community can reasonably base its decisions.

Even though we have given reassuring advice in our business reviews, as well as in our more general Guide, there are still some doubting Thomases. I am puzzled to know why. Some doubters have simply not troubled themselves to find out the facts. For example, a leading American business publication recently reported the basic facts of the actual hydro-electric joint venture with the statement that the Department opposed the venture. This encouraged a spate of gratuitous and quite erroneous criticism. Apparently, the press is not necessarily entirely immune to error.

But education is required. Here, as elsewhere, I believe in the redemption of the misguided. So, the Guide has become a best seller, having gone through two editions.

My colleagues and I in the Justice Department have recently delivered at least seven speeches explaining and elaborating upon the constructive role of the antitrust laws in United States trade.

The President has now asked us to do two further things. He asked us to continue our effort to clarify uncertainties and misperceptions about the role of antitrust with exports, and also to improve the Business Review Procedure.

We have acted promptly in response to his wishes by taking the following three steps. They should assist the American business community in learning how easy it is to avoid antitrust problems while increasing exports.

1. We have obtained a large reprinting of the Guide; in conjunction with the Department of Commerce, which is providing its extensive mailing lists, we have sent copies to 35,000 trade associations and enterprises throughout the United States identified by the Commerce Department as actual or potential exporters. In an accompanying letter I, and Assistant Secretary of Commerce Frank Weil, have invited the recipients to submit their comments, so that we might consider appropriate revisions to the Guide. Copies of the Guide are, I am assured, being made available today to all who have not yet seen it.

2. I, and members of my staff, have agreed to participate in meetings with businessmen to explain the antitrust laws and to respond to their questions and concerns. We will continue this effort and will work with the President's Export Council to increase business awareness that the antitrust laws are not an export problem.

3. After reviewing our Business Review Procedure, in early December I announced that we are prepared to respond to business review requests involving export projects within 30 business days after receiving necessary information. So far, we have received only one such export-related request. We welcome more.

I believe that our efforts at clarification are on the right track. Eventually there will be general appreciation that the antitrust laws are not a factor inhibiting United States exports.

Our views on this point, and the views of most sophisticated businessmen have recently been confirmed. I am heartened by the results of a recent study on this subject commissioned by the Bureau of Mines, entitled "Evaluation of Selected Factors Impacting on the International Competitiveness of the U.S. Minerals Industry." Representatives of nine major mining companies, as well as officials of the World Bank and the Export-Import Bank, were interviewed

at length in this study on the question of whether the antitrust laws truly impede joint ventures and other overseas operations. While many of the same familiar criticisms of the concept of extraterritorial application of our laws and of the uncertainty as to exactly when the law applies were voiced, I take satisfaction in two conclusions of the interviewers. First, they found, and I quote, "The recent Justice Department Guidelines have been reasonably effective in allaying the fears of U.S. based multinational non-fuel producers participating in joint ventures abroad."

Second, this statement from the report's general findings is worth quoting:

> [T]he perceptions of U.S. businessmen reflected [in the report] appear to be widely shared throughout the non-fuel minerals industry. That, despite these sometimes vehemently expressed perceptions, neither U.S. nor foreign antitrust laws present serious barriers to aggressive programs of overseas exploration and development. It is closer to the truth that, as one businessman candidly stated, they present only "nagging worries" for U.S. businessmen and do not significantly inhibit or delay the activities of non-fuel mineral producers operating abroad.

Consistent with these findings are the results of a recent survey conducted by the International Management and Development Institute on "Keeping Competitive in the U.S.

and World Marketplace." This survey identified the ten major disincentives to such competition, and did not find antitrust laws, enforcement activities or policies to be among the perceived obstacles to trade.

In sum, I am happy to report that our efforts to dispel the myth of the antitrust laws as an impediment to healthy foreign trade appear at last to be succeeding.

Let me turn now for a moment to another topic of current interest that seems to be raising similar fears in the business community -- the Foreign Corrupt Practices Act. The enforcement of that Act is the responsibility of the Fraud Section in the Criminal Division of the Department of Justice. When the President signed the Foreign Corrupt Practices Act on December 20, 1977, he stated that: "I share Congress' belief that bribery is ethically repugnant and competitively unnecessary. Corrupt practices between corporations and public officials overseas undermine the integrity and stability of governments and harm our relations with other countries." In accordance with those views, the President has directed the Attorney General strictly to enforce the statute.

We are convinced, as is the President and the Congress, that bribery of foreign government officials is "competitively unnecessary". Some segments of the business community and

the legal profession have suggested, nevertheless, that there are certain ambiguities in the Act that have caused some companies to forego business opportunities overseas. That issue was reviewed by the White House Task Force on Export Policy which made certain recommendations to the President relating to the Foreign Corrupt Practices Act. As a consequence, on September 26, 1978, in his export policy statement, the President stated that "the Justice Department will provide guidance to the business community concerning its enforcement priorities under the recently enacted foreign antibribery statute. This statute should not be viewed as an impediment to the conduct of legitimate business activities abroad. I am hopeful that American business will not forego legitimate export opportunities because of uncertainty about the application of this statute. The guidance provided by the Justice Department should be helpful in that regard."

After conducting a survey of the business community and interested segments of the legal profession, on March 1, 1979, the Commerce Department presented to the Criminal Division its views on how the President's directive could be implemented. Since the Foreign Corrupt Practices Act is technically an amendment to the Securities Exchange Act of 1934, and the enforcement responsibility for the

Act is shared by the Justice Department with the Securities and Exchange Commission, any implementation of the President's directive requires close coordination with the SEC. Taking into account the proposals of the Commerce Department, the Criminal Division has been discussing with the staff of the SEC the most appropriate means by which to implement the President's directive.

At this time, although no final decision has been made, I can share with you the two primary options for implementing the President's directive now being considered by the Criminal Division: (1) publishing hypothetical factual situations with related interpretations of the Act which would be roughly similar to the Antitrust Division's Guide; and (2) adopting a Foreign Corrupt Practices Review Procedure which would be generally patterned after the Antitrust Division's Business Review Procedure.

I expect that the Criminal Division will be in a position in the reasonably near future to announce how it intends to implement the President's directive, in coordination with the Securities and Exchange Commission, and thereby provide some guidance to the business community. It should be made clear, however, that the guidance that the Criminal Division will provide will in no way narrow the

scope of the Act or condone, however tacitly, any corrupt payments. We will not, in the name of "guidance," provide a roadmap for companies on how safely to evade the law and to engage in the bribery of foreign officials.

In conclusion, I suggest that most of the concern over antitrust law as a barrier to trade is misinformed and misplaced. Antitrust enforcement is a very minimal form of intrusion by government into the private affairs of businessmen. In reality, antitrust is designed to enforce the rules of free competition, and thus to liberate the businessman to exercise his own free right of business choice.

By the same token, do not be overly impressed by the purported extra support foreign businessmen get from their governments. While governmental "support" can be helpful, it almost inevitably produces some arbitrariness, inefficiency and market distortion. Those are problems many of your foreign competitors have to confront to an even greater degree than you do in the United States. In addition, in our country we ought for political and social reasons to be skeptical of government and business in too close an embrace. As in a waltz danced by an elephant and a canary, the price

of a misstep by the specific business firm involved can be very high.

The Department of Justice is an active participant in implementing United States trade policy seeking to promote competitive international markets. We are working with our colleague antitrust agencies in foreign governments to promote non-restrictive business practices throughout the free world. We are working with others in the Federal Government to reduce the market intervention of foreign governments in international trade. In this way, too, we help the American businessman export more effectively.

The antitrust laws promote competition. Competition in international trade is the name of the game. To many in other lands, competition is threatening. But it should never be threatening to American businessmen. I know that as exporters you do not ask for protected markets or assured profits. I know that what you want is simply the opportunity to compete in a free and fair market. In pursuit of this goal, the antitrust laws, so far from being a hindrance, are in fact your strongest ally.