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RECENT DEVELOPMENTS IN INTERNATIONAL ANTITRUST*

JOEL DAVIDOW†

IN THIS ERA of relative peace, many nations, including our own, are focusing more attention on important international economic issues rather than on military or political questions. These current issues include how to control abuses by multinational corporations, how to deal with commodity cartels, how to achieve a satisfactory transfer of technology to less developed nations, and how to create additional export opportunities for nations with a shortage of foreign exchange. In a broad sense, all these subjects can be viewed as involving issues of international antitrust or competition policy.

Because Americans have a deep commitment to the principles of free enterprise and free competition, we have long supported vigorous antitrust enforcement both in our domestic market and as to restraints on our foreign trade. Moreover, we have quite successfully exported our antitrust policies to other free world nations and have recently indicated our willingness to support the embodiment of these principles in international agreements applicable to all nations.¹ It has also been a cornerstone of American policy that our antitrust laws are to be applied impartially with no preference between domestic firms and foreign ones or between famous companies and obscure ones. Moreover, the enforcement policy of our antitrust agencies has always been to apply our laws so that they impose sanctions on unjustifiable business behavior while allowing conduct which is reasonably necessary for the effective conduct of business. Finally, we seek to apply antitrust law internationally in such a way as to avoid unduly hindering foreign trade or interfering with the legitimate sovereign rights of other nations.

Of course, the test of all these policies is not how often or how vigorously they are expressed in principle, but how they are carried out

*This article is based upon remarks delivered by Mr. Davidow at the Fifth International Law Symposium held at the University of Akron School of Law on November 4, 1976. The topic of the Symposium was "The Application of U.S. Antitrust Laws to U.S. Corporations Abroad." Other participants in the Symposium were James R. Atwood of the District of Columbia Bar (an article based upon his remarks follows on page 609); Mark R. Joelson; Professor Lawrence R. Velvel of the Catholic University School of Law, and Professor Don Wallace, Jr., Director, Institute for International and Foreign Trade, Georgetown University Law Center.

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¹ Address by Secretary of State Henry A. Kissinger, Seventh Special Session of the United Nations General Assembly, September 1, 1975.

and achieved in specific application. That is what I shall examine in this article, focusing particularly on the developments of the last four years. I will concentrate primarily on the enforcement activities of the Department of Justice, but will also discuss actions taken by the Federal Trade Commission and certain cases and rulings in private antitrust litigation.

The Antitrust Division has filed over a dozen international antitrust cases in the last four years. Many of these were brought by the Foreign Commerce Section which specializes in such matters; most of the others were developed by the field offices of the Division. A brief description of some of these cases will indicate their very considerable variety.

Two companies which sell the light metal lithium were accused in 1974 of allocating world markets by agreeing to pay each other a 5 percent commission if the American firms sold in Europe or the German firm sold into the United States. The case was settled by means of a decree prohibiting repetition of the conduct.² An association of Korean wig importers in New York was indicted for attempting to boycott all wig merchants who refused to join the association and who continued to deal with price cutters. The association pled no contest to the criminal charge, paid a fine and agreed to an injunction.³ Twenty-one American publishers were sued for cooperating with an arrangement of British publishers to divide world markets so as to give the British exclusive rights to re-publication in commonwealth countries while the Americans received such rights to the United States, Canada and the Philippines.⁴ This case was settled by a combination of diplomatic negotiation and the entry of a voluntary consent decree. Still another case involved the indictment of the largest American and British manufacturers of bank security equipment, Diebold Corporation and Chubb & Sons, Ltd., charging them with having agreed to cancel distributors in each other's home territories.⁵ Diebold pled no contest and paid a \$30,000 fine. In a recently settled case, associations of American mink ranchers were charged with inducing their Scandinavian competitors to decrease exports of mink pelts to the United States.⁶

In other recent antitrust prosecutions the Department of Justice charged the DeBeers diamond firm with fixing resale prices and allocating markets in conjunction with its American and European distributors. DeBeers

² United States v. Foote Mineral Co., Civ. No. 74-1652 (E.D. Pa. 1974).

³ United States v. Korean Hair Goods Ass'n of America, Cr. No. 75-622, Civ. No. 75-3069 (S.D.N.Y. 1975).

⁴ United States v. Addison Wesley Publishing Co., Cr. No. 74-5176 (S.D.N.Y. 1974).

⁵ United States v. Diebold, Inc. and Chubb & Son, Ltd., Cr. No. 76-9A (N.D. Ohio 1976).

⁶ United States v. National Bd. of Fur Farm Organizations, 395 F. Supp. 56 (E.D. Wis. 1974).

first challenged jurisdiction and then voluntarily appeared before the court and paid a \$40,000 fine.⁷ The Omega Watch Company was charged with conspiring with its American distributor to stem the flow of discount Omega watches to the United States. Omega agreed to discontinue the practice.⁸

Not all enforcement actions involve new cases. The *Quinine Cartel* case was filed in 1968, but a German defendant, Boehringer, finally agreed in 1976 to submit to the jurisdiction of the court and accepted a consent decree.⁹ This was because of the firm's desire to enter the U.S. market by acquiring an American company. In the same case, the Antitrust Division, with the cooperation of immigration authorities and the FBI, secured the arrest of a Dutch defendant six years after he had failed to appear for arraignment. He was compelled to post \$100,000 bail¹⁰

These instances indicate why it has been the position of the United States in international discussions that our national antitrust laws are usually adequate to protect us even from antitrust violations by foreign firms. Another enforcement action of interest in regard to an older case is the settlement negotiated in the 1968 *Gillette-Braun* merger case and approved by the court in 1975.¹¹ The suit had charged that by acquiring the Braun razor company of West Germany, Gillette had prevented the competitive entry of Braun's high quality electric razors into the American market. The settlement requires Gillette to bestow at least \$2.5 million on a new firm which will introduce these electric razors into the American market. Gillette is then required to sell this new company to an independent purchaser.

In my view, the two most significant international antitrust cases brought by the Division in the last few years are those involving potash fertilizer and the Arab blacklist of pro-Israeli firms. In the first of these, the grand jury indicted five multinational firms for cooperating in a scheme to coordinate American production and prices of potash fertilizer with production limitations and floor prices which were being instigated in Canada by the Provincial Government of Saskatchewan.¹² In the other case, a major American construction firm was charged with effectuating

⁷ *United States v. DeBeers Indus. Diamond Div., Ltd.*, Cr. No. 74-1151 (S.D.N.Y. 1974).

⁸ *United States v. Norman Morris Corp.*, Civ. No. 76-495 (S.D.N.Y. 1976).

⁹ *United States v. N.V. Nederlandsche*, Cr. No. 68-870 (S.D.N.Y. 1968). For a discussion of jurisdictional problems with foreign defendants, see [1974-2] Trade Cas. (CCH) ¶ 75,434, at 98,459 (S.D.N.Y. Sept. 4, 1974).

¹⁰ See 690 ANTITRUST & TRADE REG. REP. (BNA) A-6 (Nov. 26, 1974).

¹¹ *United States v. The Gillette Co.*, 406 F. Supp. 713 (D. Mass. 1975) (modified consent decree affirmed). See [1975-2] Trade Cas. (CCH) ¶ 60,651, at 67,838 (D. Mass. Dec. 30, 1975).

¹² *United States v. Ammax*, Cr. No. 76-783 (N.D. Ill. 1976).

the Arab League boycott of Israel in the United States by agreeing with subcontractors not to deal with any firm in the United States which was on the Arab League's blacklist.¹³

During the last few years, the Federal Trade Commission's enforcement activities in the international antitrust area have centered primarily in the merger field. The Commission has found illegal the proposed merger between British Oxygen, the largest United Kingdom firm in the liquid oxygen field, and Airco, the third largest American firm. The grounds for the decision were that the merger would have eliminated potential competition between British Oxygen and the American firm it acquired.¹⁴ The case is on appeal. The FTC has also challenged the acquisition of Stouffer Foods Company by the Swiss firm, Nestle, contending that the acquisition eliminated significant competition in the production and sale of specialized frozen food products.¹⁵

The Commission has been active not only in the merger area but also in the field of international licensing. It challenged agreements between Xerox Corporation and its English and Japanese licensees on the ground that the licensing and contractual arrangements eliminated significant actual and potential competition between the firms involved. The settlement requires Xerox to adopt new policies in regard to international licensing, pricing and sales.¹⁶

Despite the varied nature of these prosecutions, certain generalizations can be ventured. *First*, there are just as many cases involving firms which are not giant multinational corporations as there are cases in which such firms are involved. The large international firms do not seem to have any monopoly at all of the tendency to violate the antitrust laws. *Second*, the cases involved American defendants, foreign defendants, or both. There is no indication of any tendency to favor either group or to be prejudiced against anyone. *Third*, there are no suits brought in the last three years—or in fact in the last twenty-five years—against joint ventures by Americans to sell a product abroad or construct a facility in a foreign country. There was concern in the 1950's and 60's that U.S. antitrust enforcement might prejudice the ability of American firms to engage in such activities, but that concern seems to have been unfounded. In fact, besides not suing any foreign joint ventures, the Antitrust Division also recently granted a

¹³ United States v. Bechtel Corp., Civ. No. 76-99 (N.D. Cal. 1976).

¹⁴ FTC v. British Oxygen, Civ. No. 74-31 (D. Del. 1974) (FTC dkt. no. 8955).

¹⁵ Nestle Alimentana, S.A., [1973-1976 Transfer Binder] TRADE REG. REP. (CCH) ¶ 20,808 (Jan. 7, 1975) (FTC dkt. no. 9003).

¹⁶ In re Xerox Corp., [1973-1976 Transfer Binder] TRADE REG. REP. (CCH) ¶ 20,801 (July, 1975) (FTC dkt. no. 8909).

business review clearance to a consortium of U.S. firms desiring to bid jointly on a South American hydroelectric project.¹⁷ *Fourth*, there are only a few cases challenging international mergers. This is reflective of the highly selective nature of American merger enforcement. Over the last ten years only one large merger out of every 100 has been challenged under the antitrust laws. The same percentage — 1 in 100 — applies to challenges to large mergers between American and foreign firms.

Another trend which can be discerned in recent antitrust litigation, both government and private, is the involvement of some foreign governmental agencies in cartel situations. In the potash and Arab blacklist cases, private firms are charged with actions which extend a foreign, governmentally sponsored cartel beyond even its arguably legitimate limits. Because of sovereign immunity considerations, it is doubtful that U.S. antitrust laws apply directly to foreign government cartels, but our antitrust laws can be used to ensure that American companies do not agree to become accomplices in carrying such cartels into U.S. territory.

Many of the private international antitrust cases of the last few years have also involved questions of governmental involvement and possible defenses arising from that circumstance. In *Buttes Oil & Gas Co. v. Occidental Petroleum Corp.*,¹⁸ the District Court for the Central District of California held that one American oil firm could not secure an antitrust recovery from another because of an alleged conspiracy to induce one Arab sheik to claim and seize the foreign oil territory which had allegedly been granted to the plaintiff oil firm. In cases brought by New York City area utilities and by the Bunker Hunt Oil Co. against a group of major oil companies doing business in the Middle East, the courts sustained defenses based on the Act of State doctrine, holding that the companies had a right to bargain jointly with Libya, and were not responsible for any injury to purchasers or rival companies which resulted from the seizure of the oil by Libya or by efforts of the companies to refrain from purchasing or assisting in the sale of the oil which had been expropriated from them by Libya.¹⁹ These cases seem to indicate that American courts remain reluctant to question the legitimacy of a foreign act of state taken abroad, or the right of American companies, even acting jointly, to seek

¹⁷ United States Department of Justice Press Release, May 10, 1976 (re *Burns and Roe, Inc.*).

¹⁸ 331 F. Supp. 92 (C.D. Cal. 1971), *aff'd per curiam*, 461 F.2d 1261 (9th Cir. 1972), *cert. denied*, 409 U.S. 950 (1972).

¹⁹ *Nelson Bunker Hunt v. Mobil Oil Corp.*, Civ. No. 75-1160 (S.D.N.Y. 1975). The district court had personal jurisdiction over a West German firm whose officials came to New York to sign documents. See [1975-2] Trade Cas. (CCH) ¶ 60,558, at 67,445 (S.D.N.Y. Oct. 15, 1975). For grounds on which some of defendants' motions to dismiss were granted, see [1975-2] Trade Cas. (CCH) ¶ 60,591, at 67,604 (S.D.N.Y. Nov. 5, 1975).

favorable action from foreign sovereigns or bargain jointly with such sovereigns. On the other hand, dicta in a recent Supreme Court case, *Dunhill v. Republic of Cuba*, suggests that a majority of the members of the Supreme Court accept the need for distinguishing between the commercial activities of a state and its legitimately sovereign activities.²⁰ Activities such as granting of exclusive rights to oil lands or expropriation are still regarded as sovereign activities, but there is considerable doubt whether the production and sale of commodities on international markets would be regarded in U.S. courts as a sovereign activity rather than a commercial one. It should also be noted that in the private *Cofinco* case, which involved alleged price manipulation of Angolan coffee in the New York market, the court was unwilling to dismiss the complaint based on an Act of State defense, since evidence appeared to exist indicating that much of the challenged conduct was in the United States and was commercial in nature.²¹

As if to emphasize that foreign states do not inevitably come out on the short end of American antitrust law, the Eighth Circuit Court of Appeals recently ruled that foreign sovereigns who purchase illegally price-fixed goods from American manufacturers may sue as persons entitled to treble damages under the Clayton Antitrust Act. In a "friend of the court" brief, the Department of Justice supported the right of foreign states to sue in our courts.²²

A brief review such as this has to be more suggestive than definitive. Still, it is clear that the international antitrust area is an active and growing field of litigation. It is almost inevitable that vigorous antitrust enforcement in any area will generate discussion and even controversy. Nevertheless, it should be kept in mind that there is no indication, even in the recent period of high antitrust activity, that the enforcement of our antitrust laws is interfering with the normal and profitable conduct of American business overseas or prejudicing healthy commercial relationships with other nations. On the contrary, antitrust acts as a constant reminder to all those engaged in our trade that America is committed to free competition, to open markets and to fair dealing.

²⁰ *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682 (1976).

²¹ *Cofinco, Inc. v. Angola Coffee Co.*, Civ. No. 74-5191 (S.D.N.Y. 1975) (motion to dismiss for lack of personal jurisdiction and venue denied). See [1975-2] Trade Cas. (CCH) ¶ 60,456, at 67,051 (S.D.N.Y. July 29, 1975).

²² *Pfizer, Inc. v. Lord*, 522 F.2d 612 (8th Cir. 1975). See also [1975-2] Trade Cas. (CCH) ¶ 60,455, at 67,049 (8th Cir. Aug. 27, 1975).