FOREIGN AND INTERNATIONAL

RECENT INTERNATIONAL DEVELOPMENTS IN U.S. ANTITRUST SURVEYED BY OFFICIAL

A useful survey of recent developments in U.S. antitrust policy and jurisprudence as it relates to international commerce has been provided by Mr. Charles S. Stark, Chief, Foreign Commerce Section of the Justice Department's Antitrust Division. Speaking to the World Trade Institute Seminar on Advanced International Antitrust Practices and Related Trade Issues in San Francisco on May 12, he dealt with resale price maintenance, collusion, mergers, the extent to which the so-called Noerr doctrine shields companies in their communications with governments, the 1982 antitrust agreement with Australia and the Export Trading Company Act of 1982. His remarks on the first four of those topics were as follows:

> "There seems to be a widely held impression that the present administration's antitrust policies represent a substantial departure from Justice Department enforcement policies of the recent past. There have indeed been some significant changes, but the extent to which they impact on our overall enforcement activity is often exaggerated. As you know, last June we issued new merger guidelines, replacing earlier guidelines that had been issued in 1968. The new guidelines use somewhat different numerical criteria than the old ones, and include for the first time extensive discussion of the way in which the Division will determine what it views as an economically sensible product and geographic market.
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> "In the area of vertically imposed restraints, our current enforcement policies require an anlysis of the circumstances of each case, looking to market structure and other facts, to determine the competitive consequences of the particular practice. For purposes of our enforcement decisions, we do not rely on generalizations in prior case law that may erroneously characterize as anticompetitive arrangements that, in the particular circumstances presented, are not anticompetitive at all, but may, indeed, enhance competition. We recently filed a Supreme Court amicus brief supporting certiorari in a private case, in which we urged the court to reconsider the view that resale price maintenance should be treated as per se lawful.[1]
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> "All of these policies have implications for the kinds of international, as well as domestic cases, the Division will bring. Simply put, the Division will challenge conduct which, on the basis of what it perceives as sound economic analysis, it considers anticompetitive, and will not challenge conduct which is not. That basic enforcement criterion applies whether the conduct or the firms involved are wholly dometic, a mix of domestic and foreign, or

potentially wholly foreign. On the other hand, there has been no basic change in policy which relates particularly to our enforcement efforts regarding foreign firms or foreign conduct. To put it succinctly, our basic concern is to protect competition in our own market. Conduct that has a significant impact on competition in our market may be the subject of antitrust action, whether it originates here or elsewhere. Conversely, conduct whose only anticompetitive impact is felt in foreign markets is not a matter for U.S. antitrust concern, whether the conduct originates here or abroad.

"Two of our recent cases illustrate the kinds of conduct with which we have had and will continue to have enforcement concern. Last June we filed a civil suit against eight Japanese companies involved in buying a type of crab known as "tanner" crab from processors in the State of Alaska, for importation into Japan. About two-thirds of the tanner crab harvested from Alaskan waters were processed for export to Japan, and the eight firms named in the suit accounted for about half of all Alaskan tanner crab purchases by Japanese firms. The complaint charged the defendants with conspiring to depress and fix the prices they would offer to and accept from Alaskan processors, and use their trade association, the Japan Marine Products Importers Association, as a forum for those discussions. The case was settled by consent decree, which the court entered in October.[2]

"As a general proposition, foreign cartel activity that is directed against or substantially affects the American market is an area of significant concern to us. It is of concern whether it operates on the buying side as in the Alaskan crab case, or on the selling side. One of our current investigations involves possible agreemnts among Japanese manufacturers of 64 kilobit random access memories (a sophisticated type of computer chip) to fix the price or limit the quantities to be sold to the United States. I can identify this investigation for you because it has been publicly referred to by the Japanese; but I stress that it is still at the investigative stage and we have reached no conclusion as to whether an antitrust violation occurred.

"In the merger area our policy regarding acquisitions of or by foreign firms remains essentially the same, subject to the basic analysis described in the new merger guidelines. That is, we will examine American firms' acquisitions of foreign firms, or acquisitions by foreign firms of American firms, to determine their likely impact on competition in the United States, using essentially the same type fo economic analysis which we would apply to a wholly domestic merger. Although the language of the Clayton Act would permit us to challenge a merger involving only foreign firms,

where the merger substantially lessens competition in the U.S. market, the only circumstances in which we in fact have done so have been those in which competition from U.S. parent or subsidiary companies of the merging parties have been involved. Last year, for example, we sued to challenge a merger the immediate parties to which were two British firms, alleging that it lessened competition in the market for home and office staplers in the United States. The acquiring firm was a wholly-owned British subsidiary of American Brands, which had more than 65% of the American stapler market through its Swingline and Ace brands. Through its British subsidiary, American Brands bought another British firm which sold staplers in the United States and had about 6% of the American market. In October we filed a consent decree in that case, which the court entered this March, under which American Brands is to divest part of its American stapler operations, while retaining the acquired British firm.[3]

"I referred earlier to recent case law involving the application in foreign contexts of the Noerr doctrine. The Noerr doctrine, as you know, as a general matter provides a shield from antitrust liability for efforts to persuade the government to do something, even if the governmental action being sought is anticompetitive. The doctrine is variously said to be based on statutory interpretation, on the one hand, or required by the First Amendment's guarantee of the right to petition the government, on the other. Whatever its basis, it has been held applicable to efforts to persuade legislatures, adminsitrative bodies and courts in the United States. But its applicability to efforts to persuade foreign governmental bodies has never been firmly settled. In the Justice Department's 1977 Antitrust Guide for International Operations,[4] the Department said that it considered Noerr, or some analogue of it, applicable to protect efforts to influence foreign governments; but the Guide noted that in the only judicial opinion expressly to have addressed the question, the court concluded otherwise.[5]

"This past January, the Court of Appeals for the Fifth Circuit, in Coastal States Marketing, Inc. v. Hunt, squarely held that Noerr protection extends to the petitioning of foreign governments.[6] The Court said it saw no reason why conduct which would be perfectly lawful in United States should be treated otherwise because it is performed abroad. That seems an eminently senisble view and, I noted, it is the view the Antitrust Division has taken for some time. Of course, one must assume that just as Noerr is inapplicable in a domestic setting when the putative petitioning activity is shown to be a "sham", the "sham" exception to Noerr would apply equally in an overseas setting. Indeed, the Fifth Circuit in the Coastal States case took it for granted that if Noerr were applicable the "sham exception went with it, although it rejected plaintiff's "sham" argument on the evidence.

"In another recent court of appeals decision of some interest, the Second Circuit held that neither the act of state nor the Noerr doctrine precluded enforcement of Antitrust Division Civil Investigative Demands calling for documents relating to communications between the CID recipients and agencies of the Governments of Australia and New Zealand. That decision grew out of an antitrust investigation involving practices in the shipping trades between Australia, New Zealand and the United States. CID's were issued to a number of shipping lines and conferences asking about, among other things, contacts between the recipients and the New Zealand Wool Board and Australian Meat & Livestock Corporation, which are authorities of those governments with regulatory authority over exports of those commodities. A number of the CID recipients challenged those portions of the CID's, on the grounds that the act of state doctrine and Noerr doctrine preclude the government from looking into contacts with foreign government agencies. Actions to quash or modify the CID's on this as well as other grounds were brought in the district courts in San Francisco, New York and Washington, D.C. The district court in San Francisco ordered the CID's enforced in their entirety.[7] In Washington, the court held that neither the act of state doctrine nor the Noerr doctrine precluded the inquiry, at least at the investigation stage.[8] The matter has been argued in the Court of Appeals for the District of Columbia, which hasn't yet handed down a decision. In New York, the district court held that the act of state doctrine did preclude inquiry into contact with Australian and New Zealand officials, and refused to enforce the CID's to the extent they asked for documents relating to contacts of that nature. Last month, the Second Circuit reversed.[9] The Court noted that the Government's request that the CID's be enforced did not require an examination of the validity of, or motivation for, actions taken by the Australian or New Zealand Governments, and therefore that the act of state doctrine had no application at that stage of the proceeding. It was enough, the Court held, that the Justice Department had demonstrated reasonable basis to believe the requested information was relevant to a legitimate antitrust investigation. At the sme time, the Court rejected arguments that the Noerr doctrine precluded inquiry into contacts with foreign government agencies. The Court said that Noerr might or might not protect the conduct at issue from liability, but that since one couldn't make that determination at the investigative stage, and since the documents could be relevant to conduct that enjoyed no exemption under Noerr, the CID's could be enforced. Not surprisingly, we consider the court's holdings on both the act of state and Noerr issues to be entirely correct. With regard to the Noerr question, though, I should note that the court declined to consider whether Noerr would apply at all to contacts with foreign government officials, although in their arguments before the court the CID recipients, the Justice Department, and the Australian Government as amicus curiae, all agreed that it would.

"The significance of the holdings in the two decisions I have described is not that they are surprising or novel -- they seem to me both correct and, despite the vigor with which the opposing views were argued, obvious. Their importance lies in their avoidance of contrary outcomes which, in either case, would have been quite troublesome. To deny Noerr protection to communications with foreign government officials could prohibit firms and individuals from freely communicating with them in a way we allow and encourage domestically -- an outcome which many foreign governments would understandably view as presumptuous and offensive. On the other hand, a holding that precluded investigation into communications with foreign governments could shield from inquiry conduct abroad of a kind that we would be free to investigate in a domestic setting, even though its impact on our market might be just as great as if the conduct had occurred within our boarders. We are gratified, therefore, that the courts in this area seem to be headed in the right direction."

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1 Spray-Rite Service Corporation v. Monsanto Chemical Company, 684 F.2d 1226 (7th Cir. 1982), cert. granted - U.S. (Feb. 28, 1983) (No. 82-914)

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2 United States v. C. Itoh & Co., Ltd., et al., 1982-83 Trade Cases (CCH) //65,010 (W.D. Wash. 1982)

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3 United States v. American Brands Inc., 1983-1 Trade Cases (CCH) //65,276 (S.D. N.Y. 1983)

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4 Antitrust Division, U.S. Department of Justice, Antitrust Guide for International Operations 63 (1977) (Case N).

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5 Occidental Petroleum Corp. v. Buttes Gas & Oil Co., 331 F.Supp. 92 (C.D. Cal. 1971), aff'd per curium on other grounds, 461 F.2d 1261 (9th Cir.), cert. denied, 406 U.S. 950 (1972).

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6 Coastal States Marketing, Inc. v. Hunt, 1982-83 Trade Cases (CCH) //65,140 (5th Cir. 1983).

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7 Pacific/Australia-New Zealand Conference v. Unites States, Nos. 80-3015, -3017 (N.D. Cal. Mar. 26, 1982), appeal dismissed Nos. 82-4205, -4218, -4219 (9th Cir. May 17, 1982)

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8 Australia/Eastern U.S.A. Shipping Conference v. United States, 537 F. Supp. 807 (D.D.C. 1982), appeal argued, Nos. 82-1516, -1683 (D.C. Cir. Jan. 10, 1983).

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9 Associated Container Transportation (Australia) Ltd. v. United States, 1983-1 Trade Cases (CCH) // 65,325 (2d Cir. 1983).

REAGAN CABINET APPROVES PROPOSAL FOR ANTITRUST AND PATENT LAW AMENDMENTS

Legislative proposals which would weaken the antitrust laws substantially and increase patent protection were approved by the Reagan Cabinet on March 24. Treble damages awards would be retained only for per se antitrust offences, and recovery for other restraints of trade would be limited to actual damages plus interest. Joint research and development ventures would be removed from the per se class of illegal agreements, Patent misuse cases would be made more difficult to sustain. Holders of process patents would be empowered to block unauthorized imports of products made by their patented processes. The proposals, which are intended to form part of an international trade bill, are among those to be studied by the Monopolies and Commercial Law Subcommittee of the House Judiciary Committee, both of which are chaired by Democratic Congressman, Peter Rodino.

S.4 of the Clayton Act would be amended to provide for actual damages plus interest rather than treble damages, with the proviso that:

> "... damages attributable to agreements or practices the nature or necessary effect of which is so plainly anticompetitive that they are deemed unreasonable and therefore illegal without elaborate study in each individual case as to the precise harm they have caused or the business justification for their use shall be trebled."

The easing of the proscription against research and development agreements would be accomplished by adding the following section to the Clayton Act:

> "Agreements to engage in joint research and development, or agreements to develop, or to convey rights to use, practice or sublicense, patented inventions, copyrights, trade secrets, trademarks, know-how, or other intellectual property, shall not be deemed unlawful per se in actions udner the antitrust laws."

The rights of patent holders would be strengthened by the addition of the following section to U.S. patent law:

> "No patent owner otherwise entitled to relief for infringement or contributory infringement of a patent shall be denied relief or deemed guilty of misuse or illegal extension of the patent right by reason of his having done one or more of the following, unless such conduct, in view of the commercial circumstances in which it is employed, is likely substantially to lessen competitionl (1) licensed the patent under terms that affect commerce outside the scope of the patent's claims, (2) restricted a licensee of the patent in the sale of the patented product or in the sale of a product made under a patented process, (3) obligated a licensee of the patent to pay royalities that differ from those paid by another licensee or are allegedly excessive, (4) obligated a licensee of a patent to pay royalties in amounts not related to the licensee's sales of the patented product or the product made by the patented process, (5) refused to license the patent to any person, or (6) otherwise used the patent allegedly to suppress competition."

A parallel sectioin would be inserted in the copyright law.

The right to exclude unauthorized imports of products made by a patented process would be provided by inserting the following underlined words in 35 U.S.C. No. 154:

> "Every patent shall ... contain a grant to the patentee ... of the right to exclude others from making, using or selling the invention, and if the invention is a process of the right to exclude others from using or selling products produced thereby, throughout the United States..."

Also, the following new sub-section would be added to 35 U.S.C. No. 271:

> "If the patented invention is a process, whoever without authority uses or sells in the United States during the term of the patent therefor a product produced by such process infringes the patent."

Finally, where the patent owner was unable to determine what process had been used, the onus would be on the seller to establish that the patented process had not been used.

Canadian patent law now permits holder of process patents to exclude unauthorized imports of products made by the process.

U.S. FEDERAL TRADE COMMISSION EXTENDS ANTITRUST LAW TO BAN PARALLEL CONDUCT FOR THE PURPOSE OF PRICE COORDINATION

The FTC, in a majority decision issued on March 27, 1983, found that certain practices followed without agreement by each of four producers of antiknock gasoline additives facilitated price coordination and thereby constituted unfair methods of competition under s.5 of the Federal Trade Commission Act. The Chairman of the Commission issued a strong dissent, and the decision is to be appealed to the courts. The decision, if sustained on appeal, could extend U.S. antitrust law to situations similar to ones addressed by the joint monopolization provision in the amendments to the Combines Investigation Act which were introduced in 1977 but not enacted.

S.5 (a)(1) of the FTC Act states that "Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful." The jurisprudence is not entirely clear as to how far the Commission can go in finding an anti-competitive situation unlawful when it would not be unlawful under the Sherman or Clayton Acts.

The case involved Ethyl Corp., E.I. Dupont de Nemours & Co., PPG Industries Inc. and Nalco Chemical Co., the first two having about 70 per cent of the market and the other two the remainder. The following practices were attacked:

- Their contracts with customers provide for a thirty day advance notice of a price change. The company initiating a price change (Ethyl or Dupont) would notify customers several days in advance of the required thirty days. This, according to the FTC, was to "test the waters". It provided time for the other producers to notify their customers of a similar increase to be effective on the same date, which they usually did. Otherwise the initiating producer had time to withdraw its announced increase.
- Their contracts with customers contained what has been called the most-facoured-nation clause stipulating that a customer would receive the best price given to any other customer. This made it almost impossible for the producers to compete by offering special discounts to some customers.
- Their pricing was strictly on a uniform delivered price basis, so that net prices of all suppliers to all customers were unaffected by geography.

A legal question which was raised was whether a practice which is not predatory or monopolistic can violate s.5 by facilitating interdependent behaviour such as price coordination even when there is no agreement which would make it unlawful under s.1 of the Sherman Act relating to conspiracies in restraint of trade. The respondents argued in the negative. The Commission concluded, however, that it "need not find an agreement in order to find unlawful practices which have the same general effect as horizontal agreements".

In considering whether the practices at issue were in fact unlawful in the circumstances of the case, the Commission took into account the structure and performance of the industry along with evidence of the actual effects of the practices. It concluded that the practices were unfair methods of competition but not unfair or deceptive acts or practices. It issued an order directing Ethyl and Dupont to modify their practices. No order was issued against the two smaller companies, which were found to have been followers rather than initiators and to have deviated to some extent from some of the practices.

It is expected that the Reagan-appointed Chairman, James C. Miller, will be in a position to control the majority of the Commission by the end of the year. That makes it unlikely that the new standard will be pursued vigorously in the near future. However, the decision could well be highly significant in the long run if it is sustained on appeal.

U.K.-U.S. DISPUTE ERUPTS OVER LAKE LITIGATION

The launching of a private antitrust suit in the United States involving defunct Laker Airlines has led to a serious dispute between the U.K. and the U.S., both of which share jurisdiction over some of the companies involved.

In November, 1982 the liquidator of Laker filed a civil suit in the U.S. against a number of American, British and European airlines as well as McDonnell Douglas. Damages of $1.7 billions are sought, alleging violations of the Sherman Act on the basis that Laker was driven out of business by fare cutting and by the placing of pressure on McDonnell Douglas to stop supporting Laker. Two of the defendants, British Airways and British Caledonian, obtained a temporary order from a British Court barring Laker from continuing with its suit in the U.S., but that decision was reversed on appeal, Laker, for its part, obtained a decision from a U.S. court that the case is to be heard in an American court.

In March it was revealed that the antitrust Division of the U.S. Department of Justice had empannelled a grand jury investigation of airlines on the U.S.-U.K. route. The British Government has objected strongly to the investigation on the ground that it is in breach of airline agreements to which both countries are parties, but so far without avail.

The British airlines have a substantial presence in the United States and they will undoubtedly be ordered to produce documents and witnesses for the grand jury; failure to comply could bring heavy penalties. The British, on the other hand, may well invoke their Protection of Trading Interest Act to prevent compliance. However, while the British could obstruct the investigation, they are hardly in a position to stop it except possibly through diplomatic means.

U.K. PROBES BID BY U.S. FIRM TO ACQUIRE ART AUCTIONEER

Britain's Trade Secretary, Lord Cockfield, overrode a recommendation of the Office of Fair Trading on May 4 and ordered a study by the Monopolies and Mergers Commission of a bid by General Felt Industries Inc. of the U.S. to acquire Sotheby's. Reasons given were concern about the impact of the proposed takeover on London's position in the international art market and Sotheby's position in that market. The bid lapses automatically pending completion of the study which will take some months. Sotheby's opposes the bid and may now be able to prevent it.

The decision to refer the bid to the Commission has been criticized by the British press. A political decision to reverse a recommendation of the Office of Fair Trading always raises questions, and this proposed takeover does not appear to be of great national significance or to be likely to affect competition adversely. Moreover, the decision adds to concerns that the legislation on mergers leaves too much discretion both to the political level and to the Commission. Decisions at both levels have become difficult to predict and there have been demands either for legislative change or for a clear statement of policy.

PUBLICATIONS NOTED

William G. Shepherd, "Causes of Increased Competition in the U.S. Economy, 1939-80", The Review of Economics and Statistics, Vol. LXIV, No. 4, Nov. 1982. This article will undoubtedly affect the perceptions which many have had of the competitiveness of the entire U.S. economy. Shepherd builds upon and extends to 1980 the work of Nutter and Einhorn who estimated that the effectively competitive share of the whole American economy had risen slightly between 1939 and 1958.

By way of background, it is useful to recall a description which Joe S. Bain wrote in 1959 of historical concentration trends in the United States:

> "In extremely rough terms, the following sequence of changes in concentration may be noted for the last eighty-five or ninety years: (1) starting with a relatively unconcentrated business structure after the Civil War, the economy experienced a marked increase in overall business concentration from then until the early 1900's (around 1905 or 1910), largely through a greatly increased concentration in most manufacturing industries. (2) From 1905 or 1910 until the middle of the 1930's, overall business concentration further increased significantly, but mainly because of a marked rise in concentration in the increasingly important public utilities sector of the economy, and, to a lesser extent, in the sector of the distributive trades. In spite of the various movements in various