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Department of Justice Opinion Letter

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Honorable Harley O. Staggers
Chairman
Committee on Interstate
and Foreign Commerce
House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

This is in response to your request for the views of the Department of justice on H.R. 13921 and H.R. 13922, which were introduced during the 95th Congress, and which we understand will be reintroduced in the 96th Congress. Both bills would amend the Federal Trade Commission Act to impose certain reporting requirements on United States entities with respect to restrictive business practices abroad. They would also enact other provisions to combat such practices.

H.R. 13921 would require a United States entity to report to the Federal Trade Commission (1) whenever such entity or its foreign subsidiary engages in restrictive business practices by reason of any foreign governmental requirement, or is directly or indirectly requested by a foreign government to engage in restrictive business practices, or (2) whenever a joint venture, in which the United States entity participates with a foreign concern, engages in restrictive business practices. The Federal Trade Commission would then be obliged to notify the Attorney General, the Secretary of State, and the Special Representative for Trade Negotiations of the activities reported to the Commission by the United States entity. Failure to report these activities to the FTC would subject the entity to a civil fine of up to $1 million, while any officer or director of the entity who knowingly fails to make the report would be subject to a fine of up to $25,000, with no right of indemnification. H.R. 13921 would also forbid courts from recognizing the act of state doctrine as a basis for declining to determine the merits

* This letter was submitted to the House Committee on Interstate and Foreign Commerce by Assistant Attorney General Patricia M. Wald on 23 April 1979.

of a case involving any of the federal antitrust laws.

H.R. 13922 is identical to H.R. 13921 in imposing reporting requirements on U.S. entities. However, the former bill would also direct the President to try to negotiate with the signatory countries of GATT an international agreement prohibiting restrictive business practices. By such agreement, each signatory country would be obliged to enact and enforce legislation forbidding persons subject to its jurisdiction from engaging in such practices. Moreover, H.R. 13922 would amend §301(a) of the 1974 Trade Act to authorize the President to impose certain trade sanctions on countries that either engage in restrictive business practices or directly or indirectly require U.S. entities to engage in such practices.

The Department of Justice shares with the sponsors of these bills their concern about anticompetitive practices in international markets and the important challenge to U.S. antitrust enforcement posed by increasing involvement of governments in the conduct of international trade. The problems of the nature and scope of antitrust enforcement in cases where foreign governments are implicated is a difficult one deserving careful consideration. It should at the outset be noted, however, that most nations are not as committed as the United States to competition and open markets as a principle of economic order. Indeed many countries, including some of our closest allies, frequently regard their encouragement of certain measures that might have anticompetitive effects as both appropriate and necessary for the orderly development of their respective economies. Furthermore, most nations object to the notion that another sovereign has the jurisdiction to enforce and adjudicate rules of law applicable to activities occurring outside that sovereign's territory. This objection to an "extraterritorial" application of one nation's laws to entities abroad, even if they are subsidiaries controlled by nationals of the prescribing state, is particularly strenuous when the law can be criminally enforced, as can the antitrust laws. There is no widespread acceptance of the United States' position with respect to jurisdictional claims over certain restrictive business practices abroad. We must therefore be mindful of considerations of comity and the need to minimize, when possible, the potential for conflict with a legitimately exercised right of a foreign sovereign.

The Department believes that notification, similar to that envisioned by H.R. 13921 and H.R. 13922 could indeed, as Congressman Gore noted in introducing the bill, help deter future foreign government-induced cartel activities by making such activities more transparent. A major obstacle to effective enforcement of

U.S. antitrust laws has been the clandestine manner in which participants in some recent international cartels joined together and operated. This obstacle would be substantially eroded if U.S. entities were required to report to U.S. antitrust agencies whenever privately directed or solicited, *e.g.*, through a foreign subsidiary by a foreign government, to engage in cartel-like activities substantially affecting U.S. commerce. The U.S. agencies would then be in a position to consult, if deemed necessary, with the foreign government to attempt to minimize the adverse effects on U.S. commerce. If necessary of course, they would be in a better position to institute legal proceedings against illegal activities.

While the Justice Department favors the concept of a reporting requirement as to cartel participation imposed on U.S. entities operating abroad, and agrees that it could go far toward eliminating secret cartels from world trade, several important problems raised by H.R. 13921 and H.R. 13922 prevent the Department from supporting the reporting requirement, or the bills as a whole, as presently drafted.

H.R. 13922 and H.R. 13921 introduce four methods of dealing with restrictive business practices in international trade and with the problem posed by government participation in such practices: (1) a notification system of restrictive business practices; (2) withdrawal of the act of state defense in antitrust actions; (3) an international agreement on restrictive business practices; and (4) amendment of the Trade Act to permit sanctions against countries that engage in restrictive business practices affecting the United States or require U.S. companies to engage in such practices. Each of these four methods will be considered separately.

Notification System

H.R. 13921 and H.R. 13922 if enacted would require U.S. entities to report to U.S. antitrust agencies whenever they are directed or solicited, *e.g.*, through a foreign subsidiary by a foreign government, to engage in anticompetitive restrictive business practices affecting U.S. commerce. However, a notification system of this type raises the following concerns: First, an insufficiently focused notification requirement for companies engaged in or aware of restrictive business practices represents a significant departure from longstanding U.S. antitrust enforcement practice and philosophy. It could unduly burden both the international business community and law enforcement agencies. Considerable antitrust resources could be expended reviewing the material submitted, and failure to act within a certain time may raise a question of estoppel or may

significantly impede the business community from proceeding productively with international business arrangements. The single exception to the traditional non-notification approach to antitrust enforcement has been premerger notification. There, however, after lengthy study of the issue, the desire of both the enforcement agencies and the parties to mergers for a prior determination of legality, and the difficulty of undoing the effects of the merger once it has already taken place, were held to be overriding considerations.

Second, a reporting requirement may raise a problem with friendly governments. Such requirements could endanger the level of cooperation the Department of Justice has already reached with some friendly countries and may only exacerbate tensions that exist with others over U.S. anitrust enforcement. It can be anticipated that a reporting requirement would conflict with many foreign secrecy laws if foreign sovereigns are involved. This, of course, would put many U.S. corporations in a difficult middle ground between conflicting laws.

Third, H.R. 13921 and H.R. 13922 offer an excessively broad list of restrictive business practices. A more appropriate definition of the term would focus on government-initiated price fixing, production quotas, market restrictions and group boycotts to be implemented by commercial entities in international markets. These practices generally fall within the scope of cartel-like practices likely to have a significant adverse impact on U.S. commerce.

The notification requirement need not be as broad as the full jurisdictional reach of U.S. antitrust laws. Logically, therefore, notification should not *exceed* the scope of underlying U.S. jurisdiction. However, several of the practices referred to in the bills appear to do just this. For example, "discriminating against particular enterprises" appears to refer to the Robinson-Patman Act, which does not apply to acts committed abroad. The notification system would therefore be broader than underlying U.S. law. For another example, the bills' reporting requirement would apply in any case in which a U.S. corporation or its foreign subsidiary engages in a restrictive business practice because of a requirement of the government of a foreign country, or is requested to engage in such practices by the government of the foreign country. No provision is made in the bills limiting the reporting requirement to those practices as defined that have substantial and foreseeable effect on U.S. commerce.

As stated in the Department's *Antitrust Guide for International Operations,* judicial precedent has established that "the U.S. anti-

trust laws should be applied to an overseas transaction when there is a substantial and foreseeable effect on the United States commerce; and consistent with these ends, it should avoid unnecessary interference with the sovereign interests of foreign nations" (at 6-7). In order to be consistent with the Sherman Act, any reporting requirement should be limited to those restrictive business practices that have some substantial and reasonably foreseeable effect on U.S. commerce.

Fourth, the bills appear to impose a strict standard of liability for failure to report, even though there may be instances in which an enterprise was unaware that a foreign government had "indirectly required" its participation in a restrictive business practice. A possible solution to this problem would be a triggering mechanism whereby liability would attach only if a management executive of an entity knew or had reason to know of the reportable event. There could, however, be a presumption of knowledge where evidence of notice to the entity existed. The entity could then have the burden of rebutting this presumption. The problem of adequate notice may be particularly severe in the case of joint ventures in which a company has only a minor interest, but would be required by the bills to report any restrictive business practices in which the joint venture engages, even if there had not been any foreign government involvement. Such a statutory requirement may be inequitable, particularly since officials of the U.S. entity may not have knowledge of the restrictive business practices of its foreign joint venture, even though the entity would nevertheless be exposed to a possible $1 million fine for failure to report.

Fifth, the reporting requirements of the proposed legislation include not only restrictive business practices that are the result of secret directives or requests by a foreign government to a U.S. entity or its foreign subsidiary, but also restrictive business practices resulting from government regulations or communications made in the public sector and thus open for public inspection. Inasmuch as one of the primary objectives of H.R. 13921 and H.R. 13922 is to remove the secrecy frequently surrounding the formation and operation of international cartels, it would not seem necessary to require U.S. entities to report public regulations or communications.

Finally, although the FTC and the Justice Department have concurrent antitrust jurisdiction over international resrictive business practices affecting U.S. commerce, the Department over the years has developed a particular expertise and has devoted greater resources to investigating and prosecuting such practices. In mat-

ters of a *criminal* antitrust nature, the Department has sole enforcement responsibility. Consequently, it would be appropriate for the U.S. entity to be required to notify the Department at the same time it submits notice to the Federal Trade Commission. Such a scheme could be modelled after that contained in the Hart-Scott-Rodino Antitrust Improvements Act of 1976 that calls for simultaneous notification to the Justice Department and FTC regarding certain premerger activities.

In sum, the Department does not support enactment of the reporting requirements in H.R. 13921 and H.R. 13922, but does believe further study into the need for and scope of a reporting system is warranted.

Act of State

Both bills have an identical provision (Section 2 of H.R. 13921 and Section 4 of H.R. 13922) to prevent courts from declining to make a determination on the merits in antitrust cases on the grounds of the "Federal act of state doctrine."

The bill's reference to the "Federal act of state doctrine" is undesirably ambiguous. One meaning of the "act of state" doctrine is the holding in certain cases, such as *Sabbatino,* that U.S. courts will not examine whether a foreign expropriation of property violates customary international law.[1] Some courts have expanded the doctrine to bar examination of whether a foreign act of state is legal or illegal under that foreign country's laws.[2]

Most antitrust cases, even those involving foreign commerce, are not against sovereigns[3] and do not involve a challenge to the validity of a foreign act of state or a contention that such act was contrary to international law. On the other hand, in many antitrust cases, the defense is raised that the injury to competition resulted from the sovereign act of a government, whether Federal, State or foreign, and is thus not cognizable under the Sherman Act, regardless of whether such act of state was somehow induced by the defendant. When such act of state is of a sovereign and discretionary nature and is within the power and jurisdiction of the

1. Banco National de Cuba v. Sabbatino, 376 U.S. 398 (1964).

2. *See* Interamerican Refining Corp. v. Texaco Maracaibo, Inc., 307 F. Supp. 1291 (D. Del. 1970).

3. In the event of an antitrust suit against a foreign government or agency, the issue of the standards to apply has already been partially clarified by the Foreign Sovereign Immunities Act of 1976.

state or nation that did it, U.S. courts and the Antitrust Division may accept such a defense as fitting and proper. One ground for this determination is that the Sherman Act is aimed at *commercial* restraints motivated by business, not public, motives.

Thus, if on the one hand, the ambiguous language in these bills were interpreted to require courts to examine the merits of any *Sabbatino*-type "act of state" defenses, this would probably have very little significance, and would be raised in very few antitrust cases. If the language were interpreted to cast doubt on all "acts of state" as Sherman Act defenses, we believe such result would be undesirable. The Antitrust Division is working to keep the defense within proper bounds, but we believe this can best be done on a case-by-case enforcement or adjudicative basis, since this area requires fine distinctions based on detailed factual analysis. Moreover, refusal to apply American antitrust law may be mandated not only by an "act of state" doctrine but also by considerations of comity, which some courts have held should be a factor in determining the application of our antitrust laws to a foreign transaction.[4]

There are certain difficulties with the antitrust application of the act of state doctrine development by a few lower courts. We do not believe, as a few decisions suggest, that the purpose of this doctrine was to bar all judicial scrutiny of the actions of foreign governments or prevent examination of the circumstances leading to such actions. Such dispassionate examination need not call into question the legality or legitimacy of those acts, but ought to permit a court to seek a factual understanding of the nature and genesis of those actions in order to determine whether an antitrust charge will stand, not against the foreign government, but against those allegedly procuring its actions.

This is the position which the Department of Justice has espoused in its *amicus curiae* brief to the Supreme Court in *Hunt* v. *Mobil Oil Corporation.*[5] The Second Circuit there has held that the act of state doctrine prevented inquiry into the causal link between expropriation of the plaintiff's oil concessions and alleged actions taken by the defendants to procure the seizure. The Supreme Court denied certiorari in that case; but we do not accept the validity of the Second Circuit rule. In antitrust act of state cases,

4. *See* Timberlane Lumber Co. v. Bank of America, 549 F.2d 597 (9th Cir. 1976).

5. 550 F.2d 68 (2d Cir. 1976), *cert. denied,* 434 U.S. 984 (1977).

there is always an issue as to whether the antitrust injury was caused by the act of a sovereign or the act of private persons. It was the position of the Department of Justice that mere presence of a sovereign act in the factual chain of anticompetitive conduct should not preclude a court from inquiring into the responsible cause of the relevant injury.

As the foregoing discussion demonstrates, the Department is concerned with any overly broad application of the act of state doctrine; nevertheless we believe that the solution offered by H.R. 13922 is itself overbroad and inappropriate at the present time.

Agreement on International Prohibitions Against Restrictive Business Practices

Section 2 of H.R. 13922 would require the President to convene a conference of the signatory countries of the General Agreement on Tariffs and Trade for the purpose of reaching an agreement on international prohibitions against restrictive business practices. The Justice Department fully supports the idea of reaching such an agreement. However, we believe that an undertaking as required by H.R. 13922 would duplicate existing multilateral efforts to reach an international agreement on restrictive business practices.

The Antitrust Division of the Justice Department heads the U.S. delegation to the OECD Committee of Experts on Restrictive Business Practices that has been working for the past 12-15 years to elaborate minimum competition standards, including standards for multinationals. Work on developing international antitrust principles has also been done at the United Nations level within the UN Conference on Trade and Development (UNCTAD). UNCTAD has two committees concerned with competition principles, one to work on rules and principles on restrictive business practices, and the other to develop a code of conduct on transfer of technology. In addition, the Commission on Transnational Corporations, established as an arm of the Secretariat of the United Nations, has begun work on a code of conduct for multinationals that will address a broad range of corporate behavior.

There has been modest success in all these fora. At the OECD, the set of principles for multinationals adopted in 1976 is currently undergoing review and the OECD Council Recommendations on International Cooperation in Antitrust Matters are being revised and strengthened. The code of conduct on transfer of technology, developed in UNCTAD, currently is the subject of a U.S. negotiating conference, and it is expected that there will be a multilateral

negotiating conference on the set of principles and rules on restrictive business practices in the fall of 1979. Although it has been the U.S. position that the principles and rules or codes of conduct should be voluntary guidelines, it is possible that these documents will affect the development of national legislation on restrictive business practices without there being any requirement that they be enacted into national legislation, as H.R. 13922 proposes.

In spite of the considerable activity in this area, reaching an international agreement in the area of restrictive business practices is a difficult and slow process. Widely divergent views are held by members within the international community regarding the perceived need for prohibitions against certain business practices which the United States and a few other nations have categorized as anticompetitive and illegal. Differences also remain on issues such as whether all transactions between a subsidiary and parent should be treated the same for antitrust purposes as those between unaffiliated enterprises and on the issue of special treatment for the enterprises of developing countries. The considerable flexibility in our negotiation stance, required in order to take into account the interests of other nations, may be lost if reaching an agreement is necessary under the law. It has not appeared practical to any developed country that binding rules can be acceptably negotiated as a first step. Agreement on implementation must occur gradually when and if nations converge toward free market principles and acceptance of fair international procedures.

Constitutional limitations also militate against enactment of this provision of H.R. 13922. The provision for an international agreement can be read as an attempt to dictate that an agreement on restrictive business practices shall be made by executive agreement and shall be subject to the bill. Although Congress, if it wishes, can authorize the President to enter particular kinds of executive agreements, it cannot deprive him of the option of concluding treaties which, of course, are only subject to the requirement that they receive the advice and consent of the Senate. (Art. II, §2, U.S. Const.)

Amendment of the Trade Act

Section 3 of H.R. 13922 would amend the Trade Act of 1974 specifically to permit the President to impose trade sanctions against countries that engage in restrictive business practices affecting United States commerce or require United States companies to engage in such practices. Section 301 of the Trade Act of 1974, 19 U.S.C. 2411(a)(2), permits the President to take certain

retaliatory action already against the trade of other countries whenever he determines that they are engaged in "discriminatory or other acts or policies which are unjustifiable or unreasonable and which burden or restrict United States commerce." Prior to the exercise of such power, the President must provide an opportunity for the presentation of views concerning those restrictions, acts or policies. Based upon the adequacy of the existing statute, it is the Justice Department's view that no amendment of the Trade Act is necessary to accomplish the purpose of Section 3 of this bill.

Conclusion

In sum, the Department of Justice supports the main purpose of these bills, that is, expeditious exposure of, and effective opposition to, secret cartel arrangements supported by foreign governments that cause direct injury in U. S. commerce. The Department of Justice also welcomes support for accelerated efforts toward international resolution of restrictive anticompetitive business practices. However, the Department, for the reasons stated above, recommends against enactment of H.R. 13921 and H.R. 13922 in their present forms.

We do believe the continued exploration and discussion of the need for enactment of a reporting requirement for foreign, governmentally-involved, cartels would be worthwhile. We have also noted the possible desirability of a Congressional resolution favoring negotiation of international antitrust rules.

The Office of Management and Budget has advised that there is no objection to the submission of this report from the standpoint of the Administration's program.

Sincerely,

(Signed) Patricia M. Wald
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Assistant Attorney General