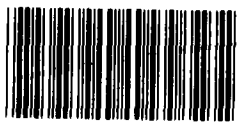
UNITED STATES GENERAL ACCOUNTING OFFICE
WASHINGTON, D.C. 20548

ENERGY AND MINERALS DIVISION

B-204468

October 7, 1981



The Honorable James D. Santini
Chairman, Subcommittee on Mines and Mining
Committee on Interior and Insular Affairs
House of Representatives

Dear Mr. Chairman:

Subject: The Impact of Antitrust Enforcement on the Country's Minerals Posture (EMD-82-11)

Increasing concern has been expressed about the ability of the U.S. minerals industries to develop, process, and obtain continuous access to minerals needed to satisfy the Nation's industrial requirements. In response to this concern you introduced H.R. 3364 in the 97th Congress. The bill proposes the creation of an executive branch Council on Minerals and Materials and several other measures that would help to establish a national minerals policy.

Title VIII of the bill would require the Attorney General to review the U.S. antitrust laws, rules, and regulations to determine their effect on the productivity and profitability of the domestic mining and minerals industries. This title addresses the views of some critics that U.S. antitrust policy has at times been counterproductive, has been too concerned with domestic market concentration, and has reduced the ability of the U.S. minerals industries to achieve adequate economies of scale or to take advantage of other cooperative arrangements that would allow them to better compete with overseas competitors.

OBJECTIVES, SCOPE, AND METHODOLOGY

In connection with title VIII, you requested on July 1, 1981, that our Office do a preliminary review of antitrust enforcement as it relates to the minerals industries, in order to help the Subcommittee draw conclusions on the feasibility of a broader-based study. (See enc. IV.) As agreed with the Subcommittee, we limited our review to two steps: determining the nature and level of recent antitrust enforcement directed toward attempts of U.S. nonfuel minerals firms to undertake cooperative actions such as mergers, joint ventures, and overseas consortia; and surveying and summarizing the perceptions of principal minerals industry officials and other industry experts about antitrust

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enforcement. 1/ For the most part, our review did not examine investigations involving alleged per se violations; these clearly illegal activities include price-fixing, boycotting, and market allocations.

We interviewed Federal antitrust enforcement officials at the Department of Justice and the Federal Trade Commission (FTC), and examined their records of recent antitrust investigations and cases undertaken in the minerals area. Our industry survey included business officials, investment bankers, trade association officials, and academics. We contacted representatives of 19 minerals firms, including large aluminum, copper, lead, and zinc producers. We also talked to a trade representative of the steel industry and several private antitrust lawyers.

FINDINGS, CONCLUSIONS, AND AGENCY COMMENTS

Briefly, our review found that there have not been a significant number of nonfuel-minerals-industry-related antitrust cases litigated at FTC or Justice over the last several years. (See enc. I, p. 7.) In addition, officials we interviewed in the nonfuel minerals industries generally do not view antitrust enforcement as a serious obstacle to their activities. (See enc. I, p. 9.) Although our findings do not rule out a more detailed study of antitrust impact on the minerals industries, as title VIII of H.R. 3364 proposes, we believe such a study would encounter two major difficulties: methodology that would be hard to develop, and results that could not readily be applied to all minerals industries because of each industry's uniqueness. (See enc. I, p. 11.)

We do, however, mention two matters related to antitrust enforcement which the Subcommittee may wish to examine further to determine whether they impact on the minerals industries and U.S. industries in general: the Business Review Procedure has not been accepted by private industry, and private, treble-damages suits are proliferating. (See enc. I, pp. 10 and 12.)

The Department of Justice and FTC's Bureau of Competition commented on this report, and agreed with our overall findings. Their full comments are included in enclosure II. Enclosure I presents a background discussion on antitrust enforcement, followed by our detailed findings and conclusions. Enclosure

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1/Our review focused mainly on the major metal mining and metal processing industries classified under S.I.C. codes 10 and 33.

III summarizes several antitrust investigations and cases cited by minerals industry spokesmen as examples of antitrust problems.

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As arranged with your office, unless you publicly announce its contents earlier, no further distribution of this report will be made until 15 days from the date of issuance. At that time, we will send copies to the Department of Justice, the Federal Trade Commission, and other interested parties, and will make copies available to others upon request.

Sincerely yours,

for J. Dexter Peach
Director

Enclosures - 4

 ENCLOSURE I

IMPACT OF ANTITRUST ENFORCEMENT ON THE COUNTRY'S MINERALS POSTURE

BACKGROUND

Federal antitrust law dates from the Sherman Act of 1890. The Clayton and Federal Trade Commission Acts, the other two basic antitrust laws, were passed in 1914. These three laws were legislated in an era of powerful oil, railroad, and other corporations, or "trusts." They have been occasionally amended over the years, but still provide the authority for most antitrust enforcement today. 1/ The laws are general in language, and therefore actual policy directed at promoting competition and controlling monopolistic behavior affecting U.S. domestic and international commerce has been established to a large degree over the years by court decisions and enforcement agency policy.

Antitrust enforcement is a combined Federal, State, and private effort. At the Federal level, the Department of Justice and FTC coordinate and share most of the general enforcement responsibilities. In addition, the International Trade Commission investigates and takes enforcement actions against unfair competition in import trade. States and private parties may also sue in Federal district courts seeking treble-damages civil judgments against alleged antitrust violators. Intrastate antitrust suits may also be brought in State courts, and many States have their own antitrust legislation and enforcement efforts.

Department of Justice enforcement

At Justice, antitrust enforcement is the task of the Antitrust Division, which has a staff of 939, and a proposed fiscal year 1982 operating budget of $49.6 million. Justice defines the Division's mission as the promotion and maintenance of competition in the American economy, and the Division's principal functions include investigating possible civil and criminal antitrust violations, conducting grand jury proceedings, preparing and trying cases, prosecuting appeals, and negotiating and enforcing final judgments.

Within the Division, 11 Washington, D.C., headquarters offices and 8 field offices carry out various kinds of investigations and litigation related to individual commodities or services. Three

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1/ Pertinent provisions of the acts are as follows. The Sherman Act, section 1, prohibits restraints of trade affecting U.S. domestic and international commerce; section 2 prohibits domestic and international attempts to monopolize trade. The Clayton Act, section 2, as amended by the Robinson Patman Act, prohibits price discrimination; section 3 prohibits certain tying and exclusive dealing arrangements; section 7 outlaws mergers and acquisitions which would tend to create a monopoly or substantially lessen competition. The Federal Trade Commission Act, section 5, has broad provisions prohibiting such practices as price-fixing, boycotts, and anticompetitive mergers.

ENCLOSURE I

of the headquarters offices--the Special Trial Section, the Foreign Commerce Section, and the General Litigation Section--and occasionally the field offices do antitrust work in the nonfuel minerals area.

Investigations of possible antitrust violations arise from several sources--including complaints from individuals and firms, media information, referrals from other executive branch agencies or the Congress, and information collected and developed by the Department itself. During a preliminary inquiry or investigation, lawyers and staff economists analyze legal and product market data, culminating in either further investigation or closure of the inquiry. Investigations often take at least several months to complete, and may eventually result in the filing of formal civil complaints or criminal indictments. 1/

To facilitate investigations of proposed mergers and acquisitions before their consummation, a pre-merger notification system was mandated by the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (15 U.S.C. 18a). Title II of that act requires the participants in large merger transactions to notify both the Division and FTC and provide them with certain business data.

The Division has also established the Business Review Procedure as a means for business to avoid potential pitfalls. By written request to the Division, businesses proposing to undertake an activity may set in motion a Division staff investigation on the legality of proposed business conduct. A written response from the Division describes its present enforcement intentions with respect to the activity and acts either to reassure those proposing the undertaking or warns them not to pursue it. (FTC employs a a similar procedure.)

Firms are also able to weigh proposed or ongoing cooperative transactions against merger, research joint venture, and international guidelines published by the Division. These guidelines set forth standards, in terms of market share and illustrative cases, by which the Division judges whether or not to challenge various kinds of cooperative corporate behavior.

FTC enforcement

At FTC, enforcement of the Clayton and FTC Acts is the task of the Bureau of Competition. The Bureau's fiscal 1982 budget is expected to fall from its 1981 amount, $33.9 million. FTC has proposed a 10-percent cut for the agency as a whole. Present staffing is about 800.

1/A civil antitrust case brought by the Department is different from a criminal one in that its intent is not punishment (i.e., fines and/or imprisonment), but a prospective enjoining of illegal practices.

ENCLOSURE I

The Bureau's stated mission is to "detect and * * * eliminate impediments to the operation of competitive forces in the markets for goods and services." Its activities include investigating possible antitrust violations, filing formal complaints, prosecuting civil actions before administrative law judges, and issuing cease-and-desist orders. Most of FTC's merger and joint venture investigations directed at the minerals industries have developed in the office of the Bureau's Assistant Director of Non-Petroleum Energy and Natural Resources.

The Bureau's antitrust investigations arise from sources similar to those mentioned for the Antitrust Division. Preliminary investigations proceed for up to 100 staff-hours or 90 days, after which further work must be approved by a Bureau evaluation committee chaired by the Bureau Director. The Commission's staff also has a Merger Screening Committee that plays a central role in reviewing mergers, acquisitions, and joint ventures. At the Bureau, as at the Division, a formal investigation may proceed for several months, requiring Bureau of Competition staff lawyers and economists of FTC's Bureau of Economics to accumulate and evaluate legal and business market data. On the basis of such data, formal complaints may be filed.

Recent patterns of enforcement

Federal antitrust laws for the most part allow great latitude for interpretation and enforcement. Consequently, antitrust enforcement policy to some degree reflects the views of each administration. During the Carter Administration, for example, Justice's and FTC's antitrust enforcement profiles were rather high. (See p. 9.)

As national economic problems grew through the 1970s, however, and as U.S. industries began to have greater and greater difficulties competitively, economists and other antitrust analysts increasingly questioned the effectiveness of U.S. antitrust enforcement policy. Some observers assert that business efficiency would actually be increased by cooperative business arrangements which have been traditionally judged to be anticompetitive.

The present administration apparently favors a more relaxed approach to antitrust enforcement, especially in relation to mergers. The Department of Justice contends that this has not facilitated recent large mergers, several of which have involved large energy and minerals companies. Further, the new head of Justice's Antitrust Division has announced that he will change the market concentration criteria in the agency's merger guidelines. The new guidelines may lessen the prospect of Government litigation against most vertical and conglomerate mergers and some horizontal mergers. In addition, FTC's Chairman-designate has stated that the agency should concentrate more on horizontal antitrust cases and not on "bigness is bad" theories. The Bureau of Competition

ENCLOSURE I

is facing cutbacks in its proposed fiscal 1982 budget, and several of its most publicized recent antitrust cases have shown signs of less aggressive enforcement.

ANTITRUST ENFORCEMENT DIRECTED AT THE MINERALS INDUSTRIES

Industries are concentrated and capital-intensive

The nonfuel minerals industries are each somewhat unique. Each mineral has its own distinct properties and final uses. Location of mineral resources, mining and processing methods, and competitive market characteristics all vary. However, the industries are comparable in several ways, some of which have made them likely objects for antitrust investigations. First, they are generally concentrated among a few large firms. For example, 11 companies produce over half of the Free World's copper, and 7 produce nearly half of its lead. Three firms account for 62 percent of U.S. primary aluminum production, and the U.S. steel and zinc industries are similarly dominated by a few large firms. The industries' concentration is related to their capital-intensive nature, involving long lead times until new supplies can be marketed. The Bureau of Mines estimates 4 to 6 years are needed for a new mine to be developed to full production, not counting exploration.

Several other characteristics are also typical. The companies are often vertically integrated. Many companies have separate divisions handling exploration and development; mining, smelting, and refining; and primary fabrication. In addition, the need to obtain access to global mineral resources has led, in many cases, to the development of multinational corporate entities, and many of these corporations are involved in the production and distribution of more than one metal or mineral. For example, the Anaconda Company (now a subsidiary of the Atlantic Richfield Company) produces copper, aluminum, lead, zinc, gold, and silver. The American Smelting and Refining Company (Asarco) produces these six metals plus tin and molybdenum.

Another industry characteristic is that the prices of some metals are influenced by volatile commodity market trends, mainly in the London and New York market exchanges. This fact helps explain companies' frequently expressed need for price stability in connection with their business risks involving long lead times. A complicating factor is that, as mentioned, each commodity is in a sense unique, so that problems and possible remedies relative to one mineral may well not be applicable to others.

Because of the huge investments involved in developing minerals, companies oftentimes undertake international joint ventures.

ENCLOSURE I

Two examples are the Southern Peru Copper Company, whose joint owners are Asarco, the Phelps Dodge Corporation, the Newmont Mining Corporation, and the Marmon Group; and Jododex Australia Pty., Ltd., a miner of copper, lead, zinc, and silver, which is jointly owned by Phelps Dodge and the St. Joe Minerals Corporation. With the exception of the United States, host national governments often join in the ventures with companies. One of the risks involved is that occasionally a country will take total control of the venture through nationalization.

We did not find extensive data on the number of joint ventures pursued recently by minerals firms. However, for the year 1978, FTC recorded 114 new joint ventures, 9 of which involved at least one minerals firm and 5 of which were international ventures. FTC's more detailed merger/acquisition figures for all U.S. industries also show considerable merger activity in the minerals industry during the period 1973-78, especially in the area of conglomerate mergers:

Domestic Mergers and Acquisitions
1973-78 (note a)

	Metals & mining mergers				
	Horizontal	Vertical	Conglomerate	Total	All industries
1973	2	2	2	6	64
1974	0	1	2	3	62
1975	0	1	5	6	59
1976	1	2	8	11	81
1977	2	1	10	13	100
1978	2	0	4	6	110
Total	7	7	31	45	476

a/Acquired company had assets of at least $10 million.

In 1981, partly as a result of relaxed antitrust enforcement, as well as economic factors, merger activity may well be increasing over these levels. Several large minerals companies have been subject to merger proposals by firms outside of the industry.

Federal enforcement directed at the minerals industries over the last several years

The 1970s were an active antitrust enforcement era, with Federal antitrust enforcement officials pursuing new interpretations of the law regarding conglomerate mergers and potential entrants into markets. In 1977, the Assistant Attorney General for Antitrust and the FTC Chairman announced that they planned to pursue "shared monopoly" cases based on the theory that competition is

restricted in concentrated markets where a few firms are dominant. This theory holds that a few large firms act as a monopolistic force in the market place even if they do not explicitly combine to set prices, or engage in other forms of illegal activity.

The Assistant Attorney General said the Antitrust Division's shared monopoly focus would be on industries with dangerous levels of concentration and questionable performance. In line with these purposes, 343 industries in which 4 or fewer companies controlled 40 percent of the market were screened by Justice. Some minerals industries required no further scrutiny, but because of their market concentration, the steel, iron ore, aluminum, and other minerals industries came under investigation by the agency for possible collusive behavior.

In addition, in 1978 a Justice official described the range of the Antitrust Division's more traditional Sherman Act enforcement efforts in the minerals area as follows:

> "There has been a qualitative increase in the activity of our enforcement program with respect to the minerals industries. Although the current copper investigation has * * * been terminated, we are engaged in several active investigations. There is a current civil investigation of the domestic aluminum industry proceeding in the Division.
>
> "There are current civil investigations of international zinc production, the international platinum industry, and the phosphate fertilizer industry. There are criminal grand jury investigations currently proceeding with respect to the sulfur industry, the nitrogen industry, and the uranium industry. No conclusion has been reached as to liability or whether in fact there have been antitrust violations."

Although these investigations no doubt caused disruptions for individual companies in terms of grand jury preparation and participation, information collection, and legal costs, few minerals-related cases were actually litigated. (See p. 7.) The major effort to find a prosecutable shared monopoly case ended without one ever being brought to court.

Our interviews with FTC and Justice antitrust officials and our examination of Federal antitrust enforcement data (from 1973 to the present) for the metal mining and primary metal processing industries indicated that although the market concentration within these industries attracts attention, especially in the processing industries, antitrust enforcement efforts have not seriously limited the cooperative business activities of the minerals industries, especially recently. We found that:

--There have not been a large number of nonfuel-minerals-related antitrust cases litigated at FTC and Justice. The large majority of investigations initiated were closed

in the investigation stage. However, some investigations/cases lasted several years. For example, at FTC, two minerals merger investigations begun in 1973 were still open in compliance as of February 1981.

--Enforcement related to minerals joint ventures has been minimal at both agencies.

The following table shows the number of investigations/cases opened by FTC and Justice in the metal mining and primary metal processing industries from 1973 to 1981:

Investigations/Cases Opened

	Mergers		Joint ventures		Other (note a)		
	FTC	Justice	FTC	Justice	FTC	Justice	Total
1973	4	1	0	0	0	2	7
1974	2	0	1	0	3	3	9
1975	2	0	1	1	1	2	7
1976	2	0	1	0	4	2	9
1977	1	1	1	0	4	3	10
1978	1	0	0	0	0	9	10
1979	6	8	0	0	0	9	23
1980	5	2	1	1	4	3	16
1981	b/0	c/2	b/0	c/0	b/1	c/0	3
Total	23	14	5	2	17	33	94

a/This category includes investigations/cases examining interlocking directorates, price-fixing, and other per se violations, and cases we could not classify.
b/As of Feb. 13, 1981.
c/As of Mar. 9, 1981.
Source: FTC and Justice.

As indicated by the table, the total antitrust enforcement caseload related to metal mining and processing increased in the latter part of the 1970s. In addition, the merger caseload increased in 1979 at both FTC and Justice. Since then, investigations have decreased at Justice, and to a lesser extent at FTC. The joint venture caseload has remained small at both agencies over the 9-year period.

Most of the investigations initiated by FTC and Justice never reached litigation or other formal enforcement proceedings. Of the 23 minerals merger investigations/cases opened by FTC in 1973-81, only three resulted in either litigation or a negotiated consent order between FTC and the private parties. The other 20 investigations were either closed in the investigative stage (14) or remained open as of February 1981 (6). For Justice, the figures are similar. In fact, of 14 minerals merger investigations opened, none was litigated. All were either closed

in the investigative stage (11) or remained open investigations (3) as of March 1981.

It should be noted, however, that any investigation initiated by either FTC or Justice could have had a chilling effect on the proposed merger activity. We did not examine individual case files to determine the number of investigations that were discontinued because the companies did not pursue announced merger plans.

Private litigation

Antitrust law, in addition to providing for Federal enforcement, permits any private person suffering damages as a result of antitrust violations to sue offenders in Federal district court and recover three times the actual damages. Our review showed that such private cases account for by far the largest number of antitrust cases filed.

Federal suits may be a factor in "triggering" some private suits. Private plaintiffs sometimes file for damages after learning that a Federal agency is investigating possible antitrust violations by one of the plaintiff's competitors. More often, customers of large firms may regard themselves as victims of alleged antitrust violations, and may file separate suits against the same defendant, building possible liability upon conviction into the millions of dollars. Our discussions with Federal and private officials indicate that such potential liability is a powerful deterrent to firms that are weighing the antitrust implications of their proposed activities.

The number of private antitrust suits filed has burgeoned since the 1960s. In 1960, 228 were filed in U.S. district courts. As the following table shows, in the 1970s the totals grew far higher. Out of all antitrust suits filed in Federal district court in the 1973 to 1978 period, over 90 percent in each year were private filings:

	Government-filed		Private-filed	Percent private
	Civil	Criminal		
1973	54	18	1,152	94
1974	40	24	1,230	95
1975	56	36	1,375	94
1976	51	19	1,504	96
1977	47	31	1,611	95
1978	42	30	1,435	95

Source: Annual Report of the Director of the Administrative Office of the U.S. Courts, 1978.

Information on the nature of private suits is not readily available. Our study of those statistics available indicates that about 3 percent of the private suits are in the nonfuel minerals area. 1/ Our conversations with business executives (see below) did not uncover any significant cases related to minerals. However, officials did express concern about the magnitude of recent damage awards in other industries, and added that the potential for such large, financially disastrous awards encourages out-of-court settlements with plaintiffs even though a company might legitimately believe that it has not violated antitrust statutes.

INDUSTRY PERCEPTIONS ABOUT ANTITRUST ENFORCEMENT

We asked business officials, private antitrust lawyers, and other knowledgeable observers of the minerals industries how they perceived antitrust enforcement in general and what aspects were especially troublesome. Representatives of mining and mineral processing companies were questioned about how antitrust law has affected the companies' ability to form joint ventures, to merge, and to compete with foreign competitors. In addition, we tried to elicit specific examples in which antitrust concerns inhibited business decisionmaking.

The reactions to our survey questions varied, but generally antitrust law enforcement was not perceived to be a major barrier to the minerals industries' activities. It appears that the consideration of antitrust enforcement is an element thoroughly ingrained in corporate decisionmaking. An undertaking involving clear antitrust violations is dropped outright at an early stage.

Specific examples illustrating how antitrust had a negative impact on the competitiveness of the nonfuel minerals industries were not readily provided. Of those examples cited (see enc. III), it was not apparent in most cases whether or not antitrust considerations impeded industry performance or were the primary factor influencing business decisions.

We cannot, therefore, draw firm conclusions about the degree of unfair enforcement or deterrence present in the cases or examples mentioned to us. On the surface, however, it appears that antitrust was only one of several factors in most of the cited cases that determined the course of action pursued by business. A full evaluation of the Government's antitrust actions would require indepth analysis of each cited example--weighing the advantages of increased efficiency to the industry and to the parties directly involved against the effect on the market price and on consumers. The companies would have to provide additional

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1/"Federal Filings Alert," Want Publishing Company, Washington, D.C., 1980.

information for such an evaluation, but their cooperation does not appear likely. Further, such analyses would necessarily involve hypothetical situations relating to foregone opportunities, where costs or benefits could not be readily identified. Specific, clear links to antitrust concerns motivating a given business decision would be very difficult to document.

We do not discount the real concern that corporate executives, especially those in large firms, feel about potential antitrust enforcement. However, they gave us the impression that they have learned to live within the constraints of the law. Business alternatives that would blatantly raise antitrust challenges are dismissed out of hand--without documention of the degree to which antitrust considerations figured in the dismissal. On the other hand, joint venture arrangements involving more than one company and perhaps the host government are often pursued, because the risk and size of the capital investment involved are too great for one firm to bear alone. The antitrust enforcement agencies apparently recognize the need for cooperative arrangements to meet large long-term risks in these industries, and have not pursued enforcement actions.

Business leaders reached a consensus regarding two areas related to antitrust enforcement. By and large they give little credence to the Business Review Procedure, and note that it does not protect against later Government or private challenges. Further, they are greatly concerned about the large awards generated by private suits in other industries.

SUMMARY AND CONCLUSIONS

Recently interest has increasingly focused on the ability of the U.S. minerals industries to develop and process the resources necessary to meet our society's requirements for growth and security. Correspondingly there has been a growing concern in recent years over the efficiency and enforcement of antitrust laws. Critics have stated that U.S. antitrust policy has been counterproductive at times, has been too concerned with domestic market concentration, and ultimately has reduced the ability of U.S. firms to achieve adequate economies of scale, or to take advantage of other cooperative arrangements that would allow them to compete with their overseas competitors.

These concerns have led to proposals that the enforcement of antitrust laws be relaxed for the minerals industries. These industries are more highly capital-intensive and more cyclical, require longer-range planning, and involve greater financial risk than many industries. Advocates for a more relaxed antitrust policy argue that horizontal mergers and joint ventures would provide the required capital and spread the risk of developing larger mineral resources. In their view the resulting "bigness"

of companies and concentration of industry would not need to be feared since the commodities have a world market and U.S. firms could not control it.

Our review of Federal antitrust enforcement directed at the minerals and mining industries found no evidence to support such proposals. Briefly, we found that:

--Antitrust enforcement agencies keep a close eye on the minerals industries because of their market concentration, but in actuality few merger cases have been litigated over the past 9 years, and almost no joint ventures have been investigated.

--Business officials and other industry experts generally do not view antitrust considerations as a serious obstacle to industry activities. Joint ventures are relatively common. Business people are accustomed to working within the constraints of antitrust.

Our findings do not preclude the possibility that the minerals industries and U.S. industry in general could be impeded in their operations by frequently changing Federal enforcement policies. Historically, the level of antitrust enforcement directed at U.S. industry as a whole has fluctuated depending on the current administration's outlook.

There is evidence of mixed attitudes toward Federal antitrust policies in the minerals industries at present. The current administration's position towards antitrust enforcement against vertical and conglomerate mergers might be a factor fueling attempts by firms outside of the minerals industries, most notably "big oil" companies, to acquire independent mining firms. The effects of these takeover attempts are not yet clear, but there is concern in the independent mining industry. Some of the minerals firms whose spokesmen have argued for a more relaxed antitrust policy toward cooperative actions within the minerals industry have now petitioned the antitrust enforcement agencies and the Congress for support in resisting takeovers on antitrust grounds.

Our findings also do not rule out a more complex study of the minerals industries which might use economic analysis to conclude that there have been opportunities foregone as the result of vigorous antitrust enforcement. These lost opportunities may or may not have resulted in increased efficiency, with little probability of potential monopolistic actions. However, our review leads us to believe that a detailed study of antitrust impact on the productivity and profitability of the minerals industries, as called for in H.R. 3364, would encounter two major obstacles: First, the methodology would be very hard to develop and illustrations of actual problems would not be readily forthcoming from the private sector; specific foregone opportunities would

ENCLOSURE I

be very hard to document and link conclusively to antitrust enforcement. And second, because of the uniqueness of individual minerals industries, results applicable to one industry would not readily apply to another. In light of our review's findings, we question whether the efforts necessary to overcome these considerable obstacles are advisable.

We did find two matters related to antitrust enforcement that the Subcommittee may wish to examine further to determine whether they impact on the minerals industries and U.S. industry in general. First, several industry officials and others mentioned the limitations of the Business Review Procedure. The procedure does not preclude later Federal, State, or private litigation against firms involved in an approved merger or joint venture. Second, although treble-damages suits have not significantly involved major minerals firms, industry spokesmen and some Federal enforcement officials agreed that private antitrust suits are proliferating, and that a number of them may represent questionable use of the deterrent threat of huge damage payments.

AGENCY COMMENTS

The Department of Justice and the Federal Trade Commission's Bureau of Competition both agreed with the overall findings of this report. (See enc. II.) Both agencies emphasized that their enforcement of antitrust laws is an aid to increased efficiency and competition, and not a hindrance.

The Department of Justice expressed concern about reported private sector criticism of the Business Review Procedure. In particular it pointed out that the Antitrust Division has never reversed a position it has taken during a Business Review, and that the Department views the Procedure as having value for the business community. We can only reiterate that there is considerable divergence of opinion on the utility of the Procedure mechanism between the Department and the industry representatives with whom we discussed the matter. Perhaps this public clarification of the Department's position will enhance the opportunity for greater future use of the Procedure. We continue to suggest that the Subcommittee may want to examine further this aspect of antitrust enforcement.

Justice also commented that the courts are generally capable of sorting out frivolous third-party suits from those in which substantial issues are raised. We are not attempting to judge the past efficacy of court operations in this regard, but rather to call to the attention of the Congress the proliferation of such suits over the past two decades and to suggest it may want to examine the potential for impairing efficient business conduct. In addition, the Department commented on recent changes in its

ENCLOSURE I

antitrust enforcement activities, and where appropriate changes were made in the report to reflect these comments.

The Bureau of Competition commented at length on the important role of antitrust enforcement in maintaining efficient and competitive markets. The Bureau stressed that its efforts further the public interest and, in this case, the optimal development and extraction of minerals resources. The Bureau also commented that each investigation it initiates is judged on its own merits; thus the Bureau does not agree with our report's suggestion that an extensive economic study of antitrust enforcement might or might not show that there have been some instances of foregone business opportunities that would have been beneficial. We continue to believe that such a study would be extremely difficult to do, and that study results could prove of very limited utility.

The Department and the Bureau also commented in detail on several of the case studies discussed in enclosure III of our report. Where appropriate, changes have been made to reflect their comments.

ENCLOSURE II

U.S. Department of Justice

SEP 14 1981

Washington, D.C. 20530

Mr. William J. Anderson
Director
General Government Division
United States General Accounting Office
Washington, D.C. 20548

Dear Mr. Anderson:

This letter is in response to your request to the Attorney General for the comments of the Department of Justice (Department) on your draft report entitled "The Impact of Antitrust Enforcement on the Country's Minerals Posture."

The Department agrees with the overall conclusions presented in the General Accounting Office's (GAO) draft report, namely, that antitrust is not an obstacle to progress in the U.S. minerals sector and that further study of this issue is not required. We appreciate the sensitivity and thoroughness displayed by GAO in developing this topic--a topic that had often been aired before but rarely taken beyond vague generalities. It is the Department's belief that the antitrust laws are an aid to increased efficiency and competition, not a hindrance.

However, we must disagree with GAO's secondary conclusions--conclusions critical of both the Department's Business Review Procedure and the availability of private treble damage suits as antitrust enforcement tools. The problem that some minerals industry executives reportedly have with our Business Review Procedure is simply that it does not "bind" the Department or potential private plaintiffs. This is true. However, it is extremely unlikely that the Department would reverse its position on a transaction to which it had given a positive review. It has never done so. The procedure is intended to--and we believe does--give substantial assurance that the Department will not challenge the conduct described. There are a number of serious difficulties to making business reviews binding in the manner implied by GAO's draft report. Even without the reviews being legally binding, however, they have been of apparent value to many businesses, given the large numbers issued over the years and the continuous filing of new review requests. Indeed, at least eight such reviews have been given to sectors of the minerals industry in the last seven years (see discussion, infra).

GAO note: Page references in enclosure II correspond to our draft report, not necessarily our final report.

ENCLOSURE II

Regarding the availability of treble damage actions, the draft report speaks at one point of treble damage actions as "nuisance" suits, and suggests there may be instances, albeit not in the minerals industries, in which they have been abused. It also clearly recognizes, however, that such suits are "a very powerful deterrent to firms that are weighing the antitrust implications of their proposed activities." There can, of course, be no guarantee in this or any other area of the law that there will be merit in every private lawsuit filed in the Federal courts. Nonetheless, we believe the courts are generally capable of sorting out the occasional frivolous suit from those in which substantial issues are raised, and that the deterrent impact of the treble damage remedy is important to antitrust enforcement and should be preserved.

The Department is also concerned that GAO has over-emphasized changes in Justice's antitrust enforcement policy as well as the impact of such changes on merger activity. It is true, as is stated on page 8 of the draft, that the Antitrust Division is revising its Merger Guidelines and is especially critical of "vertical" or "conglomerate" anti-merger theories. Nonetheless, this effort by the Antitrust Division is essentially evolutionary in nature, and is in large part consistent with changes in the Department's enforcement activities and in the courts' treatment of mergers that have occurred in practice over the last half dozen years at least. Anti-competitive mergers have been attacked by the Department in the past and will be in the future. Moreover, we are skeptical that any supposed "relaxation" of antitrust enforcement standards by the new Administration has caused the recent spate of merger activity. Page 11 of the draft report speaks of increased "minerals merger activity," yet as noted further on pages 20 and 21, this activity is not between members of minerals industries, but between acquiring companies outside of those industries and acquired companies within. We share GAO's sense of irony that some minerals industry executives who have complained about overly tight anti-merger standards in the past should now be seeking refuge from unwanted transactions through imaginative antitrust allegations. This is understandable from the viewpoint of company or executive self-interest, but it also highlights the fact that antitrust is frequently used as an excuse by companies to cover other reasons for objecting to particular transactions or arrangements.

We have several comments regarding the draft report's description of recent investigative and enforcement actions in the minerals area. On page 12, GAO discusses the Antitrust Division's late '70's "shared monopoly" screening program and notes that certain minerals industries were included within it. It should be recognized that certain other mineral industries were also initially screened by Antitrust Division lawyers and

ENCLOSURE II

were found to require no further scrutiny. In those instances, no formal investigative steps were taken and no effort or expense by industry was entailed. Furthermore, the report should be revised to clearly indicate that the list of minerals industry investigations quoted on pages 12-13 was not a list of "shared monopoly" matters. Rather, it covered a number of more traditional Sherman Act inquiries.

On page 13 the draft report speaks of the expense to industry of complying with antitrust investigative requests in litigation. Also, on page 17 the draft report speaks to the possibility of "unfair" enforcement efforts. The Antitrust Division has always been careful in launching investigations and has not done so without serious bases. That investigations can be closed without litigation should be a relief to the industry involved, not a disappointment.

Moreover, the Antitrust Division has responded to at least eight business review requests from minerals industry segments during the last seven years, and has examined and approved the majority of them. These responses involved information exchange programs for uranium, nuclear fuel, tungsten and steel distributors, as well as two aluminum industry acquisitions, an acquisition involving uranium and other minerals, and a proposed steel industry acquisition. Positive responses were given to the four information exchange requests and to one of the two aluminum acquisition requests. The acquisition involving uranium was "cleared" after modifications were made in the proposed transaction. Of the other two proposed acquisitions, the Antitrust Division declined to respond with respect to one of them on the basis of, first, unclear facts and, second, cancellation of the proposed deal. In only one of these instances--involving the Alcan-Revere transactions referred to in the report--did the Antitrust Division issue a negative letter. We believe this record further supports GAO's conclusion that antitrust enforcement has not been an unwarranted impediment in the minerals industries.

The draft report's "Enclosure II: Examples of Alleged Antitrust Problems in the Minerals Industries" also requires certain clarifications. The Department cannot address either the Federal Trade Commission's handling of the Arco/Anaconda matter or the list of possible minerals joint ventures that supposedly fell through for antitrust reasons, since we do not have a factual basis for comment. We also see no need to add to the Department's views already referred to in the draft report regarding the Copper Range, LTV-Lykes and Alcan-Revere matters. Some comment is called for, however, on the discussion of the Antitrust Division's activities regarding international zinc trade.

ENCLOSURE II

On the zinc matter, the report should reflect the fact that, while the Department eventually discontinued its international cartel inquiry, the European Economic Community's antitrust authorities have vigorously pursued their own. The draft report states that U.S. zinc producers "bore the same time and labor costs as [did cartel] members in answering Justice's requests for information." We cannot say whether this is entirely true, since the responses that we received varied from company to company. However, none of the responses from domestic producers entailed production of more than a small number of documents, and all were on a voluntary basis. It is not our impression that the relative "burden" was large, but it was and is our belief that the domestic industry was an appropriate group to ask for information.

The draft report goes on to state that:

> "In addition, U.S. producers avoided the cartel's pricing and marketing arrangement, yet suffered the effects of the cartel in the form of greatly increased imports into the U.S."

This statement expresses an erroneous interpretation of the alleged cartel's effects. Our understanding is that the cartel's goals and plans featured high prices, not low ones, and did not involve a predatory assault on the U.S. market.

The draft report asserts that the Department's investigation into the international cartel "curtailed" U.S. Government participation in the International Lead/Zinc Study Group, */ implies that the Department unfairly suspected the Group of anticompetitive activities, and states that the Department has prevented U.S. industry advisor participation in the Group's activities. All three points are incorrect. The U.S. Government has never stopped participating in the Group and still does. The Department's concern about the Group's behavior was a real one. The Group had been reported in the press as providing a background for a price-fixing arrangement among European producers during its late 1975 gathering. The Group has also been presented with outright production allocation proposals during more recent years, even though it has no statutory or treaty powers to function as an international commodity stabilization agreement. The Department has worked closely and carefully with the State Department and the Trade Representative to prevent the Group from overstepping its bounds while at the

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*/ An informal, international inter-governmental body that collects data and discusses trends in world lead and zinc trade.

ENCLOSURE II

same time not curtailing its legitimate informational activities. The Justice Department has worked with the State Department to develop new, better guidelines for industry advisor participation in such bodies as the Study Group, and those guidelines have been implemented. They in no way whatsoever prevent U.S. zinc producer representatives from attending Study Group meetings.

Finally, there is the matter of the Department's participation in the International Trade Commission's 1978 "escape clause" proceeding regarding zinc. The Department's principal argument there--that increased imports did not cause domestic producers' injury--was accepted by the Commission. The Department did not act "on behalf of foreign producers" but on behalf of free and open competition. Furthermore, the Department did not believe then that such competition would destroy remaining domestic zinc producer competition, nor does it believe so now. The recent closings of some domestic refining operations appear to be based mainly on obsolescence or on a scarcity of foreign-supplied zinc concentrates, rather than on competition from imported zinc metal. A number of other domestic zinc refineries remain in operation, and one of them is expanding its capacity. Moreover, U.S. prices for slab zinc have increased around 60 percent in the intervening three years without any import relief.

In addition to the substantive comments offered above, we are providing several comments of a technical nature which GAO may wish to incorporate in its report:

Page 5: The definition of "civil" litigation is too limited. Government-initiated civil cases often involve questions of public right or public interest; they may also involve the Government's own proprietary rights. A "civil" antitrust case brought by the Department is different from a "criminal" one in that its intent is not punishment but a prospective enjoining of illegal practices.

Page 6: Business reviews are not "an investigative tool." They are a convenience to businesses that the Department offers and which, in order to be done properly, may or may not entail some additional investigative work.

Page 15: The report suggests that damage actions are typically brought by competitors of firms that are understood to be the subjects of a Federal antitrust investigation. While that may sometimes occur, such claims are more typically asserted on behalf of customers of the firms.

ENCLOSURE II

Page 19: The conclusion states that minerals industries are more capital intensive, more cyclical, etc., than "most" other industries. This may be a bit strong. While minerals industries are, by and large, capital intensive, etc., so are many others, including automobiles, aircraft and even agriculture.

We appreciate the opportunity to comment on the substantive issues raised in this report. We also commend GAO for its balanced, deliberative and sound reflection of the various aspects of antitrust enforcement in U.S. nonfuel mineral industries, and our criticisms should be taken in that context.

Should you desire any additional information with respect to the matters discussed in this response, please feel free to contact me.

Sincerely,

Kevin D. Rooney
Assistant Attorney General
for Administration

ENCLOSURE II

FEDERAL TRADE COMMISSION
WASHINGTON, D. C. 20580

BUREAU OF COMPETITION

3 SEP 1981

The Honorable Gregory J. Ahart
Director, Human Resources Division
United States General Accounting Office
Washington, D.C. 20548

Dear Mr. Ahart:

This is in response to your request for comments on GAO's draft report, "The Impact of Antitrust Enforcement on the Country's Minerals Posture." Your request was referred to the Bureau of Competition as it has direct responsibility for the Commission's antitrust enforcement activities. I wish to emphasize at the outset that the views expressed here are those of the Bureau of Competition and are not necessarily those of the Commission or of any individual Commissioner.

As stated in the draft report, your review of antitrust enforcement activities in the area of nonfuel minerals industries involved two steps: determining the nature and level of antitrust enforcement directed toward attempts of U.S. nonfuel mineral firms to undertake cooperative actions such as mergers, joint ventures, and overseas consortia; and surveying and summarizing the perceptions of principal minerals industry officials and other industry experts about antitrust enforcement. (Report at 1-2.) Your report concludes that "there have not been a significant number of nonfuel minerals industry related cases litigated at FTC or Justice over the last several years" and that "officials in the nonfuel minerals industries generally do not view antitrust enforcement as a serious obstacle to industry conduct." (Report at 2.)

As an introductory comment, I would like to note that the Commission has a strong interest in maintaining the competitive health of the U.S. minerals industries. We believe that antitrust has an important role to play in furthering the public interest in the optimal development and extraction of this country's mineral resources, and that the economy will be benefited by antitrust actions that improve market operations and performance. The Commission therefore devotes a significant portion of its resources to antitrust enforcement activities in this area and has developed substantial expertise in analyzing the structure, conduct and performance of minerals industries.

GAO note: Page references in enclosure II correspond to our draft report, not necessarily our final report.

ENCLOSURE II

As the report notes, much of this work is performed by the office of Non-Petroleum Energy and Natural Resources. A substantial part of this work involves the investigation of mergers, acquisitions, joint ventures and similar transactions. 1/ Like the Antitrust Division, the Commission has, since the enactment of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. § 18a, reviewed a large number of transactions under the premerger notification program mandated by that Act. This program enables the Commission and the Antitrust Division to review significant transactions before they occur and to seek preliminary judicial relief if it appears that the transaction would be illegal and that competitive harm would occur if preliminary relief were not entered pending final determination of the legality of the transaction.

The principal statute under which mergers, acquisitions, joint ventures and similar transactions are reviewed is Section 7 of the Clayton Act, 15 U.S.C. § 18, which proscribes acquisitions of assets or stock of another company "where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly." These and other forms of business combinations are also reviewable under Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, which proscribes "unfair methods of competition in or affecting commerce," including transactions or conduct that would violate Section 1 or Section 2 of the Sherman Act.

As the report notes, there have been many more investigations in mineral industries than cases actually litigated. However, one would expect to find a similar relationship with respect to transactions involving many other industries, for although all significant transactions are subject to preliminary review and investigation, one has no reason to expect, a priori, that most or even a great many of them will present anticompetitive problems. The purpose of preliminary review and investigation is a prophylactic one, to ensure that transactions which do present anticompetitive concerns are detected before injury to competition has an opportunity to occur. This requires a careful case-by-case review of each transaction on its own merits.

1/ In this connection, your report should note that the Commission's staff also has a Merger Screening Committee that plays a central role in reviewing mergers, acquisitions and joint ventures. The Evaluation Committee referred to in your report is principally involved in non-merger matters.

ENCLOSURE II

Given the purpose and nature of the antitrust review process, the numbers of investigations and litigated cases, or the relationships between them, do not in themselves indicate a great deal about the level of antitrust enforcement. This is because both the number of investigations and the number of litigated cases necessarily depend on the number and kinds of transactions reviewed. For example, a merger or acquisition which appears to affect competition at a horizontal level may be more likely to result in a full investigation and possible litigation than a purely conglomerate merger or acquisition. Further, the level of merger activity may be related to a number of complex business and economic factors. Thus, a change in the number of investigations or the number of litigated cases does not necessarily reflect a change in enforcement policy.

The report, quite appropriately, is cautious in making judgments about the level of antitrust enforcement. However, I believe the report could give greater recognition to the important role of antitrust in maintaining efficient, competitive markets. As drafted, the report generally treats the past level of antitrust enforcement as tolerable from the viewpoint of businessmen, but seemingly suggests, perhaps without intention, that a greater number of litigated cases would have been an indication that antitrust enforcement has been excessive or counterproductive. Such a suggestion would not be warranted. As noted above, each transaction is carefully evaluated on its own merits, taking into consideration a variety of evaluative factors based on a large body of case law and other antitrust learning. Enforcement action is undertaken only if that evaluative process indicates there is reason to believe that the transaction is or would be anticompetitive. On the other hand, if enforcement action is not initiated in a particular case, the proper inference is not that antitrust enforcement has been relaxed or that minerals industry activities in general present little anticompetitive concern, but that no action is warranted in the particular instance under prevailing antitrust standards.

Although antitrust analysis is complex, we believe the evaluative process properly accommodates the consideration of the myriad factors involved. 1/ This, we believe, is an important

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1/ The complexity of antitrust analysis may result in some uncertainty for businessmen, but this is not unique to minerals industries nor even to the field of antitrust. With respect to minerals industry activities, another complicating element is the

(Footnote continued on next page.)

ENCLOSURE II

safeguard against unnecessary restraints on industry conduct. To be sure, antitrust enforcement necessarily results in some restraint on conduct and prohibits certain business ventures, but this is because such activities would be anticompetitive and detrimental to the public interest. Thus, we see no basis for the report's suggestion (see page 21) that an economic study of antitrust enforcement in the minerals industries could show that antitrust enforcement has resulted unnecessarily in forgone business opportunities.

As the report notes, there is a paucity of evidence that antitrust enforcement activities have caused non-anticompetitive business opportunities to be passed up. I will briefly comment upon two of the alleged examples cited in Enclosure II to the report: "ARCO Acquisition of Anaconda," and Anaconda's sale of copper concentrates to a Japanese trading company. The first is a case handled by the Commission, and the second is a matter that we have followed with some interest because of the ARCO/Anaconda case.

The Commission's complaint in the ARCO/Anaconda case alleged, in part, that Atlantic Richfield's acquisition of Anaconda would be anticompetitive in that it eliminated Atlantic Richfield as a significant potential competitor in both copper mining and the production and sale of refined copper. Conversely, entry by Atlantic Richfield de novo or through the acquisition of a small ("toehold") copper firm would have been procompetitive. The Commission's application to a federal district court for a preliminary injunction against the acquisition was denied, and the case proceeded to an administrative forum for a full trial. A tentative settlement in the case was reached in early 1979, prior to the commencement of trial. 1/

(Footnote continued from previous page.)

fact, as the report notes, that each mineral commodity is in a sense unique. While much of this uncertainty is unavoidable, we strive to make every practicable effort to minimize the uncertainty. For example, advisory opinions are possible in some circumstances. In addition, we make every effort to expedite investigations, particularly those at the pre-merger stage. Finally, the large body of existing antitrust case law should offer substantial guidance to businessmen.

1/ A minor correction to the report is in order on this point. The case did not go to trial in February 1979 as stated in the report (at page 24). A tentative settlement was reached in February 1979, approximately one month before trial was scheduled to begin.

ENCLOSURE II

The settlement order provided, in part, for substantial divestitures of Anaconda copper assets. 1/ All of the divestiture requirements were intended to improve the state of competition in the U.S. copper industry.

The requirement that Atlantic Richfield divest Anaconda's interest in Anamax Mining Company eliminates a significant joint venture with Amax and presents an opportunity for Amax to become an independent domestic producer of copper. Similarly, the requirement that Atlantic Richfield divest its stockholdings in Inspiration Consolidated Copper Company eliminated a significant horizontal relationship. Further, the requirement that Atlantic Richfield divest three undeveloped copper properties was expected to have at least two signficant effects. First, it would give a purchaser of one or more of the properties an opportunity to become a more significant copper firm in the future. For this reason, divestiture to a smaller copper company was preferred, and copper companies which already had a 10 percent or greater share of U.S. mine production were precluded from purchasing. Second, the divestitures were expected to encourage Atlantic Richfield to explore for new deposits to replace the divested properties and thereby increase the availability of copper. The Commission recently approved the divestiture of one of the copper properties to Asarco Inc., which is a major smelter and refiner of copper but less substantial in U.S. mine production. The evidence indicated that Asarco was the only prospective purchaser likely to develop the property as a mineral property.

With respect to Anaconda's recent contract with a Japanese trading company to process copper concentrate, we have no evidence to support the allegation that domestic companies lost this contract because of their inability to pool resources and offer a joint bid. 2/ First, Anaconda accepted bids from domestic smelters for less than all the concentrate. Second, Anaconda accepted the Japanese trading company bid because it was

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1/ The report's characterization that Atlantic Richfield was required to divest "most" of its copper reserve holdings is not entirely correct. While the required divestitures were substantial, Anaconda retained sufficient copper reserves to remain a major copper producer. Furthermore, there was no claim that Anaconda was a "failing company" whose only chance for survival was acquisition by Atlantic Richfield.

2/ Indeed, we have no knowledge of an interest on the part of U.S. smelters to submit a joint bid. Since no such proposal was presented to us for possible review, we have no basis for commenting on the merits of such an arrangement.

ENCLOSURE II

the only firm to make an offer to take a substantial amount of Anaconda's Butte, Montana concentrates. This copper has a high concentration of arsenic which makes it difficult to process under U.S. environmental regulations. Moreover, Anaconda accepted the trading company's bid to process all of the available concentrate because the trading company would have rejected the high-arsenic copper if it did not also receive Anaconda's production of clean copper concentrate from other mines. Third, apart from one offer to process clean copper concentrate from one of Anaconda's many mines, the Japanese trading company offered the most favorable price to Anaconda. Fourth, it is not clear that Anaconda negotiated a contract with a joint buying agency. Anaconda negotiated solely with one Japanese trading organization. The agreement between the parties permitted the trading organization to make partial assignments to other parties. Anaconda subsequently acknowledged those partial assignments. Finally, Japanese firms operating in the United States are no less subject to the antitrust laws than U.S. firms. If, arguendo, the assignment agreement raised antitrust questions, the Japanese firms would be subject to the same risks as U.S. firms for conduct substantially affecting U.S. commerce. 1/

Finally, I would like to suggest some modifications to the language in the last paragraph on page 19, which presently makes some sweeping generalizations concerning justifications for horizontal mergers and joint ventures in minerals industries. First, it is not at all clear that horizontal mergers and joint ventures are always necessary to provide required capital and to spread risk. Second, it is not at all clear that all such combinations need not be feared because commodities have a world market in which U.S. firms have no impact. These are matters that must be studied on a case-by-case, industry-by-industry basis. Thus, it would be appropriate to modify the last two sentences on page 19 to indicate that the propositions stated therein are the claims of those who advocate a relaxation of antitrust enforcement for minerals industries.

In conclusion, we agree with the report's finding that there is no strong justification for a relaxation of antitrust enforcement for minerals industries. We believe that antitrust has an important role in furthering the public interest in the optimal development and use of the nation's minerals resources. Accordingly, the Commission has developed substantial expertise

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1/ See United States v. Aluminum Co. of America, 148 F.2d 416, 444 (2d Cir. 1945); Department of Justice, Antitrust Guide for International Operations at 6, 18 (1977).

ENCLOSURE II

in this area, and we believe that the entire enforcement program -- including antitrust review, investigation and, where necessary, litigation -- has had a positive effect on competition in the minerals industries.

Sincerely,

Benjamin S. Sharp

Benjamin S. Sharp
Deputy Director
Bureau of Competition

EXAMPLES OF ALLEGED ANTITRUST PROBLEMS IN THE MINERALS INDUSTRIES

Specific examples of Federal antitrust enforcement having a negative impact on the nonfuel minerals industry were sought to support any concerns cited by industry officials. However, most officials we interviewed were either reluctant to or could not give any detailed information specifically supporting their concerns. Most limited their comments to generalities, refusing or unable to provide details on any antitrust problems.

A few industry officials and investment bankers did provide several examples in which they alleged antitrust enforcement or related court decisions had adversely affected a company's operations to the detriment of U.S. industry, or in which allegedly the fear of antitrust enforcement caused otherwise beneficial opportunities to be passed up. These cases are briefly described below.

ARCO ACQUISITION OF ANACONDA

In July 1976, the Atlantic Richfield Company (Arco) and the Anaconda Company agreed to merge. In October, just before a vote by Anaconda shareholders on the merger, FTC filed for a preliminary injunction to block the transaction, alleging among other things that Arco would be eliminated as a significant potential competitor in both copper mining and the production and sale of refined copper. FTC asked that Arco divest itself of all of its Anaconda stock (it already held 27 percent before the merger attempt), and that it be barred for 10 years from acquiring any uranium oxide or copper company without FTC approval. The case was scheduled to go to trial in March 1979.

In February 1979, an out of court settlement was reached allowing the merger to go forward but calling upon Arco to divest itself of a substantial amount of its copper reserve holdings valued at about $573 million. In approving the settlement, FTC named a list of ineligible purchasers, including the Asarco, Pennzoil, and Newmont companies. Some of these ineligible companies objected, and the decree was altered to exclude from purchasing all firms with a U.S. copper market share of 10 percent or more. Those with a 5 to 10 percent share could seek FTC approval as purchasers, and those below 5 percent were cleared as potential buyers. The decree was final in 1980, and Arco has 2 to 5 years to divest.

Industry officials questioned FTC's handling of this case in several respects. One said that FTC's original decree was discriminatory--some foreign firms which were allowed to bid for divested properties were larger than some of the U.S. companies excluded from bidding. In effect, FTC was not considering the international nature of the market. Another official

said divestiture of copper reserves should not have been a condition of Arco's acquisition of Anaconda since the latter lacked the capital to continue as a viable entity. FTC's view is that it litigated because Arco and Anaconda were direct competitors in uranium mining and potential direct competitors in copper. The target market was concentrated with high barriers to entry, and Arco was one of the potential entrants. FTC wanted to encourage Arco to enter the market by a means other than merger. (For a complete presentation of the Bureau of Competition's views on this case, see enc. II.)

AMAX ACQUISITION OF COPPER RANGE

In August 1975 American Metal Climax (Amax), Inc., and the Copper Range Company were on the verge of final stockholder approval of a merger between the two when the Justice Department filed suit, charging an antitrust violation because of their market shares in copper refining. Despite the companies' claims that high exploration and mining costs and reasons of efficiency made industry consolidation necessary, the court ruled against them, saying that Justice had proved that the merger would increase the already high concentration of the industry.

One industry official said the case was an example of failure to analyze a commodity in world market terms. Justice's view is that neither it nor the trial court contended that sales of imported copper were irrelevant, but rather they both felt that domestic copper production was a separable line of commerce. Tariffs, freight costs, and various temporary import barriers sought by U.S. minerals interests (escape clause remedies, "dumping" duties and countervailing duties) all act to create walls around the U.S. minerals markets and make it necessary to consider the competitive stance of U.S. minerals producers themselves.

LTV-LYKES STEEL MERGER

In 1978, the LTV conglomerate, owner of Jones & Laughlin, Inc., a steel company, proposed to acquire the Lykes Corporation, which controlled the Youngstown Sheet & Tube Company, and asked Justice for approval. The issue was whether Youngstown qualified as a merger target under the failing company doctrine which allows acquisitions which would otherwise be considered anti-competitive. The Attorney General ultimately ruled that Youngstown was indeed failing and thus approved the merger, contradicting the recommendation of the Antitrust Division.

Interestingly, in this case the Antitrust Division objected to the proposed merger because it clearly fell within the merger guidelines promulgated in 1968. Yet it turned out to be a much smaller horizontal merger than Youngstown had attempted years before in 1957 with the Bethlehem Steel Company. Ironically, in one of the first decisions under the amended Clayton Act's section 7, the Bethlehem-Youngstown merger was denied, and in

ensuing years Youngstown slipped into the precarious competitive position that permitted it to merge in 1978 as a failing company.

An investment banker to whom we talked said that 20 years of financial problems for Youngstown could have been averted if the Bethlehem-Youngstown merger had gone through, although he also said that other problems may have resulted from such a merger. A Justice official, on the other hand, said that the successful history of Youngstown's Indiana Harbor Plant since the 1978 merger supports the Antitrust Division's contention that Lykes was not really failing.

ALCAN ACQUISITION OF REVERE'S ALUMINUM SMELTER

In December 1977 Justice went into Federal district court to block the purchase of the aluminum smelting facilities of Revere Copper and Brass, Inc., by a U.S. subsidiary of the Aluminum Company of Canada (Alcan), Ltd. The same investment banker mentioned above said that the proposed purchase would have been advantageous for the industry as well as for Alcan, which has a rolling mill but no smelting capacity in the U.S. Revere cannot "spin off" the uneconomical facility and lacks the capital to expand the facilities to the minimally efficient size. Justice, on the other hand, viewed the purchase as a violation of section 7 of the Clayton Act. As a result of Justice's action, Alcan did not pursue the merger.

ANTITRUST ISSUES RAISED IN THE U.S. ZINC INDUSTRY

In 1976 Justice opened an investigation of an international zinc cartel, established in 1964, in which all major producing countries except the United States were members. Justice requested information from U.S. and foreign zinc producers. The cartel then disbanded, because it feared European Economic Community (EEC) antitrust attention as well. The Antitrust Division eventually discontinued its investigation although the FEC has vigorously pushed their own.

According to industry officials (although this is denied by the Justice Department--see enc. II), the Department's investigation of the cartel effectively curtailed U.S. participation in the 29-country International Lead/Zinc Study Group after Justice expressed the suspicion that private price-fixing agreements have been made at the group's meetings. According to industry officials, however, this group does not control prices. Their view is that lack of participation in the International Lead/Zinc Study Group keeps them ill-informed, thereby placing them at a competitive disadvantage.

A footnote to this situation is the December 1977 International Trade Commission hearings during which the U.S. zinc industry sought temporary relief from excessive zinc imports.

The Commission took the view, however, that the industry's troubles were caused by the lack of demand, not dumping. Some industry officials commented on Justice's role at the hearings, objecting to its apparent intervention on behalf of foreign producers and its description of the operative market. They believe that Justice was not preserving competition in the domestic market, but rather was causing further concentration of production abroad. The Justice Department takes a contradictory view, as expressed in enclosure I.

MERGERS AND VENTURES NOT UNDERTAKEN, ALLEGEDLY BECAUSE OF ANTITRUST FACTORS

Some industry people alleged that fears of antitrust enforcement have deterred otherwise beneficial business actions. These allegations are even harder to document than the effects of actual enforcement actions; however, the following examples, whose accuracy we are unable to determine, were cited as relevant.

--In 1978, the New Jersey Zinc Company, in a joint venture with a Belgian holding company, opened a major new zinc smelting facility in the United States. Asarco was also interested in joining with New Jersey Zinc in the venture, but its lawyers advised against the move for antitrust reasons. As a result, the most modern zinc smelter in the country is 50-percent foreign owned.

--In about 1977, the Aluminum Company of America (Alcoa) and the Reynolds Metals Corporation planned a joint venture for an alumina refinery in South Australia. Alcoa, however, allegedly backed out because of antitrust concerns, and Reynolds went ahead with the venture with foreign partners.

--In 1980 Anaconda shut down its copper smelter in Montana, which freed a large volume of copper ore concentrates for sale to the highest bidder. A Japanese trading company, speaking for the entire Japanese copper smelting industry, won the contract. U.S. smelters would have liked to pool resources and offer a joint bid also, but such a move was out of the question for antitrust reasons. No one U.S. firm was capable of bidding on the large ore supply. After purchase, the holding company allocated the concentrates among the Japanese firms it represented. (For a complete presentation of the Bureau of Competition's views on the validity of these arguments, see enc. II.)

It is unclear whether or not antitrust considerations were the primary factor causing these plans to have been abandoned. For example, it appears that economic factors played a primary role in the shipping of the Anaconda ore concentrates. It is not at all certain that a U.S. consortium could have outbid the Japanese. In short, in the above three cases and in general, no convincing evidence was presented to us indicating that any significant business alternative which would have clearly aided the position of U.S. industry was not carried forward simply because of antitrust concerns.

ENCLOSURE IV

COMMITTEE ON INTERIOR AND INSULAR AFFAIRS
U.S. HOUSE OF REPRESENTATIVES
WASHINGTON, D.C. 20515

July 1, 1981

The Honorable Milton J. Socolar
Acting Comptroller General of the United States
U.S. General Accounting Office
Washington, D.C.

Dear Mr. Socolar:

Hearings held by the House Subcommittee on Mines and Mining last fall focused on several potential impediments to the viability of our domestic minerals industries, including environmental regulations and tax incentives. Those hearings also raised questions concerning the impact of antitrust enforcement on our strategic minerals industries.

As you know, we recently introduced legislation in the 97th Congress addressing several of the concerns and problems facing the domestic minerals industries. Title 8 of the bill, H.R. 3364, pertains to the impact of antitrust and calls for a comprehensive study by the Attorney General. The Attorney General would be required to analyze the relevence of antitrust law to the mining, minerals and materials industries, and among other requirements, examine the effect of antitrust policies on the profitability and productivity of such industries.

We would like GAO's assistance in further defining potential legislative action in this area. Specifically, we are interested in a limited study which would describe the present nature and level of antitrust enforcement directed at minerals industries and would synthesize industry perceptions about antitrust enforcement. At a minimum, this would allow the Subcommittee as it considers H.R. 3364 to have access to necessary background information and to form a preliminary conclusion on the feasibility of a ~~broader~~ based study.

We would like GAO to acquire agency comments on the report and to report to us by the end of this session.

Sincerely,

JAMES D. SANTINI, Chairman
Subcommittee on Mines and Mining

JDS:scc