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Donald I. Baker

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Baker: Extraterritorial Application of United States Antitrust Law: Prob

Extraterritorial Application of United States Antitrust Law: Problems for Canada—Recommendations for the United States and Canada*

*by Donald I. Baker***

THESE ARE TIMES of turmoil. Serious conflicts exist between Canada and the United States over where and how American antitrust laws are to be enforced. In fact, the conflict is broader than just Canada and the United States: quite similar conflicts exist today between the United States and the other leading common law nations, including Britain and Australia.

I speak here happily freed of the constraints of public office, and yet not wholly freed from what I learned through the challenging experience of holding office. Some of my views may seem outrageous to some people in Canada. Other views may seem equally outrageous to some of my American countrymen. So be it. A free university serves both its ideals and its society well when it offers a forum for honest minds to exchange outrageous ideas—and sometimes, through the process, to find a new truth which may still seem outrageous to political apologists and other custodians of conventional wisdom.

These conflicts with which we deal are phrased in concepts of “jurisdiction,” “extraterritoriality,” “comity,” “Crown privilege,” etc. But they go much deeper. They reflect differences in national politics, priorities, and unspoken assumptions. To make progress, we must go behind the lawyers’ phrases to the broader realities.

I. THE AMERICAN REALITY

Americans have many frontier virtues and at least some frontier faults. We still have a strong sense of the worth of individual effort, and the value of individual liberty. As a people, we have a solid distrust of government and a deep lack of respect for those in authority.

Our antitrust law embodies these values. It reflects a feeling that the consumer will be better served if businesses have to hustle to survive. In other

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** Partner, Jones, Day, Reavis & Pogue, Washington, D.C.; former Assistant Attorney General in Charge of the Antitrust Division, United States Department of Justice. This paper is in the form it was originally delivered by the author, then Professor of Law at the Cornell Law School, at the Canada-United States Law Institute’s Antitrust Conference, held on September 30, 1977, at the University of Western Ontario, London. A somewhat expanded version of the paper (with full footnote documentation) has been published in the *Cornell International Law Journal*. See Baker, *Antitrust Conflicts Between Friends: Canada and the United States in the Mid-1970’s*, 11 CORNELL INT’L L.J. 165 (1978).

words, as consumers, we tend to prefer the impersonal market to a paternalistic government as our protector. But antitrust law goes deeper. It embodies a populist suspicion of the big and distant enterprise and tries to curb or break up visible private economic power. The Sherman Act therefore is not a few dusty pages buried in our law libraries but, as the Supreme Court put it, "the Magna Carta of free enterprise" in the United States. High school history students read about Senator Sherman, Standard Oil, and the robber barons. Congress may not have been too sure what it was doing in 1890, but what it did has taken on an almost constitutional quality. Price fixing, cartels, and the like are front page evils in the American environment.

Today, we are riding a particularly strong wave of public support of antitrust policies and enforcement. Politicians, encouraged by the press and public, have sharpened the antitrust weapons greatly in the past five years. First, United States antitrust enforcement budgets, already large by the standards of most industrial countries, have been increased some forty percent in constant dollars, and almost 100% in inflated dollars. Second, broad new investigatory tools have been created to aid the enforcement agencies. Third, state attorney generals have been authorized to bring large treble damage suits on behalf of injured consumers. Fourth, maximum antitrust jail sentences have been tripled, and maximum corporate fines have been increased twentyfold. Fifth, resale price maintenance has been repealed. The American political momentum is plainly for more and tougher antitrust enforcement. Antitrust enforcers are constantly asked why they are not doing *more* to break up OPEC, to eliminate the Arab boycott of Israel, to bring down energy costs, and so forth.

Americans also are afflicted with what might be called "the sunshine ethic." Americans thoroughly distrust public officials, especially when they are making vague claims about "national security," "public safety," or the general good. We aspire to be "a government of laws, not of men." We want government carried out by formal rules and orders, and we want it carried on in the open. Thus, we vindicate the right of the press to print whatever it has, while we narrowly limit the right of government to claim confidentiality on what it has. I need only to remind you of the *Pentagon Papers* case, where the Supreme Court flatly rejected the Pentagon's firm assertion of "national security" as a ground for withholding public disclosure; and the unique case captioned *United States of America v. Richard M. Nixon, President of the United States*, in which the Supreme Court unanimously rejected the right of our highest elected official to use an "executive privilege" to withhold documents sought by the public prosecutor. It was for the courts, not the President, to determine the privilege question.

The American "sunshine" tradition goes much beyond a few celebrated cases. Our Freedom of Information Act allows members of the public to obtain access to nearly all internal government documents. Congress has just re-emphasized the point by passing the Sunshine Act which requires various government agencies to hold virtually all their deliberations in public. This means, for example, that three members of the five member Civil

Aeronautics Board cannot legally hold an informal discussion among themselves on a question of airline policy.

I do not ask you to believe that all this emphasis on open markets and open government is wise. I do ask you to believe that it is real, that it embodies some deeply-held American values.

II. THE CANADIAN REALITY

I look at Canada with sympathy for the problems of maintaining peace, order, and good government among diverse people sparsely spaced across a vast continent and in the shadow of a large and energetic neighbor.

Much of what has happened in Canada is in reaction to disturbing developments in the United States. Much of the settlement in the Maritime Provinces was in reaction to the American Revolution. Much of the spirit of the Charlottetown Conference was a reaction to the horrors of the American Civil War: those there wanted what they thought to be a strong form of federal government because they saw great dangers in weakness at the center of a vast federation.

In the Twentieth Century—and particularly within recent decades—Canadians reacted in a variety of ways to the huge American role in the Canadian economy. Canada decided to regulate foreign investment and attempted to make foreign owned enterprises behave as if they were Canadian citizens rather than outposts in some overseas commercial empire.

Canadians seem to have a more charitable view toward government than American citizens do. Canadian government is directly involved in various sensitive activities from which the United States Government is precluded, for example, energy and transportation.

The Canadian confidence in government is reflected in its approach to government secrecy. The Official Secrets Act, following the British tradition, has a breadth and a scope which is hard for Americans to appreciate. Crown privilege also has a breadth unfamiliar to Americans, and the Canadian courts seem much less involved as an outside check on executive discretion than are the United States courts.

There seems to be nothing in Canada that corresponds in strength and breadth to the Jeffersonian populist tradition, which assumes "bigness is badness" in the private sector. Thus, to take a striking example, Canada has a nationwide commercial banking system dominated by a handful of very large banks. The United States, by contrast, has a balkanized banking system which confines bank operations to the borders of the specific state; consequently some of our largest banks, fenced in at home, do at least half their business abroad. The Canadian tradition seems to be one of governmental supervision and control of private economic power, rather than the more structured nature of many antitrust and other public policies in the United States.

In sum, antitrust in Canada is a technical legal matter for a small group

of specialists. Accordingly, the Combines Investigation Act is limited in its terms and has been enforced in a limited way.

III. THE QUESTION OF JURISDICTION AND REALITY

I mention the above underlying political realities because they have so much to do with today's "jurisdictional" conflicts. We have to be practical rather than ideological.

There is of course a broader reality: Our age of modern technology and industrialization makes our lives decidedly interdependent. In today's world, something can physically occur in Canada which has a primary effect in the United States; something can physically occur in the United States which may have its primary effect in Canada. For example, if I set up a powerful transmitter and started broadcasting from my hilltop in Ithaca, New York on a frequency assigned to the CBC station in Toronto, the immediate physical act would be in New York State, but the primary effect would be in Ontario where most of the listeners on that frequency are located. Or, if someone standing on the waterfront at Windsor fired a rifle across the Detroit River, the physical act of firing would occur in Ontario but the primary impact would occur in Michigan.

The same kind of thing can happen with economic activities, although the chain of causation may be less visible. Moreover, government cooperation may be much less effective when the harm is purely economic: the host government may have little political incentive to help stop an activity which produces harm in a neighboring jurisdiction while causing a profit at home. We should bear these realities in mind as we deal with today's hard questions of antitrust jurisdiction.

There are varied views on jurisdiction. At one extreme is the "pure territoriality" theory. Practically speaking, someone operating in one territory (or perhaps on the high seas) can do whatever he wants, regardless of how harmful it is to those in another territory, as long as it is not illegal where he physically does it. With all due respect, this view is more suitable to the simpler world of Queen Victoria than to our highly technological and interdependent world; and, in the economic realm, it tends to support private "beggar your neighbor" undertakings.

At the other extreme is the "pure interventionism" theory which holds that whatever is done in one state may be subjected to the jurisdiction of another state if it has *some*, albeit small, impact there. This view is equally outmoded. It is appropriate for a world in which little activity flows back and forth among nations and some great power takes upon itself the role of policing trade and relationships among nations. It is inappropriate for the post-imperial world, a world with a growing level of trade, travel, and investment among nations, filled with touchy sensitivities about sovereignty.

The major countries of the world have to find, presumably at least in part under the rubric of comity, some workable compromise between the polar extremes of "pure territoriality" and "pure interventionism;" and to make it work there must be greater cooperation in law enforcement.

Antitrust offers a good place to look at this issue, especially where it deals with tangible trade flows. Several of us at the Department of Justice (including most notably, Douglas Rosenthal, the Assistant Chief of the Antitrust Division's Foreign Commerce Section) have talked publicly about this issue for some time. We have suggested that the United States prosecutors should assert jurisdiction only: (1) where a restraint has a *substantial* impact on United States import trade; or (2) where a substantial and direct private restraint exists on the export trade opportunities for firms operating in the United States. The former is the more important category, because it is here that the United States has a direct consumer interest. (However, this approach to jurisdiction has been criticized by some American lawyers as being "too narrow" in terms of our history and jurisprudence.) It is the view stated in the Justice Department's 1977 *Antitrust Guide for International Operations*. It also is in line with the modern view of jurisdiction and comity embodied in section 40 of our own *Restatement (Second) of Foreign Relations Law of the United States*.

Of course this still leaves the question of "What is substantial?" This is not a new question for antitrust lawyers, since much antitrust jurisprudence turns on notions of substantiality. It seems to be clear that a price fix carried out in an international market in which American purchasers buy eighty percent of the supply involves a substantial impact on American commerce. Conversely, the same price fix in a broad market in which American purchasers account for less than ten percent of the market probably does not involve any "substantial" impact on American commerce. In the latter case, it would plainly be wise for the United States—or any other nation similarly situated—to refrain from seeking to exercise jurisdiction. This would be especially clear where the other ninety percent of sales were to customers within the territory (or territories) where the cartelizing took place and the government (or governments) there formally supported the cartel.

This test of substantiality opens up the possibility that at least two antitrust-minded nations may assert jurisdiction. For example, suppose a private producers' cartel covers some important raw material, forty percent of which is sold in the United States and forty percent of which is sold in the European Community. Both would indeed have a "substantial" interest and both would properly be able to enforce their antitrust laws against it. This situation is not essentially different from how we would deal with piracy. If a conspiracy were formed to practice piracy on the ships or planes of the United States and the European Community, both could and would exercise jurisdiction. In fact, this is what was done with the famous *Quinine* cartel, where both the United States Justice Department and the European Community's Commission proceeded against the quinine producers for price fixing (in that case "substantiality" was seen not only in a significant volume of sales to American buyers, but in the defendants' efforts to manipulate the American government's disposition of its surplus stockpile so as to insure that the overseas cartel would not be disrupted by "excess supply").

Thus, a government can and should exercise antitrust jurisdiction over

restraints practiced abroad, by people subject to personal jurisdiction, where the restraint has a substantial impact on sales at home. "Substantiality" can be measured in terms of sales that actually have taken place, or which would have likely taken place absent the restraint. Determining whether a restraint has a "substantial" impact may not be easy; but it is more realistic than applying either "pure territoriality" or "pure interventionism" as a basis for jurisdiction.

IV. ANTICOMPETITIVE ROLES OF GOVERNMENT

Jurisdiction is not the only subject in which we need a new spirit of pragmatic accommodation. Government involvement in cartel activities also is a prime concern.

Governments can carry out, encourage, order or wink at cartel activities in a variety of different ways, although a government interest or involvement does not of itself end the antitrust inquiry. In 1927, the United States Supreme Court held in the *Sisal Sales* case that foreign government legislation passed at the instigation of the cartelizers, to help and implement a cartel, did not afford United States antitrust immunity.

We see this issue developed more fully within the American federal system. State and local governments support, and at times even implement, restraints on competition contrary to the federal interest in antitrust enforcement and interstate trade. There have been a considerable number of antitrust cases (often private ones) arising out of such state activities. A rule has emerged that when private parties engage in a restraint on competition that the state as sovereign has commanded, then these private parties as involuntary actors, are exempt from the antitrust laws. However, where the state merely *authorized* the private parties to engage in the restraints, and they voluntarily chose to do so, no antitrust immunity is necessarily present. Similarly, *informal encouragement* by public officials does not provide the basis for antitrust immunity. Again the key, voluntary choice, belongs to the private parties who actually impose the restraint. The leading American case on price fixing involves successful Justice Department prosecution of a gasoline price stabilization scheme which Department of Interior officials informally encouraged during the Great Depression. The Supreme Court said, in *Socony-Vacuum Oil Co.*, that to allow as a defense such informal prompting would be to put the effective administration of the antitrust laws into the hands of "virtual volunteers." Sometimes government officials may even be regarded as co-conspirators in the private scheme, especially when the officials are acting beyond their legal duties.

Liability can also occur where a sovereign *formally delegates* its power to some private firm or group and makes it a self-regulator or "a state agency for limited purposes." This sovereign delegation may be a *sine qua non* to any restraint, but it is still the private party who chooses how to exercise the power. If the private party has a pecuniary interest in how the power is exercised, then it probably cannot hide behind the state's sovereignty. As a practical matter, the issue comes up most often when the state delegates power to

some self-regulatory organization (e.g., a professional association) which in turn uses its power to exclude competition.

The newest question in this area is whether "commercial" activities undertaken by a government are subject to the antitrust laws? This is a question of growing practical importance as governments take on more and more functions that had been performed traditionally in the private sector (e.g., running transportation terminals, mass transit, and sports stadiums). The Supreme Court faced this issue in *Louisiana Power & Light Co.*, where the question was whether a city-run electric light system, authorized by state law, is subject to antitrust laws. The Court held that the federal antitrust laws could be applied to such "commercial" activities carried out by municipalities. A somewhat analogous issue came up several years ago in which a closely-divided Supreme Court held that a foreign sovereign could not plead sovereign immunity as a defense to a claim arising out of a "commercial" transaction between the parties—a position which has been strengthened in the recent United States legislation on sovereign immunity. This is significant, for it suggests that a decision applying antitrust law to states and local "commercial" undertakings is likely to be extended to at least the "commercial" undertakings of foreign states operating in the United States (e.g., state owned transportation companies). If the antitrust laws are to be applied to the "commercial" activities of governments, many hard questions will arise as to what activity is really "commercial" and what is "sovereign" or "political." Where a foreign state's enterprise is involved, comity would dictate that the United States must pay some attention to the law and politics of the foreign state.

Apparently, it is not enough that the "government" is vaguely interested in some particular scheme of things. For antitrust purposes, the decisive questions will be: (1) what is the government's role, interest and power?; and (2) precisely how did the government carry out its role? All this may seem technical, but it should be viewed in the context of America's historic goal "to have a government of laws, not men" and its more formalized approach to public administration.

Perhaps, out of a spirit of comity, the United States ought to apply a different rule with respect to foreign governments indicating that so long as there is some "governmental" interest, the scheme ought to be exempt from the United States antitrust laws. Foreign governments often act informally and with broad discretion and thus even a very informal bureaucratic suggestion may be tantamount to an order. The businessman might ignore the suggestion this time, but the next time he needs approval from the same ministry or department he may have difficulties.

There is some merit to this suggestion, however, it goes too far. Suppose, for example, that the world's producers of some energy source want to increase the price. Perhaps they go to the United States Secretary of Energy and ask him what he thinks about forming some sort of producers' cartel to "stabilize" the prices and hopefully increase the predictability of supply. The Secretary agrees that such stabilization would be a fine idea because "higher

prices should produce more exploration." Now the same producers go to the Minister of Energy in each of the other major supplying nations, and each time they get the same answer: "It would be a fine idea and it also will help our balance of payments." Yet the American Secretary's informal blessing and encouragement is absolutely no defense under United States antitrust law. The producer is a "virtual volunteer." If we reach the opposite result for the equally informal blessing of the Canadian or French Minister of Energy, then we are left with an anomalous result (which, incidentally, is quite unacceptable politically within the United States). Diplomacy and comity may dictate that there be *some* flexibility in how the United States treats foreign government involvement in anticompetitive behavior, but this cannot mean accepting purely informal bureaucratic encouragement as a defense to a substantial private trade restraint.

Assume a foreign government is in fact the moving party and wants to "stabilize" prices and production in a key industry. The government can do this and assure no United States antitrust violation. But what this requires is that it play the dominant role and essentially eliminate private discretion. The foreign government, alone or in conjunction with other governments, must carry out or mandate the cartel actions. Then there is no United States antitrust liability, regardless of how substantial the impact is on American consumers. This is what the OPEC experience shows; for these governments themselves are openly operating the most effective cartel in the history of the world. Any private activity is essentially involuntary or non-existent; and the truly sovereign, political activities are beyond the effective reach of the United States courts for antitrust or any other purposes. The question turns on sovereign immunity.

The antitrust result is the same where the foreign state formally commands a private enterprise to do something abroad which directly affects the United States market. For example, suppose that an energy producing country commands its subjects, by statute or order in council, not to export the particular product at less than so many dollars a ton. The energy producer, who sells to American buyers at the state mandated minimum price level, engages in no antitrust violation even if the minimum price is intended to prop up the cartel of which that producer was a member. This issue has recurred in the Arab boycott context, where Arab governments have compelled firms not to land supplies identified as having been procured from a "blacklisted" source.

That is the unusual case. More often, a cartel involves "a blend of public and private decision-making." In such circumstances, the private party can and should be held liable for its anticompetitive initiatives. Where a foreign government *formally approves* a cartel, then this may sometimes suggest that some basic state policy lies behind the cartel. In the interest of comity, a United States court may want to ask how important the impact is on the United States. When the approved restraint has its major impact on the American market, and especially when this is the intended purpose, it is still appropriate to exercise United States antitrust jurisdiction over the private parties for their role in the scheme.

Many countries, including the United States, formally authorize export cartels and provide statutory immunity *from their own laws*. This is done for obviously mercantilist reasons. It is understandable in the context of a world in which national governments tend to be champions of producer interest within their borders.

However, the fact that the United States authorized producer export cartels and guarantees them immunity from American antitrust laws is no reason why consumer nations should not prosecute the same cartels under their own antitrust laws. Nations are entitled to be champions of consumer interests; and, provided they do it evenhandedly with due process, the United States really has no basis for complaint. Our Congress does not have the power and has never thought that it had the power to hand out immunities from the Combines Investigations Act, or the Treaty of Rome. The Parliament in Ottawa or the European Commission in Brussels also has no power to hand out general exemptions from our Sherman Act for private cartels.

All of this is salutary as a matter of practical politics. Consumers in the world are entitled to look to *their* governments to protect *their* interest—for only the government with such a consumer stake is likely to have the political incentive to enforce antitrust laws effectively. If we deny that power because of quaint jurisdictional notions or just plain timidity, then consumer interests are in fact likely to be lost to producer protectionism. It simply will be a little easier to “beggar your neighbor” than it already is.

V. COOPERATION OR CONFLICT IN ENFORCEMENT?

Much more effective cooperation among governments on these antitrust enforcement issues is needed. As nations, Canada and the United States are both producers and consumers. If they are to protect their consumer interests, cooperation is essential. The Executive Agreement between the United States and the Federal Republic of Germany offers a good example of what can be done. Each of the parties has a substantial antitrust enforcement mechanism in place, and both have vigorously enforced antitrust laws within their own borders. The Agreement promises extensive cooperation in securing documents and other relevant information from parties under investigation which conduct activities in the other's territory. This is vitally important, for if antitrust prosecution is to be evenhanded and fair it must be based on reasonable access to relevant facts. The United States-German Agreement is a long step in that direction.

What is happening in the English-speaking world (perhaps more accurately described as the English-French-Afrikaans-speaking world) is far less encouraging. There are a growing number of statutes and orders in council designed specifically to thwart antitrust investigations by any friendly foreign power. It all began in the 1950's with Ontario and Quebec “business records” legislation passed in response to an American antitrust investigation of the paper industry. It gained momentum with the British Shipping Contracts and Commercial Documents Act of 1964, designed to thwart Federal Maritime

Commission investigations. It reached full maturity with the special restrictions by Canada, Australia, South Africa and France designed to bar United States investigation of the alleged uranium cartel.

The irony of all this is particularly apparent in the context of the 1964 British Shipping Act. Shipping, like air travel, necessarily involves cooperation between the sovereigns at the ends of the routes. In this area both Britain and the United States accept a shipping conference system—but with important differences. The American Shipping Act makes clear that antitrust immunity is only for those conference arrangements regulated and approved by our Federal Maritime Commission. The British do not purport to regulate conference activity, instead they leave this to the shipping lines. This “hands off” policy runs fundamentally into the American (or the Adam Smith) ethic: We simply do not leave self-serving private commercial enterprises free to restrain whatever they wish. Rather, under the American scheme, the antitrust laws apply as a barrier to cartel behavior unless some other government’s scheme is put in their place as a safeguard. The British fundamentally object to anybody regulating their ships. However, if one power mandates what the other power prohibits, there is no trade. There is nothing outrageous about the United States saying that those who haul cargo to our ports will have to meet our Shipping Act and antitrust requirements for protecting competition.

What is disturbing about these “business records” laws is that they are being used to prevent the United States from *even looking* at whether what it regards as violations of its laws *may* have even taken place. The result is outrage and frustration in the United States. It also is likely to result in more haphazard and uneven law enforcement. The present environment will put great pressure on the Department of Justice to bring cases based on less evidence, simply because it will have to act on what it infers from the possibly distorted fragments of evidence it has. Defendants will be similarly prejudiced—the same laws may prevent them from producing any clarifying or exculpatory evidence that might otherwise be available. As a result, trials may be shorter but decisions less just.

The depth and the complexity in this whole issue is clear from the “Great Uranium Saga.” A few years ago, Westinghouse Electric Corporation sold uranium that it did not have to a number of American utilities. When the price of uranium skyrocketed from about five dollars a pound to approximately forty dollars a pound, Westinghouse refused to perform these contracts on grounds of “commercial impracticability.” The utilities sued and most of their cases were consolidated in Richmond, Virginia. Among other things, Westinghouse argued in its defense that the emergence of the uranium producers’ “club” was not something that it could have reasonably foreseen. In due course, the district judge in Richmond issued letters rogatory to the High Court in London, asking for oral testimony and documents from the senior officials of Rio Tinto Zinc, Ltd., allegedly a leading member of the “club.” The letters rogatory were issued pursuant to a treaty with and statute in England covering civil litigation. The British executives and Rio Tinto

strenuously objected to such discovery. They argued that their testimony might incriminate them under the Fifth Amendment of the United States Constitution and subject them to penalties under the Treaty of Rome antitrust regulations. The English Court of Appeals allowed the company to withhold the documents because of its potential exposure to penalties under the European Community regulations, and held that the Fifth Amendment (which only applied to *individuals*) was a question for the American court. The United States district judge, sitting in London, then ruled in favor of the Fifth Amendment privilege. Thereafter, Westinghouse prevailed on the Department of Justice to issue what amounted to an immunity order to compel testimony in the private case. In explaining its unusual course, the Department stressed that it was not acting on Westinghouse's behalf but rather it wanted immunity because the Westinghouse depositions offered the only reasonable prospect for the government to obtain testimony from these Rio Tinto officials for grand jury use.

Exposed individuals do not resist immunity orders—yet this is exactly what the Britons did, first in the District Court in Richmond and then back in the Courts of Justice in England. They argued that to allow the Department of Justice to indirectly obtain this testimony was a perversion of the treaty and the statute and contrary to the interests of Great Britain. In effect, they were arguing that any evidence that was likely to fall into the hands of the Department of Justice should be barred from private litigants with a legitimate right under the treaty. Rio Tinto was supported by counsel for the British Attorney General, who argued that there was a state interest in non-disclosure. The English Court of Appeals responded that this was not a proper way to exercise Crown privilege and that the Rio Tinto officials should answer the questions at the depositions, under the grant of immunity. They have not done so. The House of Lords has stayed the proceedings and will hear the case shortly. This saga reveals how determined the members of the uranium "club" are to prevent evidence from falling into the hands of American prosecutors. England has become such a key forum for the very practical reason that it is the only "club" member which has not erected a *general barrier* against United States discovery of uranium documents.

VI. SOME PRAGMATIC SUGGESTIONS

It is important that Canada and the United States try to work their way out of the complex situation in which they find themselves. There are some pragmatic steps that can be taken.

A. *Practical Advice to the United States*

I recommend that the United States do the following:

- (1) Make it clear and certain that United States enforcement agencies do not pursue a "pure interventionist" position on antitrust jurisdiction. They should be sensitive towards an "interventionist" reach of the type which covers many foreign mergers which are likely to have merely a modest impact on

American markets. The Department of Justice, as *amicus*, should urge a more limited view (such as a “substantial impact” test) on United States courts, in private antitrust cases.

- (2) Recognize that the grand jury has a lingering “star chamber” image among many people abroad. Thus, the Department of Justice should use the grand jury to investigate possible violations by overseas parties only when it seems *more probable than not* that a criminal indictment will be likely to result. This is narrower than the Department’s normal standard for authorizing a grand jury investigation—which is to proceed with the grand jury when a *reasonable possibility* exists that an investigation may result in criminal liability. Under my proposal, the Department would use its broad new civil powers and proceed by civil investigation. If after a civil investigation, the Department finds that a criminal violation is present, then it can still obtain an indictment by presenting the evidence again to the grand jury.
- (3) Be sensitive and restrained in using inflammatory “criminal” law enforcement tools, such as border watches. These tend to cause considerable consternation in Canada out of proportion to what they achieve.
- (4) Recognize that other countries’ systems of administration are often less formal than their American counterparts. We should look at least in part to the foreign state’s normal practice in dealing with the issue of whether the foreign state as sovereign has in fact “commanded” or “formally approved” any anticompetitive conduct under investigation.
- (5) Recognize formal approval by a foreign government as a basis for United States antitrust immunity where: (a) the major foreign state policy is at stake; and (b) the primary target or impact of the anticompetitive action is not the American import market.
- (6) Do not treat informal encouragement by foreign officials as the basis for antitrust immunity, nor charge such foreign officials as co-conspirators on the basis of such encouragement. When domestic government officials are involved, they can be more easily assumed to have some knowledge of United States antitrust laws; and it is less alarming to allow them to be charged as co-conspirators when they plainly exceed their official duties. Doing so with foreign officials causes great public consternation and little, if any, gain to American antitrust enforcement.
- (7) Apply United States antitrust laws to “commercial” enterprises, owned by foreign sovereigns, where such foreign enterprises operate in the United States or between the United States and foreign places. Out of comity, the United States should not

apply its antitrust laws to commercial activities by foreign state enterprises carried on overseas, unless the primary target or impact of such activity is in the American market. In other words, the United States should treat foreign state enterprises as engaged in conduct involving important state policies, as mentioned in paragraph (5) above.

- (8) Eliminate overlapping antitrust enforcement jurisdiction between the Federal Trade Commission and the Department of Justice in the international trade area. The "independent" commission (of which the Federal Trade Commission is one) is hard for foreigners to understand, especially when it is out of the day-to-day control of those responsible for the foreign policy of the United States. By contrast, in the airline field, international orders of the "independent" Civil Aeronautics Board are subject to review and being set aside by the President. Antitrust can be diplomatically sensitive. Therefore, it is highly desirable to leave antitrust enforcement in the hands of an executive agency directly responsible to the President, who is in turn responsible for conducting foreign policy. Most United States international antitrust enforcement is already being done by the Department of Justice. Formalizing this role would nevertheless eliminate lingering uncertainties in the private sector.
- (9) Realize that protectionism invites cartelization as a response. Therefore, the Attorney General and the Antitrust Division, as champions of competitive policy, should take an even more active role in analyzing, and when appropriate, opposing measures offered by other parts of the government to protect parts of the American economy from international competition. The newspaper stories make clear that the foreign government interest in the uranium cartel—which is very much at the heart of today's problems—was spurred by protectionist uranium policies and embargoes mandated by the United States Congress and the United States Atomic Energy Commission.

B. *Practical Advice to Canada*

I would recommend that Canada do the following things:

- (1) Canada should be more consumer-minded and investigate the extraterritorial aspects of dealing with foreign arrangements which have a substantial impact on Canada. This is well within the bounds of modern international law and is a sensible political course for a government dedicated to protecting its consumers.
- (2) To that end, prosecute United States Webb-Pomerene associations whose activities have a substantial adverse impact on Canadian markets. In other words, put the United States to the test: Does it really believe in extraterritoriality?

- (3) If you are going to cartelize, follow the Arab example. Have the government carry on the cartel activities openly and clearly while exercising central responsibility. This has the competitive virtue of putting the government squarely on the line politically, thereby giving its own media and consuming public an opportunity to be heard on these subjects.
- (4) Whenever the government seeks to get private firms to cartelize in a field where the United States is a substantial buyer, use formal government powers. It is much better to exercise formal powers at the outset than to prevent investigation after the event.
- (5) Be more sensitive and selective in dealing with the document discovery issue. It is one thing for the Canadian government to say that it needs to screen documents before they go abroad, to make sure that there is no sensitive state interest at stake. It is an entirely different thing to erect a total bar of all private documents. That looks unduly familiar—and unnecessarily abrasive—to a neighboring country which has just been through the Watergate saga and whose press and public are extraordinarily suspicious of bureaucratic “coverups” at high levels in government.

C. *Practical Advice to Both Countries*

We should remember the common values which unite us. We both have a fundamental commitment to democratic government under law. We both have a common interest in producer efficiency and consumer welfare. In the long run, we both have very strong interests in the effective working of the markets in the North American continent. Cooperation in making these markets work and in antitrust enforcement is greatly to be preferred to competition in erecting special interest barriers and cartels. We have too much in common—and too much at stake—not to try harder to do better.