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# FOREIGN DISCOVERY AND U.S. ANTITRUST POLICY—THE CONFLICT RESOLVING MECHANISMS*

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A look back at the last thirty years of United States antitrust's foreign "voyages of discovery" among friendly nations reveals a picture too often resembling not so much an era of good feeling as a thirty years war. Following hard upon Judge Hand's famous formulation of the "effects" doctrine in *Alcoa* in 1946 the Antitrust Division conducted a series of investigations in which compulsory process was used to seek documents located in foreign nations.[1] Prodded by what they viewed as U.S. antitrust authorities' impermissible overreaching, the affected countries began to enact defensive "blocking statutes." The passage by Canada's Ontario Province of the Business Records Protection Act started this trend in 1947.[2] The reaction continued with the Province of Quebec quickly enacting its own statute.[3]

In later years, Great Britain enacted its Shipping Contracts and Commercial Documents Act;[4] the Netherlands installed Article 39 of their Economic Competition Act,[5] and so it has gone almost to the present. The most recent examples are the Amendments to Canada's Atomic Energy Act[6] and Australia's Foreign Proceeding (Prohibition of Certain Evidence) Act.[7] Both were passed in 1976 to prevent documents relative to the worldwide uranium market-



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1. *See e.g., In re Investigation of World Arrangements with Relation to the Production, Transportation, Refining and Distribution of Petroleum*, 13 FRD 280 (D.D.C. 1952), and *In re Grand Jury Investigation of the Shipping Industry*, 186 F. Supp. 298 (D.D.C. 1960).

2. 1 Ont. Rev. Stat. c.44 (1960).

3. Quebec Business Concerns Act, Que. Rev. Stat. c.278 (1964).

4. Eliz. 2 c.87 (1964).

5. Act of June 28, 1956, as amended Act of July 16, 1978.

6. Atomic Energy Control Act, R.S.C. 1970, Uranium Information Security Regulations, P.C. 1976-2368, amended by P.C. 1977-2923 as of October 13, 1977.

7. Australia: Acts of the Parliament of the Commonwealth, 1901-1973 (supplemental volume for 1976).

ing arrangements from falling within the grasp of our grand jury.

Interestingly, the refusal to accede to U.S. compulsory process in foreign territories does not indicate implacable opposition to underlying antitrust principles. While United States antitrust had a head start, a significant number of nations have caught up with us and today we come together frequently to discuss problems of restrictive business practice control with our trading partners in multilateral and bilateral contexts. There is strong international consensus that restrictive business practices cutting across national boundaries must be governmentally controlled.

At the same time, however, there is little support today for binding supranational regulation. Thus, concerned nations have no choice but to use their national laws to protect domestic interests from injury by restrictive arrangements outside their boundaries. The United States is a member, along with twenty-three other countries, of the Organization for Economic Cooperation and Development (the OECD), which actively attempts to promote concensus on measures to be taken against restrictive business practices.

The United States has not changed its view of the appropriate reach of our antitrust law's subject matter jurisdiction—that we cannot do nor would we. But we have increasingly accepted our responsibility as a member of the family of nations to modify investigative practices more appropriate to domestic situations when we contemplate reaching across the water or over our northern border for documents or testimony. We believe international comity requires us, in almost all cases, to consider and consult affected foreign sovereigns before issuing compulsory process covering materials held outside the United States.

The Council of the OECD, its highest body, in 1967 and again in 1973 promulgated Recommendations to member nations that they notify and consult one another when undertaking an investigative or enforcement action against restrictive business practices involving significant national interests of another member.

While the OECD Council Recommendations of 1967 and 1973 themselves provide the signatories a sufficient vehicle and framework for institution of consultations, such requests for aid may also be made under bilateral arrangements of the sort we have negotiated with the antitrust enforcement agencies of the Federal Republic of Germany[8] and Canada.[9] Today, through our Foreign Com-

8. Agreement Between the Government of the United States of America and

merce Section, we also maintain good working relations with relevant Japanese and British authorities, which have increasingly led to fruitful gains in particular investigations, and we are exploring a possible similar arrangement with Australia.

Our bilateral efforts have been strengthened by the most recent Recommendation of the Council of the OECD,[10] promulgated this past August. The Council noted that the present state of international law and of the member nations' restrictive business practice laws presents difficulties for effective control of anticompetitive actions by multinationals,

> especially in assembling necessary information held outside the jurisdiction of the country applying its law, in serving process and in enforcing decisions in relation to enterprises located abroad.

The Council accordingly recommended that its member governments consider several actions, the most important of which for our purposes are:

> to allow, subject to appropriate safeguards, including those relating to confidentiality, the disclosure of information to the competent authorities of Member countries by the other parties concerned . . . .;
>
> to facilitate, through conclusion of or adherence to bilateral or multilateral agreements or understandings, mutual administrative or judicial aid in the field of restrictive business practices;
>
> whilst vigorously enforcing their legislation on restrictive business practices, to make use as far as possible of the OECD procedures on co-operation . . . so as to facilitate consultation and resolution of problems.

The Antitrust Division is attempting to hold to these principles in seeking information abroad. In general, where we perceive no serious threat of document destruction, we will proceed by requests for voluntary submissions, rather than by compulsory process. Simultaneously, or in most instances even before issuing a voluntary letter request, we will notify an affected government

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the Government of the Federal Republic of Germany Relating to Mutual Cooperation Regarding Restrictive Business Practices, dated June 23, 1976.

9. Joint Statement of November 3, 1969 ("Mitchell-Basford Undertaking").

10. *Recommendation of the Council* Concerning Action Against Restrictive Business Practices Affecting International Trade Including Those Involving Multinational Enterprises. Organization for Economic Cooperation and Development. Paris, 9th August 1978 C(78) 133 (Final).

under our OECD obligations. OECD notification may also be the occasion for solicitation of assistance from antitrust enforcement authorities or from government agencies in the particular country.

What all of this means is that we have stepped back from the confrontation mode of the past. In the future, we see voluntary cooperation as our first resort in obtaining information and evidence located abroad. The new emphasis is a frank recognition of the past limited utility of compulsory process in these cases. It occasionally produced some interesting subpoena enforcement litigation, but not many documents. So we now look to improvement of our relationships with the countries with which we are already cooperating, and to establishment of bilateral relationships with other nations whenever the potentiality of conflict over antitrust enforcement exists.

While we reserve the right to issue compulsory process running to material in the control or possession of a United States incorporated entity or a United States individual resident abroad,[11] we will usually alert the relevant foreign state even in these situations where we have a clear claim based on nationality.

As an example of our active pursuit of the policies urged by the OECD Council, John Shenefield led a delegation of Antitrust Division, State Department and FTC representatives to Ottawa in the second week of October for discussions with the Canadian foreign office and antitrust authorities. The purpose of this meeting was to update and improve our antitrust cooperation arrangement. This effort was begun as a result of Premier Trudeau's interest, expressed to President Carter early in 1977, in alleviating tensions stemming from U.S. antitrust investigations. Thereafter, we took the initiative and, via Vice President Mondale, the United States made a specific proposal to Mr. Trudeau. Under that proposal, United States antitrust authorities at the outset of an investigation would refrain from issuance of compulsory process covering any Canadian entity or Canadian subsidiary of a United States entity. Instead we proposed to proceed in the first instance to seek information via request to the affected entity.

Discussions with the Canadians are well advanced and we are dealing in some detail with questions of the triggering circumstances, the form and the timing of each government's actions to assist investigations of the other. I am happy to report that, from the beginnings of this exercise—in an atmosphere of some tension—we

11. 28 U.S.C. 1783 provides for such service abroad.

have now progressed to the point where I believe a new and better United States-Canadian antitrust cooperation pact should be concluded within six months.

On another front, we are working with the Government of Australia, exploring the possibilities of some similar mutual accommodation. Recently, we and the Australians have not had a smooth relationship respecting antitrust policy, and we hope that at the very least these first efforts will lead the Australians to a greater understanding of our enforcement philosophy and our law. I expect they will also produce a fuller comprehension by the United States of the importance of the Australian national interest involved in effective control over the production and marketing of their scarce natural resources.

The Australian Attorney General, Senator Peter Durack, led a delegation to Washington on September 5 for discussions with Attorney General Bell, John Shenefield and representatives of State, the FTC and our own Foreign Commerce Section. The meeting had been arranged during Attorney General Bell's visit to Australia earlier in the year. While these negotiations were cordial, it was plain that the Australians felt strongly about some of our recent actions.

Certain progress was made, for it was agreed that, taking account of different philosophies, the parties would nonetheless attempt to formulate a mechanism through which the two governments might reduce future friction between our competition policy on the one hand and their natural resources marketing policy on the other.

Other promising signs had earlier been noted. On June 1, 1978, the Australian Deputy Prime Minister and Minister for Trade and Resources, J.D. Anthony, announced new regulations for the export marketing of uranium. The following excerpt from that announcement was of great interest to us.

> Action taken in accordance with the procedures I have outlined in this statement should not give rise to any questions under the anti-trust laws of other countries. . . . [W]hile the Government does not wish to be taken as accepting that it is appropriate for other countries to apply their anti-trust laws extraterritorially without due regard to matters affecting our national interest, we urge our producers not to resort to arrangements which would jeopardise them under those laws.

The Australian Attorney General reported to Parliament the aim of his American trip had been "to explore how, for the future, the enforcement policies of the United States authorities might

take account of the laws and policies of the Australian government and the national interest of Australia." Attorney General Durack reported that the consultations were friendly and constructive, and expressed his optimism for an agreement being reached in the near future. In response to a further question he expressed his hope for such an agreement within six months.

We were equally pleased by the tenor of the Australia-United States consultations and will be working very hard to make them bear fruit.

I want to make it clear that our goal in this area is effective discovery; we believe that effective discovery can be obtained only where affected governments are convinced that our procedures are fair and sensitive to their significant national interests. Thus, we expect a process of good faith consultation and cooperation to yield real benefits to our investigations.

Our commitment to voluntary cooperation and to conciliation over differences is genuine, but I would be remiss not to say that in some circumstances the use of compulsion and the vigorous pursuit of sanctions available for disobedience to such process will likely be appropriate. I can envision times when voluntary cooperation fails, resistance to our requests proves obstructive, the American national interest in the balance is strong, and the information possessed is vital. I can even see situations where we would ask a court to attach a foreign company's U.S. assets and declare them forfeit to enforce its writ.

But again, our policy's goals as I have outlined them here are to minimize confrontation, maximize effective consultative procedures and so to diminish our need for compulsory process.

There is a term in vogue in the Multilateral Trade Negotiations, and I think it is apt here. The word is "transparency"—a proper diplomatic term for avoidance of secret dealings. Cases where private companies raise the foreign compulsion or act of state defense are often the same ones in which our discovery requests cause such conflict. The common thread in these cases is usually the nonpublic nature of the foreign government's role in encouraging or securing of agreements among private firms.

A feature of a bill recently introduced by Congressman Gore of Tennessee would remedy this problem with a dose of transparency. While we cannot support Congressman Gore's bill as currently drawn, one of its ideas holds some attraction. Under that provision, any United States company which was urged, cajoled, or ordered to take part in any anticompetitive arrangement abroad with potentially adverse affects on United States commerce would

be legally bound to promptly notify the United States antitrust authorities.

There are several problems with this idea, especially the appropriate definition of reportable incidents, and, obviously, my discussion here of Congressman Gore's proposal should not be construed as a Justice Department endorsement. However, I think that the notion of some sort of reporting onus on the United States companies in sovereign compulsion incidents is worth some thought. I think that it would dovetail nicely with our increased emphasis on bilateral consultations, and is in tune with a proposal we made in the last OECD meetings. We there sought to persuade our trading partners to accept the notion that an action to restrict trade, undertaken by one government and having competitive consequences in a second country should be recognized by all member governments as legitimate cause for affected governments to seek consultations under the 1967 and 1973 Council Recommendations.

A requirement imposed on United States entities operating abroad to notify us of such actions would serve as an early alert to the United States government to institute the consultation process. If it came promptly, we would have a good chance to employ diplomatic means to prevent or to mitigate the effects of essentially private restraints of international trade initiated or sponsored by foreign governments. The resulting transparency would also minimize subsequent discovery and enforcement conflicts by moving more of the conflict of national policies into the diplomatic realm. These are necessarily tentative thoughts, since there are certain difficulties both with the concept of imposing a notification requirement on a United States firm abroad and with the acceptability of such notification obligations to foreign sovereigns. However, all governments that wish to preserve a generally free market regime for international trade should be interested in any measure which the United States can undertake to help diminish frictions over the extraterritorial aspects of our law. I think a notification concept similar to that in Congressman Gore's bill might fit well into a legal regime which emphasizes consultation and conciliation.

I would conclude simply by repeating that our commitment is to a foreign commerce enforcement program grounded on cooperation in discovery with the governments of our major trading partners, bolstered by our increasingly mutual adherence to competition as the norm for international business dealings. We want to develop this commitment into an enforcement mechanism as effective for our foreign commerce cases as is compulsory process for our purely domestic cases.