Cornell International Law Journal

Volume 11
Issue 2 *Summer 1978*

Article 2

The Application of the Sherman Act to Conduct Outside the United States: A View from Abroad

J. S. Standford

THE APPLICATION OF THE SHERMAN ACT TO CONDUCT OUTSIDE THE UNITED STATES: A VIEW FROM ABROAD

J.S. Stanford†

"It is axiomatic that in anti-trust matters the policy of one state may be to defend what it is the policy of another state to attack." Lord Wilberforce in *Westinghouse*.[1]

It is important at the outset to put in the proper context the problems that have arisen between Canada and the United States in the area of antitrust enforcement. The close corporate links that exist between major elements of the Canadian and U.S. economies, reflecting the high degree of U.S. equity investment in such vital areas of the Canadian economy as the resource and industrial sectors,[2] yield significant benefits for Canada but also present certain problems, notably in the area of antitrust. Fortunately for Canadians, the United States has a well-developed and vigorously enforced system of domestic antitrust law. The pattern of commercial conduct that this requires of the U.S. private sector has an effect on the conduct of U.S. corporations when they enter the Canadian economy. Because the antitrust policies of our two countries are so similar in their broad fundamental objectives, this spillover effect is welcomed in Canada as beneficial. My colleagues in the Canadian Department of Consumer and Corporate Affairs have spoken of the serious problems they would experience if they had to enforce Canadian anti-combines legislation next door to a cartelized U.S. economy.

---

† Director General, Bureau of Commercial and Commodity Relations, Department of External Affairs, Ottawa. Formerly Director, Legal Advisory Division, Department of External Affairs. Member of the Alberta Bar. The views expressed herein are solely the personal views of the author and do not necessarily reflect the views of the Department of External Affairs or of the Canadian Government.

1. *In re* Westinghouse Elec. Corp. Uranium Contract Litigation, [1978] 2 W.L.R. 81, 94 (H.L. 1977).

2. *See* INFORMATION CANADA, FOREIGN DIRECT INVESTMENT IN CANADA 20 (1972).

To be sure, differences have arisen between Canada and the United States in the past over attempts to enforce U.S. antitrust laws in Canada. These differences have been the result less of fundamental conflicts of government economic policy than of a more general concern over U.S. antitrust investigations into activities within Canada. In an attempt to recognize and avoid these problems, the Fulton-Rogers understanding[3] of 1959 provided that "in the future, discussions will be held between the two governments at the appropriate stage when it becomes apparent that interests in one of our countries are likely to be affected by the enforcement of the antitrust laws of the other."[4]

The close collaboration between U.S. antitrust and Canadian anticombines officials which grew out of this arrangement appreciably reduced the friction generated by extraterritorial application of antitrust laws. This bilateral cooperation was taken a step further by the 1969 Basford-Mitchell understanding,[5] which provided for the exchange of information between Canadian and U.S. antitrust authorities and reaffirmed the intention of the two governments to apply in their bilateral relations the 1967 OECD recommendation on restrictive business practices.[6]

These two understandings have served both countries well, and neither country desires to impair their effectiveness. Quite the contrary, Canada strongly desires to maintain and enhance the kind of cooperation envisaged by the Fulton-Rogers and Basford-Mitchell arrangements. But to enable our antitrust collaboration to grow into new areas we must first resolve a new and somewhat different problem that has arisen between us as a result of recent efforts by the United States to apply its antitrust laws to conduct in Canada and other countries.

I

A NEW KIND OF PROBLEM

If the issues in our present differences are to be correctly identified and resolved, we must recognize that the problem we are now dealing with has a new dimension distinguishing it from previous bilateral antitrust issues. The Fulton-Rogers and Basford-Mitchell arrangements were directed at the anticompetitive conduct undertaken by private corporations on their own

3. *See generally* [1959] 1 HOUSE OF COMMONS DEB. 617-19 (Can.) (statement of Hon. E.D. Fulton, then Minister of Justice).

4. *Id.* at 619.

5. The understanding was announced and described in U.S. Dep't of Justice, Joint Statement (press release, Nov. 3, 1969) (copy on file at the offices of the *Cornell International Law Journal*).

6. ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, RECOMMENDATION OF THE COUNCIL CONCERNING CO-OPERATION BETWEEN MEMBER COUNTRIES ON RESTRICTIVE BUSINESS PRACTICES AFFECTING INTERNATIONAL TRADE (Oct. 5, 1967).

initiative to increase corporate profits. Public statements by senior officials of the U.S. Department of Justice Antitrust Division in 1976, however, indicated a new emphasis and direction in the Foreign Commerce Section's enforcement policy toward conduct outside the United States.[7] This new policy was "codified" for the guidance of antitrust lawyers and their clients, both in the United States and abroad, in a document issued by the U.S. Department of Justice in January 1977 entitled *Antitrust Guide for International Operations*[8] (the Guide). These statements and the Guide gave notice of an intention on the part of U.S. antitrust enforcement authorities to assert a degree of jurisdiction over activities occurring in other countries that appeared to go well beyond that which had been reflected in the Antitrust Division's prior enforcement policy. Not only did the new policy assert very broad claims to personal and subject matter jurisdiction over activities outside the United States, but more importantly, it gave notice of an intention to invoke U.S. antitrust law against activities outside the United States undertaken in compliance with or in response to foreign government policies.

A. THE CANADA-UNITED STATES ECONOMIC RELATIONSHIP

To appreciate the significance for Canada of the assertions of extraterritorial jurisdiction in the Antitrust Division's statements and Guide, one must assess their potential impact in the context of the unique economic relationship between Canada and the United States. American individuals and corporations have made very substantial equity investments in the Canadian economy, presumably because they find such investments profitable.[9] A large portion of this investment is in the economically and politically sensitive resource and industrial development sectors.[10] There is, therefore, a very large U.S. presence in vital areas of the Canadian economy.

Another significant dimension of the relationship must be kept in mind. The United States exports less than 10 percent of its gross national product.[11] Canada, in contrast, exports over 20 percent of its GNP.[12] Moreover,

7. *See* notes 15-22 *infra* and accompanying text.

8. ANTITRUST DIVISION, U.S. DEP'T OF JUSTICE, ANTITRUST GUIDE FOR INTERNATIONAL OPERATIONS (1977) [hereinafter cited as ANTITRUST GUIDE], *reprinted in* ANTITRUST & TRADE REG. REP. (BNA) No. 799, at E-1 (1977) *and* TRADE REG. REPORTS (CCH) No. 266, pt. II (1977).

9. *See generally Canadian Foreign Investment Screening Procedures and the Role of Foreign Investment in the Canadian Economy: Hearings Before the Subcomm. on Inter-American Economic Relationships of the Joint Economic Comm.*, 94th Cong., 1st & 2d Sess. (1975-1976).

10. *See* INFORMATION CANADA, *supra* note 2, at 20.

11. *See* BUREAU OF ECONOMIC ANALYSIS, U.S. DEP'T OF COMMERCE, SURVEY OF CURRENT BUS., Dec. 1977, at S-1 (United States 1976 gross national product (GNP) was $1,706.5 billion; exports totaled $162.9 billion).

about 70 percent of all Canadian exports are purchased in the United States.[13] The United States purchases over 20 percent of its total imports from Canada—more than from any other country.[14]

Two particularly relevant consequences follow from this unique bilateral investment and trading relationship. First, the implementation of Canadian economic policy in such sensitive areas as resource and industrial development will require certain conduct not only of Canadians but also of U.S. firms and their affiliates operating in Canada. If relations between the Canadian Government and the private sector are good, the conduct required to implement economic policy will be determined after consultation between business and government. Compliance with a policy that the Government has determined to be in the national interest will, in many instances, be ensured by means which fall short of the imposition of a formal legal obligation. The effective functioning of this kind of business-government relationship requires more than a government that is sensitive to the concerns of the private sector; it also requires a private sector that is responsive to the policies of government and will generally conform to those policies without having to be threatened with prosecution, fines, and imprisonment. Effective management of a complex industrial economy cannot rest upon legislated sanctions alone.

The second consequence following from the nature of the Canada-United States economic relationship is that, because Canada exports such a large proportion of its production, because so many of those exports are purchased in the United States, and because Canada is the largest source of U.S. imports, any Canadian economic policy affecting a Canadian commodity or product that is to enter international trade is very likely to have a significant impact in the United States. This consequence is unavoidable, and very often it will benefit the U.S. consumer. But sometimes it will not, because the policies in question are formulated to protect and promote Canadian economic interests, which do not always coincide with those of the United States.

---

12. *See* CURRENT ECONOMIC ANALYSIS DIVISION, STATISTICS CANADA, CANADIAN STATISTICAL REV., Dec. 1977, at 8, 11 (Canadian GNP was $190.03 billion; exports totaled $38.15 billion).

13. *Id.* at 114 (1976 Canadian exports totaled $38.15 billion, of which $25.80 billion were exported to United States).

14. *See* SURVEY OF CURRENT BUS., *supra* note 11, at S-23 (U.S. 1976 imports totaled $120.68 billion, of which $26.24 billion were imported from Canada). Imports into the United States from other countries during 1976, expressed as a percentage of total U.S. imports, were: from Japan, 12.8 percent; from the Federal Republic of Germany, 4.6 percent; from the United Kingdom, 3.5 percent; and from Italy and France, just over 2 percent. *See id.*

B. THE NEW U.S. ENFORCEMENT POLICY

It is in the context of this very intense economic relationship, with extensive intercorporate links and a large volume of trade in both directions, that we must assess the implications for Canada of the claims of antitrust jurisdiction asserted in the U.S. Antitrust Division's statements and Guide. The following passages indicate in general terms the genesis of the problem. For example, the Guide states:

> U.S. law in general, and the U.S. antitrust laws in particular, are not limited to transactions which take place within our borders. When foreign transactions have a substantial and foreseeable effect on U.S. commerce, they are subject to U.S. law regardless of where they take place. . . .
>
> . . . .
>
> . . . [T]o use the Sherman Act to restrain or punish an overseas conspiracy whose clear purpose and effect is to restrain significant commerce in the U.S. market is both appropriate and necessary to effective U.S. enforcement.[15]

The sole test of jurisdiction is effect on U.S. commerce, and this effect, once established, allegedly confers U.S. jurisdiction over conduct wherever it occurs. Douglas E. Rosenthal, Chief of the U.S. Antitrust Division's Foreign Commerce Section, has stated that

> a conspiracy, even if entered into abroad among foreigners, is subject to the U.S. antitrust laws if it has the intended and actual effect of restraining United States domestic *or foreign* commerce.[16]

"Conspiracy" is an emotive word. In ordinary usage, people "conspire" to do bad things, not good things, and one who attempts to justify a conspiracy has a heavy onus to discharge. But in some situations the acts complained of may have been directed or encouraged by a government. In such cases is it accurate or conducive to useful analysis to characterize a democratically-elected government as a "conspirator" for discharging its responsibility to ensure the continued viability of an important domestic resource or manufacturing industry?

Joel Davidow, former Chief of the Foreign Commerce Section of the Antitrust Division, U.S. Justice Department, has also noted the effort to extend U.S. law extraterritorially on the basis of the domestic effects of conduct abroad.

> U.S. antitrust officials have generally believed that the broad and even extraterritorial scope of our antitrust laws, our long-arm statutes, our courts' willingness to pierce corporate veils, and, most importantly, the attractiveness and size of our national market, have enabled us to be quite successful in policing and controlling those restrictive practices of multinational corpora-

---

15. ANTITRUST GUIDE, *supra* note 8, at 6-7 (footnote omitted).

16. Remarks of Douglas E. Rosenthal, then Ass't Chief, Foreign Commerce Section, Antitrust Div., U.S. Dep't of Justice, before the World Trade Institute, *Antitrust Jurisdiction and the Activities of Foreign Governments* 3 (emphasis added) (Dep't of Justice press release, Jan. 29, 1976) (copy on file at the offices of the *Cornell International Law Journal*).

tions which might adversely affect U.S. commerce.[17]

The Guide incorporates this expansive view of U.S. antitrust jurisdiction:

> [A firm], *which has no business activities at all in the U.S.*, may be more difficult to reach under the U.S. antitrust laws, but the Department will try to include all appropriate defendants in every case. If [the firm] has property in the United States, it may be seized under certain circumstances to induce consent to the jurisdiction of a U.S. antitrust court.[18]

It is evident from the context of these statements and the Guide —particularly the concern expressed over arrangements affecting international trade in natural resources[19]—that the enforcement policy elaborated in these documents represents, at least in part, a reaction to events since 1973. The application of this enforcement policy appears, however, not to be restricted to the rather extreme disruptions in the petroleum market in 1973-74. Mr. Davidow has indicated that foreign governmental conduct is objectionable if it has the intended effect of simply raising prices in foreign, including U.S., markets.

> The last problem, and the most difficult, arises when foreign officials organize producer nations into international cartels intended to raise the price of commodities sold to us . . . . [T]he development of such organizations is a disaster for free competition, world trade and economic development.
>
> . . . .
>
> . . . [W]e as a nation are strongly opposed to, and feel injured or threatened by, the emerging producer cartels.[20]

In the present economic environment, however, it is both politically and economically unrealistic to suggest that foreign governments, which cannot control the price of their imports, must not act, individually or collectively, to increase the price of their exports.

What are the possible strategies for the United States? Mr. Davidow dismisses diplomacy as ineffective.[21] Direct suit against the producer nations is described as "theoretically conceivable, but fraught with difficulties" because of sovereign immunity and because producer governments

> would be likely also to argue that the acts complained of were diplomatic agreements concerning the most vital natural resources of those states, and thus were acts of foreign states, which are recognized both in international law and American law as being beyond question in the courts of another nation. . . . Thus, it appears that an antitrust case aimed directly at foreign governments participating in a commodity cartel would be legally difficult and diplomatically controversial, and perhaps even confrontational.

---

17. Remarks of Joel Davidow, Chief, Foreign Commerce Section, Antitrust Div., U.S. Dep't of Justice, before the Symposium on Private Investments Abroad, Southwestern Legal Foundation, *Extraterritorial Application of U.S. Antitrust Law in a Changing World* 8-9 (June 15, 1976) (copy on file at the offices of the *Cornell International Law Journal*).

18. ANTITRUST GUIDE, *supra* note 8, at 56 (footnote omitted).

19. *See id.* at 50-61.

20. Remarks of Davidow, *supra* note 17, at 17-20.

21. *See id.* at 20.

. . . .

> Yet another alternative, and one somewhat less difficult, involves antitrust challenge to multinationals based in or with branches in America which coopèrate with and facilitate the carrying out of a foreign-state producer cartel injuring the U.S.[22]

These passages enunciate the two reasons why I describe the issue that has now arisen between the United States and a number of other countries, including Canada, as a problem with a new dimension. First, the acts complained of are not those of private firms combining for commercial advantage. Rather, they involve the intervention of governments seeking to protect "the most vital natural resources" of their economies. Second, because of the difficulties in proceeding directly against foreign governments in U.S. courts, the proceedings are brought against the multinational corporation for doing what it was asked to do in the producer state by the government of that state. The multinational becomes a conduit for the extraterritorial application of domestic antitrust law, and the antitrust investigation and civil or criminal proceeding become unilateral dispute settlement procedures in what is clearly a policy conflict between the producer and consumer governments.

C. Intergovernmental Conflicts and Domestic Law

When a manufacturing or resource marketing arrangement that has been called into existence by producer governments encounters the opposition of consumer governments, the situation that arises is one of policy differences or conflicts between governments. And as Lord Wilberforce noted in the recent House of Lords decision in the *Westinghouse* case,[23] "[i]t is axiomatic that in anti-trust matters the policy of one state may be to defend what it is the policy of another state to attack."[24] This recognition of the problem as a dispute between governments is an essential first step in any progress toward its resolution.

The principal point of this commentary is that in such a situation it is inappropriate for one of the governments involved in the policy conflict to seek to impose its desired solution by invoking its domestic law before its tribunals to adjudicate the legality of conduct in another jurisdiction. The difference should be resolved, as are other intergovernmental differences, by consultation and negotiation. Certainly, recent experience has shown that the use of extraterritorial antitrust investigation, far from preventing diplomatic controversy and confrontation, tends to exacerbate these problems and to draw the legislature and the judiciary into the fray as well.

---

22. *Id.* at 20-22 (footnote omitted).

23. *In re* Westinghouse Elec. Corp. Uranium Contract Litigation, [1978] 2 W.L.R. 81 (H.L. 1977).

24. *Id.* at 94.

Thus, the resolution of any given international policy conflict by negotiation between governments may be rendered more, rather than less, difficult when one party seeks to invoke the antitrust "remedy."

D. INTERNATIONAL LAW CONSIDERATIONS

The establishment or encouragement by one or more producer countries of arrangements to regulate production of a commodity and its international market price may or may not make good economic sense, depending on the circumstances affecting trade in the particular commodity; but such arrangements, when nondiscriminatory, are a perfectly acceptable form of conduct under international law. Objections to such conduct must therefore be based on considerations of economic policy, or possibly economic philosophy. They cannot be based, in the international context, on considerations of law.

The assertion of extraterritorial jurisdiction—upon which the new international antitrust enforcement policy is based—rests upon a number of factors which, although possibly valid in the narrow context of U.S. domestic law, are a good deal more controversial in the international arena, where the principle of reciprocity functions as a rule of reason in cases of jurisdictional conflict. Personal jurisdiction may be asserted on the basis of a telex message or telephone call from abroad to the United States or may be induced through the seizure of property.[25] Subject matter jurisdiction can be asserted on the basis of a very broad interpretation of the "effects" doctrine.[26] But can a nation such as the United States, with substantial economic interests in virtually all parts of the world, reasonably expect other governments to yield to this assertion of jurisdiction over acts outside the United States simply because the acts may have had a significant effect on U.S. domestic or foreign commerce? And what of the situation where the acts complained of were performed or encouraged by the foreign government that is being asked to yield jurisdiction to the United States?

It should be recognized that in the present context these claims to jurisdiction are asserted not to bring within the rule of law persons and activities that otherwise would be subject to no law, but to displace the jurisdiction of the state where the acts complained of took place. Those seeking to rely on these broad claims to jurisdiction are bound by the principle of reciprocity to consider whether, if the roles were reversed, the United States would be prepared to yield to a foreign state jurisdiction over acts carried out within the United States in furtherance of U.S. government policy.

---

25. *See* ANTITRUST GUIDE, *supra* note 8, at 56.

26. This can sometimes occur in a manner that appears to go beyond the objective territorial principle.

Where governments or their agencies carry out the acts in question, the new enforcement policy relies upon a formulation of the principle of sovereign immunity recently incorporated in the U.S. Foreign Sovereign Immunities Act of 1976.[27] The new Act provides that "[t]he commercial character of an activity shall be determined by reference to the nature of the course of conduct . . . rather than by reference to its purpose."[28] This formulation is narrower than either that enunciated in the Tate letter,[29] which represented U.S. policy prior to the passage of the new Act, or the "restrictive" theory of sovereign immunity applied by many states. The Guide adopts the narrower view, stating that "[i]n general, foreign firms, including state-owned or controlled firms, will be expected to observe the prohibitions of our antitrust laws."[30] In context, this statement necessarily applies to conduct outside the United States, including conduct of a state-owned firm in the state which owns it. The Guide continues:

> For example, if [a government] in its capacity as majority shareholder . . . required that company's management to organize a commercial cartel, this may be regarded as a "non-sovereign" act.[31]

Since the U.S. Foreign Sovereign Immunities Act looks at the nature, not the purpose, of the conduct, it would make no difference that the government had acted for the clearly governmental purpose of maintaining the viability of a vital resource or manufacturing industry. The fact that it had acted in a commercial context would preclude immunity. It appears that a similarly restrictive approach will govern the application of the act of state doctrine.[32]

A limited interpretation of the defense of foreign compulsion is another factor upon which the current international antitrust enforcement policy rests. To sustain this defense, U.S. law appears to require direct foreign governmental action compelling the defendant's activities.[33] This seems to place the governments of free enterprise economies at a disadvantage in relation to governments that practice a more interventionist policy. Indeed, a restrictive application of the foreign compulsion defense would induce foreign governments to adopt less permissive and more mandatory and inflexible forms of intervention in the private sector, including direct inter-

27. Pub. L. No. 94-583, 90 Stat. 2891 (codified at 28 U.S.C. §§ 1330, 1332(a), 1602-1611, 1391(f), 1441(d) (1976)).

28. 28 U.S.C. § 1603(d) (1976).

29. Letter from Jack B. Tate to Philip B. Perlman (May 19, 1952), *reprinted in* 26 DEP'T OF STATE BULL. 984 (1952).

30. ANTITRUST GUIDE, *supra* note 8, at 9.

31. *Id.* at 55 n.100.

32. *See* Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682 (1976); ANTITRUST GUIDE, *supra* note 8, at 54-55.

33. *See* Bates v. State Bar of Ariz., 433 U.S. 350 (1977); Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975); Parker v. Brown, 317 U.S. 341 (1943); ANTITRUST GUIDE, *supra* note 8, at 54-55.

vention in the affairs of U.S. multinationals of a kind to which U.S. Government representatives have objected in other contexts.[34] This kind of intervention would not be attractive to the private sector. The Canadian Government would presumably prefer, wherever appropriate, to promote national economic policies by means that are less interventionist than compulsory legislation. Intervention and coercion may become the lesser of two evils, however, if the alternative is abdication of the Government's power to guide the Canadian economy in accordance with Canadian interests.

II

POSSIBLE CANADIAN RESPONSES

For a government such as Canada's, which is affected by the new enforcement policy, the issue presented is a simple but fundamental one: will the Canadian private sector, in matters of Canadian economic policy, be more responsive to Canadian or to foreign law and policy directives where the two diverge or even conflict? In formulating responses to the new antitrust enforcement policy, the ultimate objective of the Canadian Government must be to retain the ability to determine resource and industrial development policies for Canada. The Government will lose this ability if the multinationals that play a major role in the Canadian resource and industrial sectors are more responsive in their Canadian activities to U.S. law than to Canadian policies and national interests.

A. Blocking Access to Information and Intervention to Provide Immunity

The responses of affected governments to antitrust investigations and litigation already underway indicate that a number of governments are deeply concerned over, and will seek to resist, application of U.S. antitrust law abroad in accordance with the new international enforcement policy. Di-

34. The United Nations Declaration on the Establishment of a New International Economic Order, G.A. Res. 3201, para. 4(g), 6 (special) U.N. GAOR, Supp. (No. 1) (1974); *see* Draft Resolution I, para. 4(g), 6 (special) U.N. GAOR, Annexes (Agenda item 7) 28, U.N. Doc. A/9556 (1974), asserts that "[r]egulation and supervision of the activities of transnational corporations" are among the powers of host state governments. Developing countries had proposed a text which read "[c]ontrol of the activities of transnational corporations," Draft proposal para. 4(f), 6 (special) U.N. GAOR, U.N. Doc. A/AC.166/L.47 (1974); *see* 6 (special) U.N. GAOR, Annexes (Agenda item 7) 18, U.N. Doc. A/9556 (1974), but the U.S. representative objected to the word "control" because the term implied an excessive degree of government intervention, an involvement that went beyond those measures normally exercised by a government in connection with corporate persons within its jurisdiction. The concept of "regulation" rather than "control" was carried forward into the United Nations Charter of Economic Rights and Duties of States, G.A. Res. 3281, ch. II, art. 2(2)(b), 29 U.N. GAOR, Supp. (No. 31) 52, U.N. Doc. A/9631 (1974).

rect responses to the various uranium proceedings[35] include legislation in Australia,[36] regulations under the Atomic Energy Control Act[37] and a refusal to act on letters rogatory[38] in Canada, and the intervention of the Attorney General before the House of Lords followed by a decision refusing to execute letters rogatory in the United Kingdom.[39] This reaction has generated a good deal of concern among U.S. antitrust enforcement authorities over what they regard as "stonewalling" and obstructionism by otherwise friendly governments whose business with the United States is normally carried on in a manner characterized on both sides by frankness, openness, and a desire to cooperate as fully as possible in the pursuit of common objectives. The systematic refusal of information and lack of cooperation, especially in the course of judicial proceedings, is therefore particularly puzzling and, one must assume, annoying to U.S. officials.

Canada and the United States provide information to each other freely in the course of consultation and negotiation to the extent that their laws permit. Both countries assist each other as a matter of course in various kinds of legal proceedings through the execution of letters rogatory, requests for extradition, and other procedures. What, then, is the element in the request for information about uranium marketing, for example, that sets it apart and leads normally cooperative governments to resist U.S. efforts to obtain information? I believe the answer is that, unlike the usual requests for information, this information is not being sought for purposes of intergovernmental consultation or negotiation, a process in which both sides take part and in which they would exchange information reciprocally. Rather, the information requested is to be used in a domestic U.S. judicial proceeding. But unlike normal judicial assistance, this request concerns a proceeding that the requested governments have reason to believe may be inimical to their national interests. To be more specific, if the Canadian Government transmits or permits the transmission of information from Canada to the United States to assist the prosecution of persons or corporations for acts done outside the United States at the request or encouragement of the Canadian Government, then the next time Canada seeks similar cooperation

35. *See In re* Westinghouse Elec. Corp. Uranium Contract Litigation, [1978] 2 W.L.R. 81 (H.L. 1977).

36. *See* Foreign Proceedings (Prohibition of Certain Evidence) Act, 1976, No. 21 (Austl.), *as amended by* Foreign Proceedings (Prohibition of Certain Evidence) Amendment Act, 1976, No. 202 (Austl.), *as implemented by* Order of the Attorney General, Austl. Gov't Gaz. No. S.214 (Nov. 29, 1976).

37. Uranium Information Security Regulations, SOR/77-836, 111 Can. Gaz. pt. II, at 4619 (1977) (replacing Uranium Information Security Regulations, SOR/76-644, 110 Can. Gaz. pt. II, at 2747 (1976)).

38. *Re* Westinghouse Elec. Corp. & Duquesne Light Co., 16 Ont. 2d 273 (High Ct. Justice 1977).

39. *In re* Westinghouse Elec. Corp. Uranium Contract Litigation, [1978] 2 W.L.R. 81 (H.L. 1977).

from the private sector of the Canadian economy in the implementation of national economic policy, it must expect the multinationals in Canada first to seek the advice of their U.S. legal counsel, and then to comply with the Canadian request only if compliance will not expose them or their U.S. affiliates to legal proceedings in the United States. Consequently, if the Canadian Government is not prepared to accord what protection it can to private firms prosecuted abroad for complying with Canadian policy, it cannot reasonably expect the future cooperation of those firms in carrying out measures it judges to be in the Canadian economic interest. The private sector would thus become more responsive to U.S. law than to Canadian law and policy in determining whether and to what extent it would act in the Canadian interest. This is not a result that a foreign government can accept. Nor is it a result that the United States would be likely to accept if faced with similar conduct by a foreign government holding the same relative economic "clout" and therefore the same potential for influencing conduct within the United States.

In determining how to respond to claims of extraterritorial jurisdiction that it regards as unreasonable, a government will certainly wish to consider arming itself with a discretionary power to prevent the removal of information that it believes will be used abroad contrary to its national interest. But attempts to frustrate an investigation, prosecution, or civil litigation already underway by blocking access to information are generally only partially successful, and in any event can be no more than a palliative. A good lawyer's first objective is not to defend his client successfully in court but to keep him out of court. If the threat of antitrust liability in the United States is a significant disincentive to compliance with Canadian policy, then the Canadian Government may also have to consider providing the necessary "cover," through legislation or other forms of direct intervention, to confer immunity from antitrust liability. The degree of intervention required for this purpose will be largely a function of the evolution of the U.S. doctrine of foreign compulsion. As indicated earlier,[40] the more restrictively that doctrine is applied, the more foreign governments will feel obliged—whether they like it or not—to subject the private sector to mandatory rather than flexible control.

B. Confrontation or Cooperation?

One reason for concern over the publication of the Guide and other official statements setting forth the new international enforcement policy is the effect these policy statements may have on corporate conduct outside the United States. Antitrust lawyers will rely heavily on these documents when

40. *See* notes 33-34 *supra* and accompanying text.

advising their multinational clients on the risk of prosecution in the United States for acts performed in compliance with host government policy. The result is that when the conduct in question, even though it takes place outside the United States, is of a kind to which the new enforcement policy would apply, there will be a serious disincentive to compliance by multinationals with the measures encouraged by the host government.

The problem facing host governments is how to overcome this disincentive. Recent experience has shown that antitrust prosecutions and the responses of affected foreign governments have led, if not to confrontation, at least to an impasse that, if allowed to continue, could escalate into confrontation. This is clearly not in the interests of the United States, Canada, or any other nation. The increasing complexity and interdependence of the economies of the developed world dictate even closer cooperation among governments in a number of areas, including the regulation of restrictive business practices which increasingly cross national boundaries. Therefore, although unilateral action by affected governments is likely to be part of the response, it cannot be the only response. There must also be dialogue with the United States.

Any situation that has already created some obstacles and threatens to create further obstacles to cooperation in the regulation of restrictive business practices is clearly cause for serious concern. This problem has been recognized at the highest levels of our two governments. Prime Minister Trudeau and President Carter, at their meeting in Washington in February 1977, agreed that a joint effort should be made to resolve the fundamental problem which, in the immediately preceding months, had led to three separate applications of U.S. antitrust law to conduct encouraged or approved by the Government in Canada. As a result of this meeting, U.S. Attorney General Griffin B. Bell visited Ottawa in June 1977 to consult with three Canadian ministers: Secretary of State for External Affairs Don Jamieson, then Minister of Justice Ron Basford, and then Minister of Consumer and Corporate Affairs Anthony Abbott. The four officials agreed upon general principles to guide their deputies in working out a notification and consultation procedure in antitrust cases affecting national interests.

These meetings have already produced encouraging results in the form of public statements by U.S. antitrust enforcement officials recognizing the relevance of the principle of comity to the extraterritorial application of U.S. antitrust laws. In an address to the American Bar Association in Chicago on August 8, 1977, Attorney General Bell spoke of comity as a rule of fair play in international relations:

> We owe deference to other nations when their vital national interests are at stake and the conflicting United States interest carries a lesser weight. But other nations owe us, in turn, deference at least to the extent of working toward a compromise arrangement if our fundamental national interests are

directly affected.[41]

The Attorney General went on to speak in rather severe terms of foreign legislation blocking U.S. access to information abroad, but I believe that to the extent U.S. enforcement policy reflects the basic principle enunciated by Attorney General Bell, the need to invoke such legislation will largely disappear.

Similarly, in an address to the International Bar Association in Atlanta on November 3, 1977, Associate Attorney General Michael J. Egan reaffirmed the need to take into account conflicting national interests. He also discussed the possibility that "unyielding" extraterritorial application of U.S. antitrust law "could provoke damaging retaliation" which would impair the ability of the Department of Justice "to obtain effective relief as to foreign conspiracies involving foreign products."[42]

> I submit that the only appropriate response is one of seeking accommodation and compromise when United States antitrust enforcement conflicts with foreign laws and important foreign policies.
>
> . . . .
>
> The political, economic, and social policies of foreign nations are invoked not for the purpose of horse-trading—"you stop this investigation and we will buy United States jet planes"—but to show why it is legally inappropriate to apply United States antitrust law in a particular way and why foreign law or policy should be more fully taken into account.
>
> . . . .
>
> "[W]e are not to read general words, such as those in [the Sherman] Act, without regard to the limitations customarily observed by nations upon the exercise of their powers . . . ."[43]

III

OBSERVATIONS

It is customary in articles written by public servants to include a disclaimer to the effect that the views expressed are not necessarily those of their governments. This applies to the whole of this commentary, of course, but it particularly applies to the following paragraphs, which frankly speculate on the possible resolution of the current problem. We are dealing with a new kind of problem and it is likely that policy on both sides will evolve as we come to understand each other's concerns better and seek to accommodate them in ways that take account of our own national interests.

---

41. Address by Griffin B. Bell, U.S. Attorney General, before the American Bar Ass'n 6 (Aug. 8, 1977) (copy on file at the offices of the *Cornell International Law Journal*).

42. Address by Michael J. Egan, Assoc. U.S. Attorney General, before the Business Law Section, International Bar Ass'n 7-8 (Nov. 3, 1977) (copy on file at the offices of the *Cornell International Law Journal*).

43. *Id.* at 8, 12 (quoting United States v. Aluminum Co. of America, 148 F.2d 416, 443 (2d Cir. 1945)).

A. Domestic Law and International Relations

Achieving a meeting of minds in the area of international antitrust enforcement is not an easy task. Even after we dispose of the rhetoric concerning, on the one hand, considerations of national sovereignty and, on the other, the fundamental importance of the antitrust laws to the national way of life, there remains a barrier to understanding that is difficult to identify but is nonetheless very real and often very frustrating. I believe this barrier arises in part because of a tendency in discussions of this subject to switch back and forth from consideration of national law to consideration of policy factors that ought to affect the extraterritorial enforcement of that law, without always recognizing that these are two related but quite different subjects. This schizophrenic approach to the problem is an almost unavoidable consequence of the fact that the courts, in applying domestic law extraterritorially, often recognize the relevance of considerations of national policy and seek to reflect them in their decisions. But ultimately it is the function of courts to determine and apply domestic law, not foreign policy; thus concepts such as sovereign immunity, act of state, foreign compulsion, and possibly even comity, are applied by the courts as domestic law rather than as foreign policy.

When U.S. officials engage their counterparts from foreign governments in discussions to identify the limits upon the application of U.S. antitrust law to conduct outside the United States, both sides recognize that they are not negotiating the content of U.S. domestic law. For the U.S. representatives the content of U.S. law is not negotiable; for the representatives of the other nation the content of U.S. domestic law, although it may be part of the problem, does not provide an acceptable basis in principle for the resolution of differences between governments and is to that extent irrelevant. This places the U.S. participants in a difficult position: on the one hand, they are bound to uphold and enforce U.S. law; on the other, they are required to recognize that there are limits beyond which domestic law ought not—and possibly cannot—be enforced as to conduct abroad. The determination of these limits involves to some extent principles of international law, but to an even greater extent it involves the application by governments of the principle of international comity as an essential factor in the conduct of their international relations. Therefore, in discussions of what the acceptable limits of jurisdiction are or ought to be, any examination of the domestic case law on extraterritoriality should be conducted in full awareness of the limitations of its relevance.

To summarize, in any discussion between governments of the rules to apply on the international plane, the rules of national law, whether statutes or judicial decisions, cannot be determinative; at best they can suggest the direction in which common ground might be sought, while at worst they

can be serious obstacles to the application of the principle of comity necessary to any resolution of the problem. One recent U.S. court of appeals decision that is potentially very helpful in this respect is *Timberlane Lumber Co. v. Bank of America*[44] There Judge Choy acknowledged that

> at some point the interests of the United States are too weak and the foreign harmony incentive for restraint too strong to justify an extraterritorial assertion of jurisdication.
>
> What that point is or how it is determined is not defined by international law. . . .
>
> . . . .
>
> . . . An effect on United States commerce . . . is alone not a sufficient basis on which to determine whether American authority *should* be asserted in a given case as a matter of international comity and fairness. . . .
>
> . . . .
>
> The elements to be weighed include the degree of conflict with foreign law or policy, the nationality or allegiance of the parties and the locations or principal places of business of corporations, the extent to which enforcement by either state can be expected to achieve compliance, the relative significance of effects on the United States as compared with those elsewhere, the extent to which there is explicit purpose to harm or affect American commerce, the foreseeability of such effect, and the relative importance to the violations charged of conduct within the United States as compared with conduct abroad.[45]

The individual factors identified by the court in *Timberlane* may be subject to discussion, but the whole tenor of the court's decision suggests that U.S. domestic law does indeed contain a rather broad element of discretion in "foreign interest" cases, from which one may conclude that U.S. representatives do have a basis in their own domestic law for discussing with their foreign counterparts the application of principles of "international comity and fairness" to specific cases.

B. National Policy and International Cooperation

A state may object to the application of foreign law to conduct within its territory not only on the bases of sovereignty and generally accepted principles of international law, but also on the ground that the conduct relates to a specific national interest and national policy—which is likely to be the case where the conduct in question has been mandated or encouraged by the government. In view of the embryonic state of international law in this area, national interest and policy will often be primary considerations in situations involving the extraterritorial application of foreign laws. In these cases, the objecting state would appear to be under an obligation—political or moral rather than legal—to inform the state seeking to apply its law

44. 549 F.2d 597 (9th Cir. 1976).
45. *Id.* at 609, 613, 614 (footnotes omitted) (emphasis in original).

extraterritorially of what its policy is and, in general terms at least, the kinds of conduct that it has encouraged in support of that policy.

The state being asked to exercise forbearance in the extraterritorial application of its law will wish to assure itself, first, that "national interest" is not being invoked ex post facto to cloak what was essentially a commercially motivated combine or a deliberate attempt to evade its law. And second, the state will wish to examine the general scope of the asserted policy so that it may identify the conduct, if any, that may have gone beyond what was necessary or desirable to achieve the identified national interest. The state objecting to the extraterritorial application of law should be prepared to provide information concerning these points.

A problem arises, however, if information concerning measures taken by the objecting state in its national interest that has been provided to the requesting state for intergovernmental consultation is used by the authorities of the requesting state as evidence before its domestic judicial bodies to support the extraterritorial application of its law. Governments normally are prepared to discuss their policies with representatives of other friendly governments affected by those policies. But few, if any, governments will readily accept the proposition that the importance of their national interests and the characterization of their activities as governmental or otherwise are appropriate subjects for determination by a foreign state's judicial bodies. These are questions that a domestic tribunal may well consider when applying a domestic law principle of comity in adjudicating a dispute affecting only private parties, but where governmental policies are called into question, the dispute is a matter for intergovernmental consultation, not domestic law adjudication. Because governments may object in principle to this kind of examination of their policies by foreign courts, they may be reluctant to cooperate in the conduct of such proceedings by providing information in support of such an examination. Nor are governments likely to accept the contention that they are under an obligation to disclose or permit disclosure of detailed information in their possession or jurisdiction to foreign courts in order to attempt to establish innocence under foreign law. To do so would amount to a recognition of foreign jurisdiction when it is the very claim to jurisdiction that is disputed.

It is clear, therefore, that a government might readily provide information to a friendly government for one purpose but not for another. Consequently, the response to be made to any request for information will depend not only upon the nature of the information sought but also upon the purpose for which it is sought and the willingness of the requesting state to ensure that the information will be used only for this purpose. In the absence of any assurance that the information will not be used in a manner

inimical to the requested state's national interest, it seems entirely reasonable that the requested state will decline to provide the information sought.

C. Looking Behind National Policy

If the conduct under examination was mandated or encouraged by the government in whose territory the act occurred, it is not at all clear that the state seeking to apply its law extraterritorially ought to go further and inquire into the manner in which the state requiring or encouraging that conduct secured the compliance of the private sector with national policy. This would appear to be entirely an internal matter of the latter state. Systems of government vary, even among the democracies. The system of separation of powers among the executive, legislative, and judicial branches exists in the United States, with an elaborate network of checks and balances governing the relationships among the various branches. By contrast, in Canada and the United Kingdom, the executive holds office by virtue of the support of the majority in the legislature—specifically, the House of Commons. This difference has practical consequences. A policy endorsed by the U.S. Administration may or may not enjoy the support of Congress. When a Canadian Minister announces Government policy, however, it is recognized that implementation of that policy can, if necessary, be secured through the enactment of legislation by virtue of the Government's majority in Parliament. But both the Government and the private sector may prefer to avoid the formality and rigidity of legislation, and compliance with policy may instead be secured through discussions and voluntary action permitted, but not compelled, by domestic law. This is a feature of the Canadian system of government which may differ from that of the United States and which the doctrine of "foreign compulsion," if rigidly applied, would be unable to accommodate. Further, this difference illustrates some of the limitations on extending the experience of the federal-state relationship in the United States into the international arena. The relationship between the U.S. federal and state governments is determined by a national constitution, but the relationship between the United States and foreign governments is not similarly regulated by national law. Although international law is not yet sufficiently developed in this area to provide a corresponding set of rules, it does not follow that this lacuna in international law should be filled by the application of U.S. domestic law.

As mentioned earlier, a state which is asked to exercise forbearance in the application of its law to conduct outside its territory will wish to assure itself that the invocation of national interest is made in good faith and not ex post facto to cloak either commercially motivated anticompetitive conduct or a deliberate attempt by a domestic company to evade the state's law by acting through an affiliate abroad. In determining whether the invoca-

tion of national interest is made in good faith, however, one must recognize that serious problems in a vital industry may first be brought to the attention of the government by the industry itself. And whether the problem is first identified by industry or by the government, it is very likely that the government will wish to consult with industry to identify the elements of the problem and the possible remedies. This form of industry-government collaboration does not suggest that the government is simply being used as a tool of industry in the latter's search for commercial advantage. Such collaboration is not only entirely consistent with government conduct in the broad national interest, it is, or should be, a normal step in the process by which governments formulate industrial policy. Consultation of this kind should not, therefore, compromise the public character of the government policy subsequently decided upon or affect how authorities in other countries view the measures mandated or encouraged by the government to protect the industry in the public interest.[46]

CONCLUSION

Canadians and Americans pride themselves on living in societies governed by the rule of law. But when the extraterritorial application of law gives rise to competing claims to jurisdiction, such jurisdictional conflicts cannot be resolved internationally by recourse to national law. When the

46. Professor Baker's implication, *see* Baker, *Antitrust Conflicts Between Friends: Canada and the United States in the Mid-1970's*, 11 CORNELL INT'L L.J. 165, 191 n.148, that the difference in our approaches reflects the difference in our professional backgrounds may be correct, but I doubt that the issue is entirely subjective. We seem to differ on two levels. On the national level I accept that a court may seek to determine the policy of a foreign government in order to determine whether the principle of comity is relevant. I do not agree, however, that it is appropriate for the court, having identified a foreign national policy clearly expressed as such by the government, to look behind that policy and make the application of the principle of comity dependent upon whether the manner of the formulation or implementation of the policy conformed to U.S. domestic procedures. The U.S. system of government reflects U.S. experiences; those of other states reflect their different experiences. Even among the democracies these differ widely. It would be wrong for one state to use its experience as the criterion for judging the governmental systems of other states. It is not a matter of displacing the rule of law, but rather one of identifying which law is relevant and respecting it.

Nor do I seek to displace the rule of law, where it now exists, on the international level. I do urge that where a transnational antitrust issue is really a manifestation of a policy conflict between national governments, it should be recognized that there may be no applicable international law to resolve the conflict. In such cases resolution should be sought through the normal methods of consultation and negotiation. For one government to seek to resolve the conflict in its favor by invoking its national law before its domestic tribunals is not the rule of law but an application, in judicial guise, of the principle that economic might is right, a concept that ought to be even more repugnant to lawyers than to diplomats.

If any potential private cartelizers read in this an invitation to seek a governmental "cover" for private anticompetitive conduct, I urge them not to act on that understanding. It could be very expensive. A government that invoked "national interest" where none existed would thereby forfeit its ability to invoke that interest in later cases. This is a powerful incentive to play the game fairly.

competing jurisdictional claims essentially reflect divergent or even conflicting national policies, recourse to the national law and domestic judiciary of one of the disputants is an inappropriate means of resolving the conflict. In an ideal world, international disputes of this kind could be resolved by reference to international law and, if necessary, international judicial or other dispute settlement procedures. But the present state of international law is inadequate for this task. This commentary has sought to demonstrate that the current differences over the extraterritorial application of antitrust law must be recognized as policy issues rather than as legal issues and dealt with accordingly. This is certainly not to suggest that the regulation of differences of this kind is not a proper subject for international law. On the contrary, the challenge facing the representatives of governments now involved in consultations to resolve these issues is to identify principles governing the extraterritorial application of antitrust law that will be generally acceptable to states engaged in or affected by such conduct. These principles, if they are agreed upon and respected, can provide the basis for a pattern of state conduct which could very well evolve into a body of customary international law in this area of large and growing importance to an economically complex and interdependent world. The motivation to succeed in this endeavor is provided, first, by our common recognition that it is in the national interests of both our countries to maintain and increase our cooperation in the field of antitrust enforcement, and second, by our mutual desire that our relations in this area reflect the spirit of constructive good neighborliness which is the hallmark of our relationship.