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Recommended Citation

Baker, Donald I. (1978) "Antitrust Conflicts between Friends: Canada and the United States in the Mid-1970's," *Cornell International Law Journal*: Vol. 11: Iss. 2, Article 1.
Available at: <http://scholarship.law.cornell.edu/cilj/vol11/iss2/1>

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CORNELL INTERNATIONAL LAW JOURNAL

Volume 11

Summer 1978

Number 2

ANTITRUST CONFLICTS BETWEEN FRIENDS: CANADA AND THE UNITED STATES IN THE MID-1970'S

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.¹ In fact, the conflict is broader than just that between Canada and the United States: quite similar conflicts exist today between the United States and the other common law nations, including Britain and Australia.² This is definitely discouraging.

What is encouraging is that we are able to hold a rational dialogue about these conflicts and their causes.³ I am happily freed of the constraints

† Professor of Law, Cornell Law School. A.B. 1957, Princeton University; B.A. in Law 1959, Cambridge University; LL.B. 1961, Harvard Law School. From August 1976 to May 1977 the author served as Assistant Attorney General in Charge of the Antitrust Division, U.S. Department of Justice.

1. The most recent example is the current uranium dispute. *See Re Westinghouse Elec. Corp. & Duquesne Light Co.*, 16 Ont. 2d 273 (High Ct. Justice 1977). *See generally* notes 118-39 *infra* and accompanying text.

2. *See* notes 104-13 *infra* and accompanying text.

3. For another view on some of the issues dealt with in this Article, see Stanford, *The*

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 people in the United States. So be it. I believe in the honest exchange of possibly outrageous ideas—for sometimes, through the process, we can find a new truth that may still seem outrageous to political apologists and other custodians of conventional wisdom.

These conflicts with which we deal are phrased in dry lawyers' concepts: "jurisdiction," "extraterritoriality," "comity," "Crown privilege," and so forth. But they go much deeper. They reflect differences in national policies, priorities, politics, and unspoken assumptions. To make progress, we must go behind the lawyers' phrases to the broader realities. Let me take the first step in this direction. I shall start with the United States and then turn to Canada.

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, Americans have a solid distrust of government, a deep lack of respect for those in authority. The Bert Lance affair is one of the most recent manifestations of this phenomenon.⁴

U.S. 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 words, as consumers, Americans would generally rather rely on the impersonal market than on a paternalistic government for protection.⁵ 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.⁶ The Sherman Act,⁷ therefore, is not a few dusty pages buried in our

Application of the Sherman Act to Conduct Outside the United States: A View from Abroad, 11 CORNELL INT'L L.J. 195 (1978).

4. See generally Horrock, *Variety of Charges Caused Bert Lance's Decline and Fall*, N.Y. Times, Sept. 22, 1977, at 17, col. 1.

5. In *Northern Pac. R.R. Co. v. United States*, 356 U.S. 1 (1958), Mr. Justice Black wrote:

The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions.

Id. at 4.

6. In his landmark opinion in *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1948), Judge Learned Hand stressed that, by enacting the Sherman Act, Congress "was not necessarily actuated by economic motives alone. It is possible, because of its indirect social or moral effect, to prefer a system of small producers, each dependent for his success

law libraries but, as the Supreme Court put it, "the Magna Carta of free enterprise" in the United States.⁸ High school history students read about Senator Sherman, Standard Oil, and the robber barons. Congress may not have been too sure of what it was doing in 1890,⁹ but what it did has taken on an almost constitutional quality.¹⁰ Price fixing, cartels, and the like are front page evils in the American environment.

Today, antitrust policies and enforcement are riding a particularly strong wave of public support. Politicians, encouraged by the press and public, have sharpened the antitrust weapons greatly in the past five years. First, U.S. antitrust enforcement budgets—already large by the standards of most industrial countries—have been increased about 40 percent in *constant* dollars, and almost 100 percent in inflated dollars.¹¹ Second, broad new investigational tools have been created to aid the enforcement agencies.¹² Third, state attorneys general have been authorized to bring treble damage class actions on behalf of injured consumers.¹³ Fourth, maximum antitrust jail sentences have been tripled, and maximum corporate fines have been increased twentyfold.¹⁴ And fifth, resale price maintenance

upon his own skill and character, to one in which the great mass of those engaged must accept the direction of a few." *Id.* at 427. The Supreme Court made the same point in its first decision under § 7 of the Clayton Act, as amended in 1950: "[W]e cannot fail to recognize Congress' desire to promote competition through the protection of viable, small, locally owned businesses. Congress appreciated that occasional higher costs and prices might result from the maintenance of fragmented industries and markets. It resolved these competing considerations in favor of decentralization." *Brown Shoe Co. v. United States*, 370 U.S. 294, 344 (1962).

7. 15 U.S.C. §§ 1-8 (1976).

8. *United States v. Topco Assocs.*, 405 U.S. 596, 610 (1972).

9. See W. LETWIN, *LAW AND ECONOMIC POLICY IN AMERICA* 16 (1965); H. THORELLI, *THE FEDERAL ANTITRUST POLICY* 225-32 (1954); Letwin, *The English Common Law Concerning Monopolies*, 21 U. CHI. L. REV. 355, 384-85 (1954).

10. Both the Sherman Act, 15 U.S.C. §§ 1-8 (1976), and the Clayton Act, 15 U.S.C. §§ 12-27, 44, 29 U.S.C. §§ 52-53 (1976), speak in general terms. Their language does not mandate answers to close questions. Rather, these antitrust laws embody a broad commitment to competition as the fundamental economic regulator, but leave room for shifts in the nature of the commitment over time. Chief Justice Hughes made this point in his opinion in *Appalachian Coals, Inc. v. United States*, 288 U.S. 344 (1933), a case that was first a shift, and then an aberration, in antitrust enforcement: "As a charter of freedom, the [Sherman] Act has a generality and adaptability comparable to that found to be desirable in constitutional provisions." *Id.* at 359-60.

11. U.S. OFFICE OF MANAGEMENT & BUDGET, *THE BUDGET OF THE UNITED STATES GOVERNMENT* 307 (1978); *id.* at 346 (1973). The total personnel of the U.S. antitrust enforcement agencies increased about 50 percent during the last decade. See *Oversight of Antitrust Enforcement: Hearings Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary*, 95th Cong., 1st Sess. 333 (1977) [hereinafter cited as *Oversight of Antitrust Enforcement*] (statement of Assistant Attorney General Donald I. Baker).

12. See Hart-Scott-Rodino Antitrust Improvement Act of 1976, Pub. L. No. 94-435, tits. I, II, 90 Stat. 1383 (amending scattered sections of 15 U.S.C. (1976)).

13. *Id.* tit. III (codified at 15 U.S.C. §§ 15c-15h (1976)).

14. Antitrust Procedures and Penalties Act of 1974, Pub. L. No. 93-528, 88 Stat. 1706 (codified in scattered sections of 15, 47, 49 U.S.C.).

has been repealed.¹⁵ The American political momentum is plainly for more, and tougher, antitrust enforcement.¹⁶ 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 are also afflicted with what might be called the sunshine ethic. As a people, we thoroughly distrust public officials, especially when they make vague claims about national security, public safety, or the general good. We aspire, in the celebrated phrase of the Massachusetts Declaration of Rights, to have "a government of laws and not of men."¹⁷ Americans want government carried out through formal rules and orders, and want it carried on in the open. Thomas Jefferson once said if he had to choose between government without newspapers and newspapers without government, he would choose the latter.¹⁸ This bias lingers on. Thus we vindicate the right of the press to print whatever it has, while narrowly limiting the right of government to claim confidentiality on what it has. Illustrative of this tradition are the *Pentagon Papers* case,¹⁹ where the Supreme Court flatly rejected the Government's firm assertion of "national security" as a ground for withholding public disclosure,²⁰ and the uniquely captioned case, *United States v. Nixon, President of the United States*,²¹ in which the Supreme Court unanimously rejected the right of our highest elected official to use a broad "executive privilege" to withhold documents subpoenaed by the special prosecutor.²² It was for the courts, not the President, to determine the privilege question.²³

The American sunshine tradition goes much beyond the few celebrated cases. The Freedom of Information Act²⁴ allows members of the public to obtain access to nearly all internal government documents.²⁵ Congress has just reemphasized the point by passing the Government in the Sunshine

15. Consumer Goods Pricing Act of 1975, Pub. L. No. 94-145, 89 Stat. 801 (amending 15 U.S.C. §§ 1, 45(a) (1976)).

16. See *Oversight of Antitrust Enforcement*, *supra* note 11, at 1-8 (statements of Senators Kennedy, Laxalt, and Metzenbaum).

17. Mass. Const. pt. 1, art. XXX.

18. Letter from Thomas Jefferson to Colonel Edward Carrington (Jan. 16, 1787), reprinted in 4 THE WRITINGS OF THOMAS JEFFERSON 357, 360 (P. Ford ed. 1894).

19. *New York Times Co. v. United States*, 403 U.S. 713 (1971) (per curiam).

20. "Both the history and language of the First Amendment support the view that the press must be left free to publish news, whatever the source, without censorship, injunctions, or prior restraints." *Id.* at 717 (Black, J., concurring). "Secrecy in government is fundamentally anti-democratic, perpetuating bureaucratic errors. Open debate and discussion of public issues are vital to our national health. On public questions there should be 'uninhibited, robust, and wide-open' debate." *Id.* at 724 (Douglas, J., concurring) (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 269-70 (1964)).

21. 418 U.S. 683 (1974).

22. *Id.* at 707-13.

23. *Id.* at 703-05.

24. 5 U.S.C. § 552 (1976).

25. *Id.* § 552(a)(2)-(3), (b).

Act,²⁶ which requires various government agencies to hold virtually all their deliberations in public.²⁷ 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!²⁸

Whether all of this emphasis on open markets and open government is wise is not the issue.²⁹ What is important is that these American values be recognized as real and deeply held.

II

THE CANADIAN REALITY

I like to think that I look at Canada from the perspective of a friend and admirer. I certainly do so 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.

I am struck by how much of what has happened in Canada has been in reaction to less than wholly pleasant developments in the United States. Much of the settlement in the Maritime Provinces was a 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 was a strong form of federal government because they saw great dangers in weakness at the center of a vast federation.

In the 20th century, and particularly in the last couple of decades, Canadians have reacted to the huge American role in their economy in a variety of ways. This is reflected in Canada's regulation of foreign investment³⁰ and in its attempts to make foreign-owned enterprises behave as if

26. Pub. L. No. 94-409, 90 Stat. 1241 (1976) (codified in scattered sections of 5, 39 U.S.C.).

27. 5 U.S.C. § 552b (1976). The Act provides that "every portion of every meeting of an agency shall be open to public observation." *Id.* § 552b(b). Subsection (c) sets forth a narrow list of exceptions.

28. *See* 5 U.S.C. § 552b(a)(2), (b) (1976); 49 U.S.C. § 1321(c) (1976).

29. I have questioned its wisdom before. *See* Baker, *Antitrust in the Sunshine*, 21 ST. LOUIS U.L.J. 347, 351-53 (1977).

30. The restrictions on nonresident ownership of Canadian industry were prompted by the sharp increase in direct foreign investment following the Second World War. By 1953, nonresidents had contributed 50 percent of the equity and debt capital invested in Canadian manufacturing and 57 percent of that employed in mining—a dramatic rise from the 1926 figures of 35 percent and 38 percent respectively. DOMINION BUREAU OF STATISTICS, CANADA'S INTERNATIONAL INVESTMENT POSITION 1926-1954, at 35 (1956). The "Gray Report" stated that, as of 1967, nonresidents owned 58 percent of the assets of Canadian manufacturing companies and almost 63 percent of the assets of Canadian mining concerns. GOV'T OF CANADA, FOREIGN DIRECT INVESTMENT IN CANADA 21 (1972). *See* J. DICKEY, CANADA AND THE AMERICAN PRESENCE (1975). Canada's regulation of foreign investment in the financial industry is particularly restrictive: nonresidents may not own more than 25 percent of the stock of any Canadian bank, life insurance, trust, or loan company. Bank Act, CAN. REV. STAT. c. B-1, § 75(2)(g) (1970); Canadian and British Insurance Companies Act, *id.* c. I-15, § 19 (1)-(2) (1970);

they were purely citizens of Canada, rather than outposts in some overseas commercial empire.³¹ Canadians seem to have a more charitable view of government than do Americans. The Canadian Government is directly involved in the sensitive activities that Americans keep the government out of in the United States. For example, in Canada the Government plays a key role in the broadcasting field³²—and does quite a good job indeed—while in the United States broadcasting is almost wholly relegated to the private sector³³—with what often seems a sacrifice of program quality in the search for commercial advertising revenues. Similarly the Canadian Government does much more in energy and transportation than its American counterpart.³⁴

The Canadian public's greater confidence in government is reflected in a wholly different approach to government secrecy. The Official Secrets Act,³⁵ following the British tradition,³⁶ has a breadth and scope that is hard for Americans to appreciate.³⁷ Crown privilege has a reach unfamiliar to Americans.³⁸ And the courts seem much less involved as an outside check

Trust Companies Act, *id.* c. T-16, § 38(1)-(2) (1970); Loan Companies Act, *id.* c. L-12, § 45(1)-(2) (1970). See generally Arnold, *Restrictions on Foreign Investment in Canadian Financial Institutions*, 20 U. TORONTO L.J. 196 (1970); Comment, *Foreign Investment Restrictions: Defending Economic Sovereignty in Canada and Australia*, 14 HARV. INT'L L.J. 345 (1973).

31. See, for example, Canada's actions in the uranium controversy, notes 104-13 *infra*, and Canada's regulation of the petroleum industry, Thompson, *Sovereignty and Natural Resources—A Study of Canadian Petroleum Legislation*, 1 VAL. L. REV. 284 (1967).

32. Beke, *Government Regulation of Broadcasting in Canada*, 36 SASK. L. REV. 39, 41 (1971).

33. See *id.*

34. For example, over one-half of Canada's railway mileage and its larger national and international airlines are owned by the government. Pickersgill, *Evolving a New Policy in Canadian Transportation*, 36 ICC PRAC. J. 1949, 1950 (1969) (address by the President of the Canadian Transportation Commission).

35. CAN. REV. STAT. c. O-3 (1970), as amended by Protection of Privacy Act, [1973-74] Can. Stat. c. 50, §§ 5-6 (1974).

36. See, e.g., Official Secrets Act, 1911, 1 & 2 Geo. 5, c. 28, as amended by Official Secrets Act, 1920, 10 & 11 Geo. 5, c. 75.

37. See, e.g., Official Secrets Act, CAN. REV. STAT. c. O-3, § 3(1) (1970) (making it a crime for any person, for any purpose prejudicial to the interests of the State, to approach or be in the neighborhood of a prohibited place); *id.* § 3(2) (conviction may be obtained "if, from the circumstances of the case . . . it appears that [the defendant's] purpose was a purpose prejudicial to the safety or interests of the State"); *id.* § 11(2) (search warrant may be obtained without prior judicial approval in cases of "great emergency"); *id.* § 14(2) (public may be excluded from trials).

38. Section 41 of the Federal Court Act of Canada, CAN. REV. STAT. c. 10, § 41 (2d Supp. 1972), codified in part the prior common law of Crown privilege. Cf. *Bradley v. McIntosh*, 5 Ont. 227 (C.P. Div. 1884) (application of prior common law privilege). Section 41(2) provides:

When a Minister of the Crown certifies to any court by affidavit that the production or discovery of a document or its contents would be injurious to international relations, national defence or security, or to federal-provincial relations, or that it would disclose a confidence of the Queen's Privy Council for Canada, discovery and production shall be refused without any examination of the document by the court.

CAN. REV. STAT. c. 10, § 41(2) (2d Supp. 1972). The Canadian court in the *Westinghouse*

on executive discretion.

Nothing in Canada seems to correspond in strength and breadth to the Jeffersonian populist tradition that assumes "bigness is badness" in the private sector.³⁹ Thus, to take a striking example, Canada has a nationwide commercial banking system dominated by a handful of very large banks.⁴⁰ The United States has a balkanized banking system which confines the operations of any bank to the borders of the specific state⁴¹—with the interesting result that some of the largest American banks, fenced in at home, do at least half their business abroad.⁴² The Canadian tradition seems to be more of government oversight and control of private economic power, rather than the more structural approach that characterizes many antitrust and other public policies in the United States.

In sum, antitrust in Canada is much more of a minority taste—a technical legal matter—for a small group of specialists. Accordingly, the Combines Investigations Act⁴³ is more limited in its terms than the American antitrust statutes and has been enforced in a much more limited way.

litigation, *see* notes 118-39 *infra* and accompanying text, applied the Crown privilege to block the discovery of government documents relating to uranium production and marketing. *Re* Westinghouse Elec. Corp. & Duquesne Light Co., 16 Ont. 2d 273 (High Ct. Justice 1977).

Where government assertion of the Canadian Crown privilege is prompted by a private party, it would be appropriate for the court to invoke the *Interstate Circuit* evidentiary presumption that the evidence would be unfavorable to the defendants. *Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 226 (1939). *See also* FED. R. CIV. P. 37(b)(2)(A).

39. *See* P. AREEDA, *ANTITRUST ANALYSIS* 25, 272 (1974); note 6 *supra*.

40. *See* Bank Act, CAN. REV. STAT. c. B-1 (1970), *as amended*. As of 1960, over 90 percent of the Canadian banking industry's assets were held by five of the nine Canadian banks. Baum, *Banking in Canada*, 59 GEO. L.J. 1127, 1127 & n.1 (1971). The Bank Act, [1966-67] Can. Stat. c. 87, § 75 (1967) (codified in CAN. REV. STAT. c. B-1, § 75 (1970)), granted present members of the industry a limited monopoly, thus assuring that this concentration of power would be maintained.

41. 12 U.S.C. §§ 36(c), 1842 (1976). Several banks and holding companies, however, enjoy "grandfather" rights to conduct certain interstate operations. All national banks are also subject to state banking laws, which further limit the industry's geographic operations. 12 U.S.C. § 36(c)(1)-(2) (1976); *cf.* *First Nat'l Bank of Logan v. Walker Bank & Trust Co.*, 385 U.S. 252, *rehearing denied*, 385 U.S. 1032 (1966) (Comptroller of the Currency may not authorize national banks to establish branches that violate state law). Only 17 states allow unlimited branching, 21 permit branching in limited areas, and 11 prohibit all branch operations. (Wyoming has no state branch banking law.) 1 FED. BANKING L. REP. (CCH) ¶ 3106 (1978). *See also* Baker, *Bank Expansion: Geographic Barriers*, 91 BANKING L.J. 707 (1974).

42. *See* BANKAMERICA CORP., ANNUAL REPORT 1976, at 44 (1977) (67 percent of total after-tax earnings for 1976 from foreign operations); CHASE MANHATTAN CORP., ANNUAL REPORT 1976, at 30 (1977) (53 percent); CITICORP, ANNUAL REPORT 1976, at 20 (1977) (72 percent); MANUFACTURERS-HANOVER CORP., ANNUAL REPORT 1976, at 28 (1977) (48 percent).

43. CAN. REV. STAT. c. C-23 (1970), *as amended*.

III

THE QUESTION OF JURISDICTION AND REALITY

These underlying political realities have 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 much more interdependent than our grandparents would have dreamed possible. I can sit at home in upstate New York drinking Canadian beer and listening to Canadian radio. I can even have my lights go out, as happened in 1965, because a piece of electrical equipment failed in Ontario, producing a cascade of confusion through our highly interconnected electric power systems.⁴⁴ Canadian air may be polluted by some activity not too far from where I live.⁴⁵ In today's world, something can physically occur in Canada that has a primary effect in the United States; something can physically occur in the United States that 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 live. 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. These are simple examples because they deal with effects that a physicist can measure.

The same kind of thing can happen with economic activities, except that 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 that produces harm in a neighboring jurisdiction but profit at home. These realities must be borne in mind when dealing with today's hard questions of antitrust jurisdiction.

There are varied views on jurisdiction. At one extreme is the "pure territoriality" theory.⁴⁶ Under this doctrine someone operating in one territory—or perhaps on the high seas—can do absolutely whatever he wants, regardless of how harmful it is to persons in another territory, as long as the act is not illegal where he physically does it.⁴⁷ With all due respect, this

44. See generally N.Y. Times, Nov. 10, 1965, at 1, col. 7.

45. See, e.g., Trail Smelter Case (United States v. Canada), 3 R. Int'l Arb. Awards 1905 (1949).

46. Subjective territoriality.

47. A state has jurisdiction to prescribe a rule of law

(a) attaching legal consequences to conduct that occurs within its territory, whether or not such consequences are determined by the effects of the conduct outside the territory

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 what might be called the "pure interventionism" theory,⁴⁸ which is popular with a certain class of antitrust zealots in the United States. This theory holds that whatever is done in one state may be subjected to the jurisdiction of another state if it has *some*, however small, impact there.⁴⁹ This view is equally outmoded. It is appropriate for a world in which little commercial 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 today's post-imperial world, filled with touchy sensitivities over sovereignty and experiencing a growing level of trade, travel, and investment among nations.

Where should we go from here? And by "we" I mean not only the United States but Canada and other major countries. We 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 then we have to make this compromise work by greater cooperation in law enforcement.

Antitrust offers a good place to look at this question, especially where it deals with tangible trade flows. Several of us at the Department of Justice have talked publicly about this issue for some time.⁵⁰ We have suggested that the U.S. prosecutors ought to be asserting jurisdiction only: (1) where a restraint has a *substantial* impact on U.S. import trade; or (2) where there exists a substantial and direct private restraint on the export trade opportunities of firms operating in the United States. The former is the much more

RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 17(a) (1965).

48. Objective territoriality.

49. A state has jurisdiction to prescribe a rule of law attaching legal consequences to conduct that occurs outside its territory and causes an effect within its territory, if either

(a) the conduct and its effect are generally recognized as constituent elements of a crime or tort under the law of states that have reasonably developed legal systems, or

(b)(i) the conduct and its effect are constituent elements of activity to which the rule applies; (ii) the effect within the territory is substantial; (iii) it occurs as a direct and foreseeable result of the conduct outside the territory; and (iv) the rule is not inconsistent with the principles of justice generally recognized by states that have reasonably developed legal systems.

RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 18(a) (1965). Restraint of trade is generally recognized as a crime and thus falls within subsection

(a). See Loevinger, *Antitrust Law in the Modern World*, 6 ABA INT'L & COMP. L. BULL. 20 (1962). Comment (e) to § 18 makes it clear that a substantial effect is not required to assert jurisdiction under subsection (a).

50. See, e.g., Baker, *Antitrust and World Trade: Tempest in an International Teapot?*, 8 CORNELL INT'L L.J. 16, 32-38 (1974).

important category, because it is there that the United States has a direct consumer interest. This approach to jurisdiction has been criticized by some as being "too narrow" in terms of American history and jurisprudence.⁵¹ Nevertheless, it is the view stated in the Justice Department's 1977 *Antitrust Guide for International Operations*,⁵² and it is also in line with the modern view of jurisdiction and comity embodied in section 40 of the *Restatement (Second) of Foreign Relations Law of the United States*.⁵³

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.⁵⁴ It seems to be clear that a price-fix carried out in an international market in which American purchasers buy 80 percent of the supply involves a substantial impact on U.S. commerce. Conversely, the same price-fix in a broad market in which American purchasers account for less than 10 percent of the market probably does not involve any "substantial" impact on U.S. commerce. In the latter circumstance, 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 90 percent of sales were to customers within the territory where the cartel was formed and the government 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—40 percent of which is sold in the United States with an additional 40 percent sold in the European Economic Community (EEC). Both would indeed have a substantial interest and both would properly be able to enforce their antitrust laws against it. This situation, I submit, is not essentially different from

51. See, e.g., Rahl, *American Antitrust and Foreign Operations: What Is Covered?*, 8 CORNELL INT'L L.J. 1, 4-9 (1974).

52. ANTITRUST DIVISION, U.S. DEP'T OF JUSTICE, ANTITRUST GUIDE FOR INTERNATIONAL OPERATIONS 5-7 (1977) [hereinafter cited as ANTITRUST GUIDE], reprinted in ANTI-TRUST & TRADE REG. REP. (BNA) No. 799, at E-1 (1977), and TRADE REG. REPORTS (CCH) No. 266, pt. II (1977).

53. (1965). Section 40 provides:

Where two states have jurisdiction to prescribe and enforce rules of law and the rules they may prescribe require inconsistent conduct upon the part of a person, each state is required by international law to consider, in good faith, moderating the exercise of its enforcement jurisdiction, in the light of such factors as

- (a) vital national interests of each of the states,
- (b) the extent and the nature of the hardship that inconsistent enforcement actions would impose upon the person,
- (c) the extent to which the required conduct is to take place in the territory of the other state,
- (d) the nationality of the person, and
- (e) the extent to which enforcement by action of either state can reasonably be expected to achieve compliance with the rule prescribed by that state.

54. See, e.g., *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 362-67 (1963).

the way piracy is dealt with: if a conspiracy were formed to practice piracy on the ships or planes of the United States and the EEC, both could and would exercise jurisdiction.⁵⁵ In fact, this is what was done with the famous quinine cartel, where both the U.S. Justice Department⁵⁶ and the EEC Commission⁵⁷ 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 also in the defendants' efforts to manipulate the U.S. Government's disposition of its surplus stockpile to insure that the overseas cartel would not be disrupted by excess supply.⁵⁸

To summarize, a government can and should exercise antitrust jurisdiction over restraints, practiced abroad but 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 that would have been likely to have taken place absent the restraint.⁵⁹ 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 on which we need a new spirit of pragmatic accommodation. Another one concerns government involvement in cartel activities.

Of course governments can be very cartel-minded.⁶⁰ Governments can

55. See Convention on the High Seas, done Apr. 29, 1958, art. 19, 13 U.S.T. 2312, T.I.A.S. No. 5200, 450 U.N.T.S. 82 (providing that "every State may seize a pirate ship or aircraft" and that "[t]he courts of the State which carried out the seizure may decide upon the penalties to be imposed."); RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 34 (1965) (providing that "[a] state has jurisdiction to prescribe a rule of law with respect to piracy" consistent with the Convention on the High Seas).

56. *United States v. N.V. Nederlandsche Combinatie Voor Chemische Industrie*, Cr. No. 68-870 (S.D.N.Y., filed Oct. 25, 1968); *id.* Civ. No. 70-2079 (S.D.N.Y., filed May 21, 1970). See [1974] 2 Trade Cas. ¶ 75,434 (S.D.N.Y. 1974) (transcript).

57. See generally *ACF Chemiefarma NV v. Commission des Communautés européennes*, 16 Recueil de la Jurisprudence de la Cour [R.J.C.] 661, [1967-1970 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8083 (Ct. J. Comm. Eur. 1970); *Buchler & Co. v. Commission des Communautés européennes*, 16 R.J.C. 733, [1967-1970 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8084 (Ct. J. Comm. Eur. 1970); *Boehringer Mannheim GmbH v. Commission des Communautés européennes*, 16 R.J.C. 769, [1967-1970 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8085 (Ct. J. Comm. Eur. 1970).

58. Complaint at ¶ 20(h), *United States v. N.V. Nederlandsche Combinatie Voor Chemische Industrie*, Civ. No. 70-2079 (S.D.N.Y., filed May 21, 1970).

59. Cf. *United States v. El Paso Natural Gas Co.*, 376 U.S. 651 (1964) (an unsuccessful outside bidder had a substantial impact on market price levels in an otherwise monopolistic market).

60. Governments have become increasingly involved in "cartel" and "commercial" activities. Generally, in the post-Keynesian world, national governments regard it as a central re-

carry out, encourage, order, or wink at cartel activities in a variety of different ways.⁶¹ Does governmental interest or involvement itself end the anti-trust inquiry? No, of course not. This answer has been clear at least since 1927 when the U.S. Supreme Court held in *United States v. Sisal Sales Corp.*⁶² that foreign government legislation, helping to implement a cartel and passed at the instigation of the cartel members, did not provide U.S. antitrust immunity.⁶³

This issue is developed most fully within the American federation. State and local governments support, and at times even implement, restraints on competition that run flatly contrary to the federal interest in anti-trust enforcement and interstate trade.⁶⁴ There have been a considerable number of antitrust cases, often private ones, arising out of such state activities.⁶⁵ What has emerged is a rule providing that when private parties are engaged in a restraint on competition *commanded* by the state as sovereign,

sponsibility to intervene directly in—or displace—competitive markets to promote their own domestic employment, income, and public welfare goals.

Key primary products cartels, including OPEC and the uranium cartel, *see* notes 118-23 *infra* and accompanying text, have given great public visibility to cartel activities. Other primary products producers have sought to emulate OPEC. These activities raise very important "political" questions both for producer-country governments, especially where sales of a single product account for a very large proportion of the nation's GNP, and for consumer-country governments heavily dependent on imports. Sometimes, as in the case of the Canadian uranium transactions, both producer and consumer political interests are raised.

Governments, including the U.S. Government, have also become involved in arranging or encouraging private quota agreements when "too much competition" from outside is "politically unacceptable" for the importing country. *See, e.g.,* Consumers Union of U.S., Inc. v. Rogers, 352 F. Supp. 1319 (D.D.C. 1973), *aff'd in part sub nom.* Consumers Union of U.S., Inc. v. Kissinger, 506 F.2d 136 (D.C. Cir. 1974). In addition, in recent years governments have become more heavily involved in running "commercial" enterprises that trade in or with the United States. This is true in the transportation sector, *see, e.g.,* Victory Transport Inc. v. Comisaria General de Abastecimientos y Transportes, 336 F. 2d 354 (2d Cir. 1964), *cert. denied*, 381 U.S. 934 (1965), and government nationalization has made it increasingly true in various producer markets, *see, e.g.,* Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682, 702-03 (1976).

61. Government involvement in cartel activities can be divided into seven broad categories: (1) sovereign compulsion, *see* note 66 *infra* and accompanying text; (2) formal approval, *see* note 67 *infra* and accompanying text; (3) formal state ratification after the fact, *see* note 67 *infra*; (4) state acquiescence, *see* note 67 *infra*; (5) state delegation of the power to restrain to private parties, *see* notes 72-75 *infra* and accompanying text; (6) state authorization of a restraint in a "commercial" contract, *see* note 67 *infra*; and (7) informal encouragement, *see* notes 68-71 *infra* and accompanying text.

62. 274 U.S. 268 (1927).

63. The Government charged the defendants with monopolizing the import and sale of sisal in the United States. Although "the conspirators were aided by discriminating legislation" passed by the Mexican federal and provincial governments, they were still held liable because the monopoly was created and maintained "by their own deliberate acts" in the United States. *Id.* at 276.

64. *See, e.g.,* Cantor v. Detroit Edison Co., 428 U.S. 579 (1976); Parker v. Brown, 317 U.S. 341 (1943); Padgett v. Louisville & Jefferson County Air Bd., 492 F.2d 1258 (6th Cir. 1974); Ladue Local Lines, Inc. v. Bi-State Dev. Agency, 433 F.2d 131 (8th Cir. 1970).

65. *See* the cases cited in note 64 *supra*.

then these private parties—being involuntary actors—are exempt from the antitrust laws.⁶⁶ Where, however, the state merely *authorizes* the private parties to engage in the restraints, and they voluntarily choose to do so, no antitrust immunity is necessarily present.⁶⁷ It goes without saying that *infor-*

66. "The state in adopting and enforcing the . . . program made no contract or agreement and entered into no conspiracy in restraint of trade or to establish [a] monopoly but, as sovereign, imposed the restraint as an act of government which the Sherman Act did not undertake to prohibit." *Parker v. Brown*, 317 U.S. 341, 352 (1943). See *Bates v. State Bar of Ariz.*, 433 U.S. 350, 359-63 (1977); *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 790-91 (1975). This rationale seems to apply to direct action taken or commanded by a foreign sovereign within its territory. See *American Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909).

When a foreign government seeks to compel a restraint within the United States, such compulsion is not likely to provide immunity. One district court, however, has allowed the defense of sovereign compulsion in such circumstances. See *Interamerican Ref. Corp. v. Texaco Maracaibo, Inc.*, 307 F. Supp. 1291 (D. Del. 1970). But the Department of Justice has made very clear that it opposes the *Interamerican* court's view. ANTITRUST GUIDE, *supra* note 52, at 50-52. The argument, which I find persuasive, is that the foreign government-compelled restraint within the U.S. market is wholly beyond the foreign state's jurisdiction. See *United States v. Bechtel Corp.*, [1976] ANTITRUST & TRADE REG. REP. (BNA) No. 747, at D-1 (N.D. Cal., filed Jan. 16, 1976) (Department of Justice sought to enjoin a boycott within the United States commanded by various sovereigns abroad); Competitive Impact Statement of United States, 42 Fed. Reg. 3718 (1977).

In general, the more "commercial" the state's role, the less likely it is that a court will recognize a claim of antitrust immunity and the more likely that it will treat the state's "command" as a mere contractual "restraint."

67. In *Parker v. Brown*, 317 U.S. 341 (1943), the Court stressed that "a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful." *Id.* at 351. Therefore, a court may inquire into the nature of the state's approval, the role of the private parties in bringing it about, and the importance to the state of the approved private conduct. See *United States v. Sisal Sales Corp.*, 274 U.S. 268 (1927).

In *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976), the Court disallowed the defense of sovereign approval to a utility defendant that allegedly monopolized the sale of light bulbs by tying it to the sale of electricity. The utility claimed that the electric service tariffs approved and ordered into effect by the Michigan Public Service Commission provided antitrust immunity. Recognizing that "cases of this kind involve a blend of private and public decisionmaking," *id.* at 592, the Court contrasted two polar situations. On the one hand, notwithstanding state participation, the private party may have exercised sufficient freedom of choice so that he could be held responsible for the consequences of his acts. On the other hand, "there may be cases in which the State's participation in a decision is so dominant that it would be unfair to hold a private party responsible for his conduct in implementing it." *Id.* at 592-95. In *Cantor* the Court denied immunity because (1) the utility initiated and implemented the light bulb sales program; and (2) supplying light bulbs was not central to the government agency's task of regulating electric power distribution. *Id.* at 594-95, 597 n.37.

Cantor and *Sisal* both involved prior formal state approval of the challenged restraint, but there is another type of approval: formal state ratification after the fact. State ratification is entitled to less weight in determining antitrust immunity than is prior approval because the occurrence of commercial activity prior to state approval makes clear that private initiative was the dominant factor in the scheme to restrain. The argument for immunity here rests upon traditional considerations of comity: is the subsequently approved conduct so important to the foreign government that the activity should be protected against antitrust attack?

An additional form of government "involvement" in cartel activities is state acquiescence, which is entitled to even less weight than either formal approval or state ratification. State acquiescence in a restraint generally does not provide a basis for recognizing antitrust immu-

mal encouragement by public officials does not provide the basis for immunity—for here again the key voluntary choice belongs to the private parties who actually impose the restraint.⁶⁸ Interestingly, the leading American case on price fixing involved successful Justice Department prosecution of a gasoline price stabilization scheme informally encouraged by officials in the Department of the Interior during the Great Depression. The Supreme Court said in *United States v. Socony-Vacuum Oil Co.*⁶⁹ that to allow such informal prompting as a defense would be to put the effective administration of the antitrust laws into the hands of “virtual volunteers.”⁷⁰ Sometimes the government officials may even be regarded as co-conspirators in the private scheme, especially when the officials are acting beyond the scope of their legal duties.⁷¹

Liability can also occur where a sovereign *formally delegates* its power to some essentially private firm or group—making the latter a self-regulator or “a state agency for limited purposes.”⁷² The sovereign delegation may be

nity. In its landmark decision, *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940), the Supreme Court stated what is surely the general rule: “[t]hrough employees of the government may have known of those programs and winked at them or tacitly approved them, no immunity would have thereby been obtained.” *Id.* at 226. A limited exception, however, might be found where: (a) the state is thoroughly familiar with the private activity and adopts a “no action” policy (which is tantamount to affirmative approval); and (b) the matter is so important to the state that its “no action” position should be respected. For example, in *United States v. National Ass’n of Sec. Dealers, Inc.*, 422 U.S. 694 (1975) (5-4 decision), the Supreme Court held that a federal regulatory agency’s continued acquiescence in a series of restraints for three decades provided implied immunity. The agency’s assent “hardly represents abdication of its regulatory responsibilities. Rather, we think it manifests in an informed administrative judgment that the [privately formulated restraints] were appropriate means for combating the problems of the industry.” *Id.* at 728. Most federal agency cases, however, have denied immunity where agency acquiescence is involved. *See, e.g., Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973).

A final form of state authorization is authorization of a restraint in a “commercial” contract. Such approval does not appear to create a general basis for antitrust immunity. The normal rule is surely reflected in *Hecht v. Pro-Football, Inc.*, 444 F.2d 931 (D.C. Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972), which allowed an antitrust challenge to a stadium lease between a government agency and a private firm.

68. One can imagine some very special circumstances in despotic countries that might call for an exception to this general rule. For example, would a casual suggestion by President Amin of Uganda more properly be regarded as an “informal encouragement” or as a “command by the state as sovereign”?

69. 310 U.S. 150 (1940).

70. *Id.* at 225-27.

71. *See Goldfarb v. Virginia State Bar*, 421 U.S. 773, 791-92 (1975) (“The State Bar . . . has voluntarily joined in what is essentially a private anticompetitive activity, and in that posture cannot claim it is beyond the reach of the Sherman Act.”); *cf. Harman v. Valley Nat’l Bank of Ariz.*, 339 F.2d 564 (9th Cir. 1964) (attempt to induce action by attorney general may be evidence of scheme to monopolize or restrain trade); *Consumers Union of U.S., Inc. v. Rogers*, 352 F. Supp. 1319, 1322-23 (D.D.C. 1973), *aff’d in part sub nom. Consumers Union of U.S., Inc. v. Kissinger*, 506 F.2d 136 (D.C. Cir. 1974) (executive branch lacks authority to immunize private restraint agreement from antitrust laws).

72. *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 791 (1975).

a *sine qua non* to any restraint—but it is still the private party who chooses how to exercise the power.⁷³ If the private party has a pecuniary interest in how the power is exercised, then it probably cannot hide behind the state's sovereignty.⁷⁴ As a practical matter, the issue comes up most often when the state delegates power to some self-regulatory organization—for example, a professional association—which in turn uses its power to exclude competition.⁷⁵

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 traditionally have been performed by the private sector, such as running transportation terminals, mass transit, and sports stadiums. Past Supreme Court decisions have recognized that when a government body undertakes “commercial” activity it can be subjected to federal regulatory law⁷⁶ and to federal taxing power.⁷⁷ This year the Court faced the antitrust question head on and, in *City of Lafayette v. Louisiana Power & Light Co.*,⁷⁸ held that the federal antitrust laws could be applied to

73. Cases in which the state delegates the power to restrain to private parties involve the same issue present in the “formal approval” cases: is the state itself the moving force behind the restraint or is the private party, exercising power delegated by the state, really responsible for the restraint?

For example, in *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962), a Canadian government agency delegated to a private firm “the discretionary agency power to purchase and allocate to Canadian industries” all supplies of a particular product during World War II. *Id.* at 703 n.11. The Supreme Court unanimously rejected the claim that this formal delegation immunized the defendant against an antitrust charge that the defendant had used the delegated power to favor its own affiliate and to exclude competing sellers from the Canadian market. “There is nothing to indicate that [the Canadian] law in any way compelled discriminatory purchasing . . .” *Id.* at 707.

In *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975), the state's legislature and highest court had delegated broad authority to control the legal profession to a state instrumentality staffed by practicing lawyers. When the State Bar's power was used to restrain price competition, the Government sought to impose antitrust liability. The issue, said the Court, was whether the anticompetitive activities were “compelled by direction of the State acting as sovereign.” *Id.* at 791. The Court unanimously agreed that the State Bar's actions were “voluntary” and “private.” *Id.* at 792. “The fact that the State Bar is a state agency for some limited purposes does not create an antitrust shield that allows it to foster anticompetitive practices for the benefit of its members.” *Id.* at 791 (footnote omitted).

74. See *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 791-92 (1975); *Gibson v. Berryhill*, 411 U.S. 564, 578-79 (1973).

75. See the cases cited in note 74 *supra*.

76. *Union Pac. R.R. Co. v. United States*, 313 U.S. 450 (1941) (a city that participated jointly with a railroad in developing a terminal facility could be held liable for illegal discrimination under the Elkins Act); *United States v. California*, 297 U.S. 175, 183-87 (1936) (state operation of common carrier held subject to federal regulatory law).

77. *Ohio v. Helvering*, 292 U.S. 360 (1934) (state operated liquor monopoly subject to federally imposed tax on those selling liquor).

78. 98 S. Ct. 1123 (1978).

“commercial” activities carried out by municipalities. The Court plurality⁷⁹ reasoned that

the economic choices made by public corporations in the conduct of their business affairs, designed as they are to assure maximum benefits for the community constituency, are not inherently more likely to comport with the broader interests of national economic well-being than are those of private corporations acting in furtherance of the interests of the organization and its shareholders.⁸⁰

For the plurality, the ultimate question was one of state law: did the state, as sovereign, command, or at least explicitly authorize, the municipality to engage in the anticompetitive contracts and other activities that would otherwise violate the federal antitrust laws? It emphasized that “all government entities, whether state agencies or subdivisions of a state, are [not], simply by reason of their status as such, exempt from the antitrust laws.”⁸¹ For Chief Justice Burger, who provided the crucial fifth vote, the issue was not one of municipal law so much as a question of whether the government bodies were “engaging in what is clearly a business activity; activity in which a profit is realized.”⁸² The Chief Justice would not exempt such “commercial” activity from the federal antitrust laws unless it was strictly necessary to comply with the command of the state as sovereign—that is, he would place governmental “commercial” activity on very much the same footing as private commercial activity.

Although all the implications of *City of Lafayette* are not clear for foreign and government-owned “commercial” undertakings, one thing does seem clear: a majority of the Supreme Court is squarely set against giving antitrust immunity to government-owned “commercial” enterprises simply because they are government-owned. Such enterprises, when they restrain competition in the American market, are even less likely than locally owned commercial enterprises to be concerned about the American consumer’s interest, which the antitrust laws are designed to protect. This conclusion is fully in line with the Supreme Court’s recent decision that foreign government-owned “commercial” undertakings are not entitled to plead sovereign immunity in U.S. courts⁸³—a decision since ratified by Congress.⁸⁴ To say

79. The four-member plurality consisted of Justices Brennan, Marshall, Powell, and Stevens.

80. 98 S. Ct. at 1131.

81. *Id.* at 1134.

82. *Id.* at 1139 (quoting the findings of the district court).

83. *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682 (1976).

84. Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, 90 Stat. 2891 (codified in scattered sections of 28 U.S.C.). The statute defines “commercial activity” as “either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.” 28 U.S.C. § 1603(d) (1976).

this, of course, does not answer the hard practical questions of whether a foreign government activity should be regarded as "commercial" or "sovereign," and whether this issue should be judged under foreign law and practice or U.S. law and practice.⁸⁵

It is thus not enough that "government" is vaguely interested in some particular aspect of the restraint. For antitrust purposes, the decisive questions will be: What is government's role, interest, and power? Precisely how did the government carry out its role? All this may sound terribly technical, but I think that it should be viewed in the context of America's historic goal to have a government of laws and not men, and its more formalized approach to public administration.

Perhaps the United States, in the spirit of comity, ought to apply a different rule with respect to foreign governments—saying, in effect, that so long as there is some "governmental" interest, the scheme ought to be exempt from the American antitrust laws. The argument for such an approach would be: "After all, foreign governments often act informally and with broad discretion, so that even a quite informal bureaucratic suggestion may be tantamount to an order. Sure, the businessman may ignore the suggestion this time, but heaven help him the next time he needs approval for something from the same ministry or department."

There is some merit in this thought, but truly it goes too far. Suppose, for example, that the world's producers of some energy source think it would be good if their prices were higher. Perhaps they go to the U.S. Secretary of Energy and ask him what he thinks about forming some sort of producers' cartel to "stabilize" prices and 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 is a fine idea, and it will also help our balance of payments." Yet the American Secretary's informal blessing and encouragement is absolutely no defense under U.S. antitrust law.⁸⁶ He is "a virtual volunteer."⁸⁷ Reaching the opposite result for the equally informal blessing of the Canadian or French Minister of Energy would produce an anomalous result, which would be politically unacceptable within the United States. In sum, there may well be *some* room for greater flexibility in how the United States treats foreign government in-

85. See Baker, *Antitrust Remedies Against Government-Inspired Boycotts, Shortages, and Squeezes: Wandering on the Road to Mecca*, 61 CORNELL L. REV. 911, 927-31 (1976). The Department of Justice itself has stated: "we recognize that drawing the line between what is 'sovereign' and 'commercial' may prove difficult in particular cases, which may turn in part on questions of foreign law, custom and practice." ANTITRUST GUIDE, *supra* note 52, at 8 n.21.

86. See notes 68-71 *supra* and accompanying text.

87. See *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 227 (1940).

volevement in anticompetitive behavior—just for reasons of diplomacy and comity—but it really cannot go as far as accepting pure informal bureaucratic encouragement as a defense to a substantial private trade restraint.

Let us assume, however, that a foreign government is in fact the moving party. It wants to “stabilize” prices and production in a key industry—in essence to “cartelize” that industry. The government can do this and ensure that no U.S. antitrust violation occurs. But this requires that the foreign government play the dominant role and essentially eliminate private discretion.⁸⁸ In other words, the foreign government, alone or in conjunction with other governments, must carry out or mandate the cartel actions itself as sovereign. Then there is no U.S. antitrust liability regardless of the impact on American consumers.⁸⁹ This is what the OPEC experience shows, for these governments themselves are openly operating the most effective cartel in the history of the world, free from antitrust liability.⁹⁰ Why, some ask, should this be so? The reason is that any private activity is essentially involuntary or nonexistent; and the truly sovereign, political activities are beyond the effective reach of the U.S. courts for antitrust or any other purposes. The question turns on sovereign immunity pure and simple.⁹¹

The antitrust result is the same where the foreign state formally commands a private enterprise to do something abroad that directly affects the U.S. market.⁹² For example, suppose that an energy-producing country commands its subjects, by statute or order in council, not to export a particular product at less than so many dollars a ton. The energy producer, who sells to American buyers at the state-mandated minimum price, engages in no antitrust violation even if the state-mandated price is intended to prop up the cartel of which that producer was a member. This issue has come up

88. Gulf Oil Corporation, one of the alleged members of the Canadian uranium cartel, took “extraordinary care to ensure [that] its participation was at the direction of the Canadian Government.” *The Globe and Mail* (Toronto), Sept. 30, 1977, at 1, col. 1, at 2, col. 2. Gulf balked at the initial invitation to join the cartel, raising its prices only after it had been told to do so by Canada’s Deputy Minister of Energy, Mines and Resources. *Id.* at 2, col. 7.

89. See note 66 *supra* and accompanying text.

90. The Organization of Petroleum Exporting Countries (OPEC) was founded in 1960 by five major petroleum states. The present member states of OPEC are: Algeria, Ecuador, Gabon, Indonesia, Iran, Iraq, Kuwait, Libyan Arab Republic, Nigeria, Qatar, Saudi Arabia, United Arab Emirates, and Venezuela. *THE WORLD ALMANAC AND BOOK OF FACTS* 1978, at 598.

For a general discussion of the legal and economic position of the oil industry in the Middle East, see G. LENCZOWSKI, *MIDDLE EAST OIL IN A REVOLUTIONARY AGE* (National Energy Project 1976).

91. Under the “sovereign immunity” doctrine, a foreign government is exempt from suit simply because of its legal status as a sovereign entity. See, e.g., 28 U.S.C. § 1604 (1976). The doctrine no longer applies to purely “commercial” activities in the United States or to “commercial” activity having an effect in the United States. *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 698-705 (1976); 28 U.S.C. § 1605(a)(2) (1976).

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

in the Arab boycott context, where Arab governments have compelled firms not to land supplies identified as having been procured from a "blacklisted" source.⁹³

But I think that this is the unusual case. More often a cartel involves "a blend of public and private decision making."⁹⁴ Where the private effort is dominant the private party can, and should, be held liable for its anticompetitive initiatives.⁹⁵ Where a foreign government *formally approves* a cartel this may suggest that some basic state policy lies behind the restraint. In the interest of comity, the U.S. court may want to ask how important the matter is to the state approving the cartel and how great the impact is on the United States. When the approved restraint has its major impact on the American market—and especially when this is its intended purpose—I believe it is still appropriate for the United States to exercise antitrust jurisdiction over the private parties for their role in the scheme.

Jurisdictional questions have also arisen in the context of export cartels. Many countries, including the United States,⁹⁶ formally authorize export cartels and provide them with statutory immunity *from their own laws*.⁹⁷ This is done for obvious mercantilist reasons.⁹⁸ Such action is un-

93. See *United States v. Bechtel Corp.*, [1977] ANTITRUST & TRADE REG. REP. (BNA) No. 796, at E-1 (N.D. Cal. 1976) (proposed consent judgment).

94. *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 592 (1976) (footnote omitted). This blend is well illustrated by the role of the Canadian Government in response to actions taken by the alleged uranium cartel. On August 17, 1972, the Canadian Minister of Energy, Mines and Resources wrote to the President of the Atomic Energy Control Board of Canada, instructing the Board not to allow export of uranium from Canada to certain countries at prices below certain minimum price levels. Letter from Donald S. MacDonald to Dr. D.G. Hurst (Aug. 17, 1972), reproduced as an attachment to News Release by the Honourable Alastair Gillespie, Minister of Energy, Mines and Resources (Oct. 14, 1977) (copy on file at the offices of the *Cornell International Law Journal*). The letter began:

On June 29, 1972, Cabinet approved the terms of uranium export marketing arrangement proposed by producers in Canada and several other countries. In order to enforce compliance with the terms of the marketing arrangements Cabinet also approved a proposal to issue an appropriate Regulation pursuant to Section 9 of the Atomic Energy Control Act together with a Direction to be given to the Board pursuant to section 7 of the Act.

Thus, this document reveals an approval by government of a privately proposed arrangement, which was in turn implemented by government orders.

95. See *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 598 (1976).

96. 15 U.S.C. §§ 61-65 (1976); see note 154 *infra*.

97. See, e.g., Combines Investigation Act, CAN. REV. STAT. c. C-23, § 32(4) (1970), as amended by An Act to Amend the Combines Investigation Act, §§ 14(4), 32(4) [1974-76] Can. Stat. 1535 (1975); Ordinance no. 45-1483, art. 62, [1945] Journal officiel de la république française 4150, [1945] Dalloz, *Législation* 137; Restrictive Trade Practices Act, 1956, 4 & 5 Eliz. 2, c. 68, § 8(8). See generally COMMITTEE OF EXPERTS ON RESTRICTIVE TRADE PRACTICES, ORGANISATION FOR ECONOMIC CO-OPERATION & DEVELOPMENT, EXPORT CARTELS (1974).

98. The Webb-Pomerene Act was passed "to aid and encourage our manufacturers and producers to extend our foreign trade." H.R. Rep. No. 1118, 64th Cong., 1st Sess., 1 (1916). Congress felt that American firms needed the power to form joint export associations in order to compete with foreign cartels. . . . Congress was willing to create an exemption from the antitrust laws to serve this narrow purpose Congress

derstandable in the context of a world in which national governments tend to be hard-nosed champions of producer interests within their borders.

But the fact that the United States authorizes 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 antitrust laws. Nations are entitled to be hard-nosed champions of consumer interests; and, provided they do it evenhandedly, in accordance with due process, the United States really has no basis for complaining. Our Congress never thought that it had the power to hand out immunities from the Combines Investigation Act,⁹⁹ or the Treaty of Rome;¹⁰⁰ and, if it did, it would be wrong. The converse is also true. The Parliament in Ottawa or the European Council of Ministers in Brussels has no power to dispense 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* interests—for only the government with such a consumer stake is likely to have the political incentive to enforce antitrust law effectively. If we deny that power—because of quaint jurisdictional notions or just plain timidity—then consumer interests will often lose out to producer protectionism. It will just be a little easier to “beggar your neighbor” than it already is. I for one do not find that a very attractive prospect.

V

COOPERATION OR CONFLICT IN ENFORCEMENT?

More effective cooperation among governments on these antitrust enforcement issues is needed. All nations are both producers and consumers. If all nations are to protect their consumer interests—and I think they should—then cooperation is essential. The Executive Agreement between the United States and the Federal Republic of Germany¹⁰¹ offers a good example of what can be done. Each of the parties has a substantial antitrust enforcement mechanism in place,¹⁰² and both have vigorously enforced an-

evidently made the economic judgment that joint export associations could increase American foreign trade without depriving American consumers of the main advantages of competition.

United States v. Concentrated Phosphate Export Ass'n, 393 U.S. 199, 206 (1968).

99. CAN. REV. STAT. c. C-23 (1970), *as amended*

100. Treaty of Rome, *done* Mar. 25, 1957, arts. 85-86, 298 U.N.T.S. 11.

101. Agreement on Restrictive Business Practices, June 23, 1976, United States-Federal Republic of Germany, 27 U.S.T. 1956, T.I.A.S. No. 8291; [1978] 5 TRADE REG. REP. (CCH) ¶ 50,283.

102. Germany's antitrust law is the Act Against Restraints of Competition (Gesetz gegen Wettbewerbsbeschränkungen), July 27, 1957, [1957] Bundesgesetzblatt [BGBl] I 1081, *as republished* Apr. 4, 1974, [1974] BGBl I 869, *amended*, Law of June 28, 1976, [1976] BGBl I 917.

titrust laws within their own borders. What the agreement promises is quite extensive cooperation in securing documents and other relevant information from parties under investigation and having activities in the other's territory.¹⁰³ 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 seems to be a large 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 specifically designed to thwart antitrust investigations by any foreign power.¹⁰⁴ It all began in the 1950's with the Ontario and Quebec "business records" legislation,¹⁰⁵ passed in response to extraterritorial application of U.S. regulatory laws, including a U.S. Justice Department antitrust investigation of the paper industry;¹⁰⁶ it gained momentum with the British Shipping Contracts and Commercial Documents Act of 1964,¹⁰⁷ designed to

103. The Agreement on Restrictive Business Practices, *supra* note 101, art. 1(c), provides for the exchange of "reports, documents, memoranda, expert opinions, legal briefs and pleadings, decisions of administrative or judicial bodies, and other written or computerized records." Each country agrees to provide, on its own initiative, any "significant information" relating to restrictive business practices that have a substantial effect on the other country. *Id.* art. 2(2). Each party further agrees to honor all requests for information provided that compliance with such requests would not violate domestic law, be inconsistent with important national interests, or unreasonably burden the requested antitrust authority. *Id.* arts. 2(3), 3(1), (3).

104. Foreign "bank secrecy" laws have long been a potential barrier to U.S. law enforcement, but generally our courts have not allowed these to be a defense to production of evidence by a party over whom the United States has personal jurisdiction. *United States v. Field*, 532 F.2d 404 (5th Cir. 1976) (tax investigation); *United States v. First Nat'l City Bank*, 396 F.2d 897 (2d Cir. 1968) (antitrust investigation).

105. Business Records Protection Act, [1947] Ont. Stat. c. 10 (codified at ONT. REV. STAT. c. 54 (1970)); Business Concerns Records Act, [1957-58] Que. Stat. c. 42 (1958) (codified at QUE. REV. STAT. c. 278 (1964)). Both acts prohibit the removal of any business records from the respective provinces in compliance with a request or order from any judicial, legislative, or administrative governmental authority outside the province. If there is reason to believe that such a foreign request or order will be made, the Attorney General of the province may petition a court for an order requiring persons to post security to ensure that no one will remove the records in compliance with the foreign request or order. The acts impose criminal penalties, including imprisonment, for noncompliance if the person seeking removal of the records knows of the Attorney General's application.

106. *See generally In re Grand Jury Subpoenas Duces Tecum Addressed to Canadian Int'l Paper Co.*, 72 F. Supp. 1013 (S.D.N.Y. 1947).

107. 1964, c. 87, *modified by* the Transfer of Functions (Shipping and Construction of Ships) Order 1965, para. 2, 1965 STAT. INST. No. 145, *and* Ministry of Aviation Supply (Dissolution) Order 1971, para. 2(1), 1971 STAT. INST. No. 719. Section 1 of the Act authorizes the British Board of Trade to prohibit compliance with any measures taken by foreign countries to control "the terms or conditions upon which goods or passengers may be carried by sea" if it appears to the Board "that those measures, in so far as they apply to things done or to be done outside the territorial jurisdiction of that country . . . constitute an infringement of the jurisdiction which, under international law, belongs to the United Kingdom." *Id.* § 1(1). The Act

thwart Federal Maritime Commission investigations,¹⁰⁸ and it reached full maturity with the special restrictions by Canada,¹⁰⁹ Australia,¹¹⁰ South Africa,¹¹¹ and France¹¹² designed to bar the U.S. Justice Department investigation of the alleged uranium cartel.¹¹³

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. It is fine for the British Parliament to say in effect, "We don't want the Yanks messing around with our boats"—but to say that surely is not the end of the analysis, nor I suspect even the end of the beginning of the analysis. It so happens that 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 conference arrangements regulated and approved by the U.S. Federal Maritime Commission.¹¹⁴ The British do not purport to regulate conference activity, instead leaving this to the shipping lines.¹¹⁵ That "hands-off" policy runs contrary to the American and the Adam Smith ethic:¹¹⁶ in the United States, private commercial enterprises, serving their own interests, are not left free to restrain whatever they deem to be in their own best interest. Rather, under American policy, the antitrust laws apply as a barrier to cartel behavior unless some other government's scheme is put in their place as a safeguard.¹¹⁷ The British, of

also permits a British Secretary of State to prohibit compliance with a foreign court's request for the production of commercial documents if it appears to the Secretary that the request "constitutes or would constitute an infringement of the jurisdiction which, under international law, belongs to the United Kingdom." *Id.* § 2(1)(b). The Act imposes a substantial fine for noncompliance. *Id.* § 3(1).

108. See 698 PARL. DEB. H.C. (5th ser.) 1215-84 (1964). See generally *In re Grand Jury Investigation of the Shipping Indus.*, 186 F. Supp. 298 (D.D.C. 1960).

109. See 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)).

110. See Foreign Proceedings (Prohibition of Certain Evidence) Act, 1976, No. 121 (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).

111. Atomic Energy Act, 1967, No. 90, § 30, 15 STAT. REPUB. SO. AFR. 1045 (1977).

112. See Cheeseright, *RTZ stands in the shade*, Financial Times (London), Nov. 8, 1977, at 14, cols. 3, 7.

113. See notes 118-39 *infra* and accompanying text.

114. 46 U.S.C. § 814 (1976).

115. See 698 PARL. DEB. H.C. (5th ser.) 1218-21 (1964). See also *id.* at 1222-24.

116. People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices. It is impossible indeed to prevent such meetings, by any law which either could be executed, or would be consistent with liberty and justice. But though the law cannot hinder people of the same trade from sometimes assembling together, it ought to do nothing to facilitate such assemblies; much less to render them necessary.

1 A. SMITH, *WEALTH OF NATIONS* 200 (4th ed. London 1822).

117. In 1963, the Supreme Court stated: "Subject to narrow qualifications, it is surely the

course, fundamentally object to anybody regulating their ships. My answer is both blunt and realistic: "If the British want to sail into American ports, abide by American rules. If the United States wants to sail into British ports, we jolly well will have to abide by Britain's rules. If one power mandates what the other power prohibits, there is no trade." I see nothing—on jurisdictional or other grounds—that is outrageous about the United States saying that those who haul cargo to U.S. ports will have to meet the American requirements protecting competition as set forth in the Shipping Act and the antitrust laws. American competitive policies are wholly consistent with freedom of the seas. The only thing they are not consistent with is the "strict territoriality" theory of jurisdiction.

What is disturbing about this crop of "business records" laws is that they are being used to prevent the United States from *even investigating* whether a violation of its laws *may* have taken place. The result is political outrage and frustration in the United States. It is also likely to result in more haphazard and uneven law enforcement. The Antitrust Division prides itself on careful investigation and evenhandedness in selecting defendants in any case it ultimately decides to bring. The present environment will put great pressure on the Division 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. No lawyer can take pride in that.

The depth and the complexity of this issue is clear from the "Great Uranium Saga"¹¹⁸ that is now being played to packed houses of lawyers and journalists at the Royal Courts of Justice in London¹¹⁹ and at the U. S. District Court for the Eastern District of Virginia in Richmond.¹²⁰ This controversy arose because a few years back Westinghouse Electric Corporation sold a lot of American utilities a lot of uranium that it turned out not to

case that competition is our fundamental national economic policy, offering as it does the only alternative to the cartelization or governmental regimentation of large portions of the economy." *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 372 (1963). This same message runs throughout the Court's recent decision in *City of Lafayette v. Louisiana Power & Light Co.*, 98 S. Ct. 1123 (1978).

118. See generally Note, *Discovery in Great Britain: The Evidence (Proceedings in Other Jurisdictions) Act*, 11 CORNELL INT'L L.J. 323, 324-25 & nn.4-7 (1978).

119. The proceedings in England began when Westinghouse Electric Corporation submitted applications to Master Creightmore of the Queen's Bench Division, requesting him to make *ex parte* orders giving effect to letters rogatory issued by Judge Merhige of the U. S. District Court for the Eastern District of Virginia. Master Creightmore made the orders on October 28, 1976. See *In re Westinghouse Elec. Corp. Uranium Contract Litigation*, [1977] 3 W.L.R. 430, 433 (C.A.), *rev'd on add'l facts*, [1978] 2 W.L.R. 81 (H.L. 1977).

120. See *In re Westinghouse Elec. Corp. Uranium Contracts Litigation*, 405 F. Supp. 316 (J.P.M.D.L. 1975).

have. When the price of uranium skyrocketed from about \$7 a pound to approximately \$42, Westinghouse refused to perform these contracts on grounds of "commercial impracticability."¹²¹ The utilities sued, and most of their cases were consolidated in Richmond.¹²² Among other things, Westinghouse argued in its defense that the emergence of the uranium producers' "club" was not something that it could reasonably have foreseen.¹²³ 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., which was allegedly a leading member of the "club."¹²⁴ The letters rogatory were issued pursuant to a treaty¹²⁵ and statute¹²⁶ in England covering civil litigation. The British executives and Rio Tinto strenuously objected to such discovery. Using a degree of lawyerly ingenuity, they argued that their testimony might incriminate them in violation of the fifth amendment of the U. S. Constitution and subject them to penalties under the Treaty of Rome antitrust regulations.¹²⁷ The English Court of Appeal allowed the company to withhold the documents because of its potential exposure to penalties under the EEC regulations,¹²⁸ and held that the possibility of violations of the fifth amendment, which only applied to the *individuals*, was a question for the American court.¹²⁹ The U.S. District Judge, sitting in London, then ruled in favor of the fifth amendment privilege.¹³⁰ Thereafter, Westinghouse prevailed on the Department of Justice to issue what amounted to an immunity order to

121. *In re Westinghouse Elec. Corp. Uranium Contract Litigation*, [1978] 2 W.L.R. 81, 85 (H.L. 1977). Westinghouse relied on U.C.C. § 2-615 for the "commercial impracticability" defense. *Id.*

122. *In re Westinghouse Elec. Corp. Uranium Contracts Litigation*, 405 F. Supp. 316 (J.P.M.D.L. 1975).

123. *See In re Westinghouse Elec. Corp. Uranium Contract Litigation*, [1977] 3 W.L.R. 430, 435 (C.A.), *rev'd on add'l facts*, [1978] 2 W.L.R. 81 (H.L. 1977).

124. *Id.*

125. Convention on the Taking of Evidence Abroad, *opened for signature* Mar. 18, 1970, 23 U.S.T. 2555, T.I.A.S. No. 7444. The Treaty establishes procedures for obtaining evidence located in a foreign jurisdiction. Both the United Kingdom and the United States are parties. *See id.*; [1977] Gr. Brit. T.S. No. 20 (Cmd. 6727).

126. Evidence (Proceedings in Other Jurisdictions) Act, 1975, c. 34. The Act sets forth the procedures by which and the conditions under which English courts can enforce letters rogatory. *See generally* Note, *supra* note 118.

127. *Règlement No. 17: Premier règlement d'application des articles 85 et 86 du traité*, 5 JOURNAL OFFICIEL DES COMMUNAUTÉS EUROPÉENNES 204 (1962) (promulgated under authority of the Treaty of Rome, *done* Mar. 25, 1957, arts. 85, 86, 298 U.N.T.S. 11). The legislation of the European Economic Community has the force of law in England. European Communities Act, 1972, c. 68, § 2(1).

128. *In re Westinghouse Elec. Corp. Uranium Contract Litigation*, [1977] 3 W.L.R. 430, 439-41 (C.A.), *rev'd on add'l facts*, [1978] 2 W.L.R. 81 (H.L. 1977).

129. *Id.* at 441.

130. *In re Westinghouse Elec. Corp. Uranium Contract Litigation*, [1978] 2 W.L.R. 81, 90 (H.L. 1977).

compel testimony in the private case.¹³¹ In explaining its unusual course, the Department stressed that it was not acting on Westinghouse's behalf; rather, it wanted immunity because the Westinghouse depositions appeared to be the Government's only reasonable prospect for ever obtaining the testimony of these Rio Tinto officials for use by its grand jury.¹³²

Then things got "curiouser and curiouser."¹³³ Exposed individuals do not normally resist immunity orders—yet this is exactly what the Britons did, first in the District Court in Richmond¹³⁴ and then back in the Courts of Justice in England.¹³⁵ They argued that to allow the Department of Justice to obtain this testimony, through this indirect route, was a perversion of the treaty and the statute and was contrary to the interests of Great Britain.¹³⁶ 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 nondisclosure.¹³⁷ The House of Lords unanimously agreed with Rio Tinto.¹³⁸ Although the Lords did not invoke Crown privilege by name, they declared that granting Westinghouse's request for discovery would run counter to the longstanding British policy of noncooperation with American courts seeking to enforce U.S. antitrust laws overseas.¹³⁹ What this saga reveals is how determined members of the uranium "club" are to prevent evidence from falling into the hands of American prosecutors. England became a key forum for a very practical reason: it is the only country that has a "club" member and has not erected a *general barrier* against U.S. discovery of uranium documents.

131. See *id* at 91; Letter from Griffin B. Bell, U.S. Attorney General, to William B. Cummings, U.S. Attorney, E.D. Va., (July 12, 1977) (copy on file at the offices of the *Cornell International Law Journal*). See also 18 U.S.C. §§ 6002-6003 (1976) (federal immunity of witnesses provisions).

132. Letter from Griffin B. Bell, *supra* note 131, at 1.

133. L. CARROLL, *Alice's Adventures in Wonderland*, in THE COMPLETE WORKS OF LEWIS CARROLL 23 (1939).

134. Memorandum of Views Furnished for the Honourable Robert R. Merhige, Jr. by Linklaters & Paines, *In re Westinghouse Elec. Corp. Uranium Contracts Litigation*, M.D.L. No. 75-235 (E.D. Va. 1977) (copy on file at the offices of the *Cornell International Law Journal*).

135. See *In re Westinghouse Elec. Corp. Uranium Contract Litigation*, [1978] 2 W.L.R. 81, 92 (H.L. 1977).

136. See *id* at 96.

137. See *id* at 93-94.

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

139. *Id* at 94.

VI

SOME PRAGMATIC SUGGESTIONS

I am an American and a friend of Canada. As such, I find it important that Canada and the United States try to work out the complex mess in which they find themselves. This is equally true of the other common law countries involved.¹⁴⁰ There are no simple answers—and certainly no answers that will satisfy ideological zealots—but 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 clear—and sure—that U.S. enforcement agencies do not pursue a “pure interventionist” position on antitrust jurisdiction. For example, they should be sensitive about the “interventionist” reach of the type shown in some drafts of the Premerger Notification Regulations,¹⁴¹ which seem to cover a great many foreign mergers likely to have at most a modest impact on U.S. markets.¹⁴² The Department of Justice, as *amicus*, should help in urging a more limited view—such as my “substantial impact” test¹⁴³—by U.S. courts in private antitrust cases.

(2) Recognize that the grand jury, which has been largely abandoned elsewhere in the common law world, has a lingering “star chamber” image among many people abroad. This being so, 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 come out of it. 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.¹⁴⁴ Under my proposal, the Department would still proceed by civil investigation, using its broad new civil powers.¹⁴⁵ If the Department finds, after a civil investigation, that in fact a criminal violation is present, then it can still obtain an indictment by presenting the evidence to the grand jury.

140. Most notably Britain, Australia, and South Africa.

141. Federal Trade Commission, Mergers and Acquisitions, Proposed Rulemaking, 41 Fed. Reg. 55,488 (1976).

142. See Proposed Rules §§ 801.10, 801.15, 41 Fed. Reg. 55,490-91 (1976) (to be codified in 16 C.F.R. pt. 801) (notification required for the merger of a foreign subsidiary of a U.S. corporation with a foreign business).

143. See notes 50-59 *supra* and accompanying text.

144. See generally Baker, *To Indict or Not to Indict: Prosecutorial Discretion in Sherman Act Enforcement*, 63 CORNELL L. REV. 405 (1978).

145. See Hart-Scott-Rodino Antitrust Improvement Act of 1976, Pub. L. No. 94-435, tits. I, II, 90 Stat. 1383 (amending scattered sections of 15 U.S.C. (1976)).

(3) Be sensitive and restrained in using inflammatory “criminal” law enforcement tools, such as border watches.¹⁴⁶ 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.¹⁴⁷

(5) Recognize formal approval by a foreign government as a basis for U.S. antitrust immunity where: (a) a major foreign state policy is at stake; and (b) the action is not primarily aimed at and does not have a significant impact upon the U.S. import market.

(6) Neither treat informal encouragement by foreign officials as the basis for antitrust immunity,¹⁴⁸ nor charge such foreign officials as co-

146. See generally Leahy, *Border Patrol Checkpoint Operation under Warrants of Inspection: The Wake of Almeida-Sanchez v. United States*, 5 CALIF. W. INT’L L.J. 62 (1974).

147. For example, in *Surety Title Ins. Agency v. Virginia State Bar*, [1978] 1 Trade Cas. ¶ 61,897 (4th Cir. Mar. 1, 1978), the court of appeals stayed consideration of a “state action” antitrust case, in order to give the highest court of the state the opportunity to clarify exactly what the state’s role was under state law. In some instances this type of procedure might be appropriate in the foreign realm.

148. This point represents the heart of my difference with Mr. Stanford. He essentially opts for a world of diplomacy and informal government initiative—views that are altogether appropriate for a distinguished civil servant and diplomat in a well-governed society. I essentially opt for a rule of law in which courts do play a central role and do allow necessities (but not preferences) of states to influence judicial decisions—a view that is appropriate both to a citizen of a republic in which the judiciary has proven to be the key check on bureaucratic excesses and to a lawyer who has spent the larger part of his professional life enforcing a key body of law having great potential flexibility.

Mr. Stanford essentially says two things. First, “[t]he effective functioning of [the] 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.” Stanford, *supra* note 3, at 198. He adds to this point that “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.” *Id.* at 212. Second, when one government seeks to encourage private action that is harmful to the government or economy of another state, “it is inappropriate for . . . [the latter government] 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.” *Id.* at 201.

Mr. Stanford’s “bottom line” is this: if two governments have some interest in something, it is suddenly taken out of the judicial channels which are so central, at least to the American system, and is thrust into the vaguer world of diplomacy. His practical message to potential private cartel members is thus: “If we can somehow get a foreign government interested in this matter—however informally—we can do whatever we want, however injurious it is to the U.S. economy, and however flagrantly it violates the fundamental policies of the U.S. antitrust laws.” Of course, the foreign government and the potential private cartel members would prefer an informal route, simply to avoid publicity, a point strikingly brought home in the Cana-

conspirators on the basis of such encouragement. When domestic government officials are involved, they can be more easily assumed to have some knowledge of U.S. antitrust laws, and it is less alarming to allow them to be charged as co-conspirators when they have plainly exceeded their official duties.¹⁴⁹ Bringing antitrust charges against foreign officials causes great public consternation and little, if any, gain to U.S. antitrust enforcement.

(7) Apply U.S. antitrust laws to "commercial" enterprises owned by foreign sovereigns where such foreign enterprises are operating in the United States or between the United States and foreign countries. For reasons of comity, the United States should not apply its antitrust laws to "commercial" activities by foreign state enterprises carried on overseas, unless the activity is primarily aimed at or has an impact upon the U.S. 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.¹⁵⁰ The "independent" commissions—of which the Federal Trade Commission is one—are hard for foreigners to understand, especially when they are 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 setting aside by the President. Antitrust can be diplomatically sensitive. Therefore, it is highly desirable to have antitrust enforcement in the hands of an executive agency directly responsible to the President, who is in turn responsible for conducting foreign policy. Most U.S. international antitrust enforcement is already being done by the Department of Justice. Formalizing this role would nevertheless eliminate lingering uncertainties in the private sector.

dian uranium investigation. Bureaucrats usually prefer private informal solutions to legislated ones, simply because such private informal arrangements are less subject not only to judicial checks but also to the ultimate checks of the democratic process. As a lawyer and democrat, I have a strong preference for policies that compel a state to take action as a sovereign and to command what the bureaucrats and the potential cartel members privately believe to be in the national interest. For example, in the uranium situation it does not seem clear beyond doubt that, if the Canadian public had known what was going on, the Parliament in Ottawa would indeed have mandated what the bureaucrats and the private firms thought was desirable.

149. *Cf. Harman v. Valley Nat'l Bank of Ariz.*, 339 F.2d 564 (9th Cir. 1964) (refusing to dismiss a cause of action based on allegations that defendant conspired with and submitted false information to the state attorney general, who placed a savings and loan institution into receivership).

150. Some have advocated that all antitrust enforcement responsibility, not just international matters, be consolidated into a single federal agency. *E.g., Oversight of Antitrust Enforcement*, *supra* note 11, at 627 (prepared statement of Dean Ernest Gellhorn).

(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 government organizations to protect parts of the U.S. economy from international competition. The newspaper stories¹⁵¹ make clear that the foreign government interest in the uranium cartel—which is very much at the heart of today's problem—was spurred by quite protectionist uranium policies and embargoes mandated by the U.S. Congress¹⁵² and the U.S. Atomic Energy Commission.¹⁵³

B. PRACTICAL ADVICE TO CANADA

I would recommend that Canada do the following things:

(1) Be more consumer minded. Go the extraterritorial route in dealing with foreign arrangements that have a substantial impact in Canada. This is well within the bounds of modern international law and is a politically sensible course for a government dedicated to protecting its consumers.

(2) To that end, prosecute U.S. Webb-Pomerene associations¹⁵⁴ 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? I think that it does!

(3) If you are going to cartelize, do it like the Arabs. Have the government carry on the cartel activities openly and clearly, 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.¹⁵⁵

(4) Use formal government powers where the government seeks to encourage private firms to form cartels in a field where the United States is

151. See, e.g., *The Globe and Mail* (Toronto), Sept. 30, 1977, at 2, cols. 2-3.

152. See 42 U.S.C. § 2201(v)(B) (1976).

153. See 10 C.F.R. §§ 40.1-90 (1977) (licensing of source materials); *id.* §§ 50.1-110 (licensing of production and utilization facilities); *id.* §§ 70.1-71 (licensing of special nuclear material). The Atomic Energy Commission is now the Nuclear Regulatory Commission.

154. The Webb-Pomerene Act, 15 U.S.C. §§ 61-66 (1976) provides a limited exemption from antitrust liability:

Nothing contained in [the Sherman Act] shall be construed as declaring to be illegal an association entered into for the sole purpose of engaging in export trade and actually engaged solely in such export trade, or an agreement made or act done in the course of export trade by such association, provided such association, agreement, or act is not in restraint of trade within the United States, and is not in restraint of the export trade of any domestic competitor of such association

Id. § 62.

155. See, e.g., *The Globe and Mail* (Toronto), Sept. 30, 1977, at 1, col. 1.

a substantial buyer. 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 government to say that it needs to screen documents before they go abroad to make sure that no sensitive state interest is at stake. It is an entirely different matter to erect a total bar to discovery of all private documents. That looks unduly familiar—and unnecessarily abrasive—to a neighboring country that 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 that unite us. We both have a fundamental commitment to democratic government under law. We both have an interest in producer efficiency and consumer welfare. In the long run, these interests, both political and economic, are likely to be better served by relying primarily on markets working back and forth across our common borders. Cooperation in making these markets work and in anti-trust 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.