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*by J.S. Stanford**

A New Kind of Problem

IT IS IMPORTANT to realize that we are dealing with a new kind of antitrust problem, and not the kind of problem to which the Fulton-Rogers and Basford-Mitchell bilateral antitrust arrangements addressed themselves. These arrangements were aimed at the prosecution of anticompetitive conduct undertaken by private corporations on their own initiative to increase corporate profits.

This new problem does not arise from a change in United States antitrust law, but from a new emphasis in American antitrust enforcement policy, specifically, a greater effort to extend the reach of United States antitrust law to activities beyond the American borders. This new policy was given official recognition in a document issued by the United States Department of Justice in January 1977 entitled *Antitrust Guide for International Operations.* The intention on the part of American antitrust enforcement officials now is to assert a degree of jurisdiction over activities occurring in other countries that appeared to go well beyond that which had been reflected in the Antitrust Division's prior enforcement policy. The *Antitrust Guide* evinces a policy of asserting very broad claims to personal and subject matter jurisdiction over activities outside the United States. Furthermore, it gives notice of an intention to invoke United States antitrust law against activities outside the United States undertaken in compliance with or in response to foreign government policies.

The Nature of the Problem

The target of the new antitrust enforcement policy is not only the commercial cartel for private gain but includes the resource management and industrial policies of governments. This is perhaps an understandable reaction to the vulnerability we all felt in the face of the 1973 oil measures. But it amounts, in effect, to the extraterritorial application of United States antitrust law to assure supplies from abroad at favourable prices without regard to the resource policies of the supplier governments.

The vehicle for implementing this policy is the United States-based multinational, threatened with prosecution if its affiliate abroad cooperates with the host government in a resource development policy resulting in an adverse effect in the United States. The particular vulnerability of Canada to

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such an enforcement policy is obvious. Resource development is a major part of our national economy. The Canadian resource sector depends upon a high degree of foreign, particularly American, ownership and a high proportion of our resources are exported to the United States.

POSSIBLE CANADIAN RESPONSES

The objective of Canadian governments, in formulating responses to this new situation, must be to retain the ability to determine resource and industrial development policies in Canada. They will lose this ability if the multinationals that play a major role in Canadian resource and industrial development sectors are more responsive, with respect to their Canadian activities to United States law than to Canadian laws, policies and national interests.

One possible response is to seek to frustrate prosecutions for conduct mandated or encouraged by the Canadian government, *e.g.*, by preventing access to documents. The uranium case, whatever its merit, shows that governments in Canada do not yet have effective instruments for managing this aspect of the problem, and it may be necessary to put more effective instruments in place.

But attempts to frustrate a prosecution already under way are only a palliative. A good lawyer does not simply defend his client in court; it is more important to him to keep his client out of court.

The reason the *Antitrust Guide* may have a more negative effect than the uranium prosecution is that the former indicates how the Justice Department will seek to apply antitrust law, including the Business Review Procedure in the future. The critical point in time is when corporate decisions are being made on whether to comply with Canadian government policy, guidance and directives. If, at this point, the threat of antitrust prosecution by the United States is a signficant disincentive, then the Canadian government will have to provide to the private sector whatever cover is necessary to immunize it from such prosecution.

The degree of cover that may be required is a function of the evolution of the United States doctrine of foreign compulsion. There is a national interest factor present in at least some aspects of the uranium case, and that case may provide an indication of the degree of host government intervention required to immunize conduct.

If I may be permitted an aside, there seems to be something strange, almost perverse, where an agency of the government of the largest and most successful free enterprise economy in the world insists upon a narrow application of the doctrine of foreign compulsion, thereby compelling foreign governments to intervene more and more directly in the private sector, including intervention in the affairs of United States multinationals of a kind American government representatives have objected to in other contexts. This kind of intervention would not be attractive to either the private sector or to the Canadian government. If the government were to act in this way, it would do so only because the alternative would be to surrender totally its power to guide the Canadian economy in accordance with Canadian interests.

I must emphasize that the kind of cover or immunization to which I refer would be provided only when such action was justified by the national interest. The credibility and effectiveness of such intervention would be seriously impaired if the national interest came to be invoked after the event in an attempt to immunize anticompetitive conduct which had essentially been commercially motivated.

AVOIDING CONFRONTATION

The scenario I have described so far is largely one of confrontation, which is a pretty sterile form of diplomacy, to be used only when all else has failed. It is not characteristic of the way in which Canada and the United States conduct their bilateral relations on this subject.

Prime Minister Trudeau has raised the subject with President Carter. Attorney General Bell has visited Ministers Jamieson, Basford and Abbott, and officials have now begun a series of discussions in an attempt to resolve some of the basic issues raised by the new antitrust enforcement policy. The participants in these discussions consist not only of antitrust officials, but include persons concerned with other general policy factors. The Canadian objectives in these discussions are, first, to secure recognition that where the conduct complained of arises from Canadian government policy, the government policy conflicts involved should be resolved by consultation and negotiation. In other words, a recognition that an antitrust prosecution is not an appropriate device for resolving what are essentially policy disputes between the Canadian and the United States governments.

Second, in those rare cases where consultation and negotiation fail to resolve the policy divergence, we seek to secure a recognition that there will be times when it is necessary for Canada to make, in its national interest, decisions which may have an adverse economic effect in the United States. We would further seek to generate a willingness, in such circumstances, to forego any threat or use of antitrust prosecution.

These talks between officials have begun well. There is reason to believe we can secure recognition of our concerns and, with this problem removed, be able to undertake even more effective cooperation between Canadian and American antitrust agencies in the prosecution of commercially motivated anitcompetitive activities.