
Winter 1980

A New Approach to U.S. Enforcement of Antitrust Law Against Foreign Cartels

Douglas E. Rosenthal

Benjamin H. Flowe Jr.

Follow this and additional works at: <https://scholarship.law.unc.edu/ncilj>



Part of the [Commercial Law Commons](#), and the [International Law Commons](#)

Recommended Citation

Douglas E. Rosenthal & Benjamin H. Flowe Jr., *A New Approach to U.S. Enforcement of Antitrust Law Against Foreign Cartels*, 6 N.C. J. INT'L L. 81 (1981).

Available at: <https://scholarship.law.unc.edu/ncilj/vol6/iss1/5>

This Article is brought to you for free and open access by Carolina Law Scholarship Repository. It has been accepted for inclusion in North Carolina Journal of International Law by an authorized editor of Carolina Law Scholarship Repository. For more information, please contact law_repository@unc.edu.

A New Approach to U.S. Enforcement of Antitrust Laws Against Foreign Cartels

by Douglas E. Rosenthal* and Benjamin H. Flowe, Jr.**

International cartels often conflict with U.S. economic ideals and institutions, creating difficulties for U.S. businesses, consumers, and often the government itself. Recently, many troublesome cartels, such as OPEC, have involved foreign state actions and foreign sovereign policies creating new obstacles to the effective enforcement of U.S. antitrust laws. The proposed Cartel Restriction Act of 1979,¹ a bill considered in the U.S. House of Representatives during the last session of Congress, is an attempt to provide a new mechanism to enable U.S. Government anti-trust enforcement agencies to deal more effectively with international cartels. The proposed Act, House Bill 4661, would impose certain reporting requirements on U.S. entities who are asked to engage in foreign cartels and would create substantial civil penalties for those who fail to report.² It would also codify the act of state doctrine,³ the foreign com-

* Partner, Southerland, Asbill & Brennan, Washington, D.C.; Formerly Chief, Foreign Commerce Section, Antitrust Division, U.S. Department of Justice, 1977-1980. A.B. 1961, LL.B. 1966, and Ph.D. 1970, Yale University.

** Executive Editor, *North Carolina Journal of International Law and Commercial Regulation*; A.B. 1978, Duke University; J.D. expected 1981, University of North Carolina at Chapel Hill.

¹ H.R. 4661, 96th Cong., 1st Sess. (1979) (proposed amendment to 15 U.S.C. §§ 20 & 21 (1976)).

² *Id.* sec. 2, § 20.

³ *Id.* § 21. The act of state doctrine has been defined as "an act of a foreign state by which the state has exercised its jurisdiction to give effect to its public interests." RESTATEMENT (SECOND) FOREIGN RELATIONS LAW OF THE UNITED STATES § 41 (1965). "A typical state action treated as an 'act of state' is the taking by a state of property within its own territory." *Id.* § 41, comment d. See, e.g., *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 401 (1964).

Although the authors have certain reservations about the statutory codification of this doctrine, this article will focus only on the reporting requirements of the proposed Cartel Restriction Act of 1979. It should be noted, however, that the Department of State has opposed the Bill's codification of the doctrine on the grounds that the Bill only addresses a portion of the doctrine and would thus cause confusion, *Hearings on H.R. 4661 Before the Subcommittee on Consumer Protection and Finance of the House Committee on Interstate and Foreign Commerce*, 96th Cong., 2d Sess. (1980) (statement of William T. Lake, Deputy Legal Adviser, Department of State) [hereinafter cited as *1980 Hearings*] (copy on file in the office of the *North Carolina Journal of International Law and Commercial Regulation*), and the Department of Justice has also opposed the codification on the grounds that the "doctrine is particularly suitable for [flexible] case-by-case development by the courts rather than by the use of specific legislatively mandated rules imposed on the courts." *Id.* (statement of John H. Shenefield, Associate Attorney General, Department of Justice).

The Bill would require that the courts *not* decline jurisdiction solely on the ground that a case would necessitate an examination of the reasons for any official act of a foreign state. The

pulsion doctrine,⁴ and the method of determining the subject matter jurisdiction that U.S. courts may exercise when international cartel disputes involve official actions of a foreign state.⁵ Thus, the Bill would provide an early warning mechanism by which U.S. Government anti-trust enforcers could gain better information at an early stage and thereby, presumably, more effectively eliminate international cartel activities harmful to U.S. interests.

House Bill 4661 is unpopular with multinational corporations, both foreign and domestic, and with the governments of other nations. To them it manifests all of the ethnocentrism, aggressiveness, and disregard for the contrary policies and institutions of foreign governments, which reject the interference with their sovereignty this bill would initiate, that is seen abroad as one of the worst aspects of our legal system.⁶ The Bill is advocated at a time when many of the developed nations of the world are reacting strongly to U.S. enforcement of antitrust laws against actions that have occurred wholly outside the United States. International tension in this area has been dramatically exacerbated by the *In re Westinghouse Uranium* case⁷ which has involved and affected several foreign

Bill would, however, *permit* the courts to refrain from examining the validity or legality of any official act by a foreign state within its territory by which act the foreign state has exercised jurisdiction to give effect to its public interest. H.R. 4661, *supra* note 1, sec. 2, § 21 (a), (b) (1979).

⁴ The foreign sovereign compulsion doctrine is an affirmative defense for a person whose conduct was compelled by a foreign government. The defense is not available when the foreign state simply acquiesces in, approves, or encourages a private restraint or when the foreign government would require conduct within U.S. territory that would violate U.S. law. *See Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 705 (1962); *United States v. Sisal Sales Corp.*, 274 U.S. 268 (1927); *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597 (9th Cir. 1977); *Interamerican Refining Corp. v. Texaco Maracaibo, Inc.*, 307 F. Supp. 1291 (D. Del. 1970). A version of the doctrine is discussed in relation to compliance with discovery orders at text accompanying notes 15-16 *infra*.

Although this portion of the Bill is also beyond the scope of this article, the Department of State has opposed its codification as needless. 1980 *Hearings*, *supra* note 3 (statement of William T. Lake). The Bill, however, would not change the common law definition outlined above. *See* H.R. 4661, *supra* note 1, sec. 2, § 21(c).

⁵ The Bill codifies certain factors that should be considered by a court in determining whether to exercise jurisdiction in an antitrust case when a foreign state has established a law or policy requiring action by a U.S. entity that is inconsistent with U.S. antitrust laws. H.R. 4661, *supra* note 1, sec. 2, § 21 (c). This section generally follows the developing common law. *See* text accompanying notes 18-21 *infra*. Yet, the Justice Department has opposed such a codification because the factors listed risk being interpreted as an exclusive list or priority ordering as opposed to the flexible judicial approach that is developing. 1980 *Hearings*, *supra* note 3 (statement of John H. Shenefield). The Department of State has also opposed this section for similar reasons. *Id.* (statement of William T. Lake).

⁶ *See, e.g.*, 1980 *Hearings*, *supra* note 3 (statement of Michael Blechman).

⁷ For interlocutory decisions in this ongoing case, *see In re Uranium Antitrust Litigation*, 617 F.2d 1248 (7th Cir. 1980); *In re Uranium Antitrust Litigation*, 480 F. Supp. 1138 (N.D. Ill. 1979). *See also In re Westinghouse Electric Corp. Uranium Contracts Litigation*, 563 F.2d 997 (10th Cir. 1977); *Rio Tinto Zinc Corp. v. Westinghouse Electric Corp.*, [1978] 1 All E.R. 434 (House of Lords 1977). The case and its implications are discussed at text accompanying notes 26-36 *infra*. The reader should note that Mr. Rosenthal supervised the Justice Department grand jury investigation of the uranium cartel. The investigation, relying on the same theories as the plaintiffs' complaint in this private litigation, did not lead either to a criminal or civil

governments, many of whom are allies of the United States. A number of these states have reacted with retaliatory legislation that authorizes limitations on discovery within their boundaries, authorizes refusal to enforce U.S. antitrust judgments, and even allows a company to recover most of the damages that have been assessed against it in the U.S. antitrust action.⁸

Congress is not insensitive to this international tension and the Cartel Restriction Act of 1979 has gone no further than preliminary hearings. Passage in its present form would probably frustrate enforcement of U.S. antitrust laws against international cartels and impede the competitive power of U.S. businesses by provoking a new escalation of retaliatory action by foreign governments. An American president could destroy his foreign policy credibility if he signed it. The Bill, however, could be made more effective and more acceptable to Congress and the international community even in the current context.

This article will offer proposals for the Bill's improvement to that end. First, as background to these proposals, the article will review the jurisdictional "effects doctrine" which has facilitated the application of U.S. antitrust law to foreign conduct and information, examine international views on the propriety of the effects doctrine, offer a brief explanation of the *In re Westinghouse Uranium* case and the international reaction to it, and briefly discuss some of the retaliatory legislation enacted by foreign states. Having set the background, the article will then examine the proposed Cartel Restriction Act, focusing solely on the Bill's reporting requirements. Finally, specific proposals will be made for altering those reporting requirements to achieve maximum enforcement effectiveness with minimal international backlash.

In the courts of the United States, a governmental or a private party may establish subject matter jurisdiction over extraterritorial activities of a foreign based party via the effects doctrine. This doctrine, applied most often in antitrust cases, gives U.S. courts subject matter jurisdiction over acts performed by foreign entities outside the United States if those acts were intended to and did directly and significantly affect commerce.⁹ The Department of Justice has stated the essence of the effects doctrine as follows: "When foreign transactions have a substantial and foreseeable effect on U.S. commerce, they are subject to U.S. law regardless of where they take place."¹⁰

prosecution of cartel members. See also note 35 *infra*. Mr. Rosenthal is, therefore, not an impartial observer in these matters. Neither is the principal sponsor of H.R. 4661, Congressman Albert Gore, Jr. His constituency receives power from the Tennessee Valley Authority, one of the plaintiffs' in the Chicago litigation.

⁸ See text accompanying notes 39-41 *infra*.

⁹ *United States v. Aluminum Co. of America*, 148 F.2d 416, 443-44 (2d Cir. 1945).

¹⁰ U.S. DEP'T OF JUSTICE, ANTITRUST GUIDE FOR INTERNATIONAL OPERATIONS (1977). See generally Davidow, *U.S. Antitrust and Doing Business Abroad: Recent Trends and Developments*, 5 N.C.J. INT'L L. & COM. REG. 23 (1980); Lacey, *Antitrust and Foreign Commerce: Reach and Grasp*, 5 N.C.J. INT'L L. & COM. REG. 1 (1980); J. GRIFFIN, PERSPECTIVES ON THE EXTRATERRITORIAL

The basic justifications for the effects doctrine as applied in antitrust cases are that (1) it would be inequitable to allow foreign enterprises, especially those controlled by U.S. parents, freely to engage in conduct that significantly damages persons within the United States when such conduct is illegal for domestic entities, and (2) it could be an intrusion into U.S. domestic commerce if private foreign cartels were free to fix prices on U.S. imports. The doctrine recognizes that much of the world's commerce takes place across national borders and that, for instance, predatory pricing practices can cause as much damage to U.S. businesses when they originate abroad as when they originate within the United States.

Few countries other than the United States, however, agree that the effects doctrine is an appropriate basis for subject matter jurisdiction, especially for antitrust cases. Some nations oppose this exercise of jurisdiction beyond national borders as a matter of principle. Much opposition also comes from the fact that many foreign governments advance policies, such as the selective encouragement of their export cartels, that the U.S. government opposes. Many opponents of the effects doctrine note that the United States does not discourage U.S. export cartels and wonder about the seeming double standard.

First, as a matter of principle, many nations consider that *prima facie* activities in furtherance of the illegal course of conduct within a territory should be required to establish subject matter jurisdiction and that limited exceptions should be subject to the overriding rights of the territorial state. The justification of this territorial jurisdiction or "constituent elements" theory is that it best delimits the appropriate sphere of action of each state, minimizes the occurrence of overlapping jurisdiction, and reduces international friction in the economic field where national policies and laws may well differ. The territorial principle of jurisdiction also provides business planners with greater certainty about their legal obligations.¹¹

The effects doctrine does have a basis in international law, however. Its exercise in antitrust cases is said to be analogous to personal injury crimes or torts, such as where pistols are fired into a country from outside

APPLICATION OF U.S. ANTITRUST AND OTHER LAWS (1979). *See also* United States v. Watchmakers of Switzerland Information Center, Inc., [1963] Trade Cases (CCH) ¶ 70,600, at 77,456 (S.D.N.Y. 1962), *order modified*, [1965] Trade Cases (CCH) ¶ 71,352 (S.D.N.Y. 1965) ("direct and substantial restraint on . . . foreign commerce of the United States"); United States v. Timken Roller Bearing Co., 83 F. Supp. 284, 309 (N.D. Ohio 1949) *modified on other grounds*, 341 U.S. 593 (1951) ("a direct and influencing effect on trade").

¹¹ Rosenthal, *U.S. Antitrust Laws, The Problem of Extraterritoriality, and the Role of the U.S. Government In Private Litigation*, in THIRD ANNUAL INSTITUTE FOR CORPORATE COUNSEL: CORPORATION LAW AND PRACTICE HANDBOOK SERIES 389-99 (P.L.I. No. 339, (1980)). The British view was espoused by Viscount Dilhorne in a speech on the *Westinghouse* case. "For many years now, the U.S. has sought to exercise jurisdiction over foreigners in respect of acts done outside the jurisdiction of that country. This is not in accordance with international law. . . ." *In re Westinghouse Electric Corp. Uranium Contracts Litigation*, [1978] 1 All E.R. 434, 460 (House of Lords 1977), *reprinted in* 17 INT'L L. MATERIALS 38, 50 (1978).

its borders. In fact, the Permanent Court of International Justice provided some justification for the exercise of the effects doctrine in *The S.S. Lotus* in 1927.¹² *The Lotus* case involved a collision between French and Turkish ships in which a Turkish ship sank and eight Turkish nationals were lost. The Turkish government argued that the French captain was criminally liable under Turkish law for his acts which had an effect on the Turkish ship. By finding that there was no principle of international law which would prevent Turkey from instituting criminal proceedings based on such effects, this case would appear to leave the extent to which extraterritorial jurisdiction may be claimed to the discretion of the enforcing states.¹³

Those who adhere to the territorial doctrine, however, would distinguish *The Lotus* from economic cases. In cases of economic injuries to U.S. persons committed by foreign private enterprises, especially where the foreign enterprises were acting consistently with the economic policies of the host government, advocates of the territorial doctrine assert that the United States should pursue the matter by diplomatic negotiations as it would if the action were compelled by the foreign state itself. It is argued that such negotiations pursued on a country to country level would best assure that the conflicting interests of both sovereigns and their respective nationals are adequately balanced, as compared to a decision by a court in a single country of doubtful international expertise and impartiality.¹⁴ Thus, there are strong differences of opinion regarding the propriety of the effects doctrine as a principle of jurisdiction.

Friction is also caused by procedural aspects of effects doctrine cases. Any American antitrust case is likely to entail extensive discovery of business documents.¹⁵ In international cases discovery creates special problems since the commercial information that is needed will be located in foreign jurisdictions. This information is often voluminous and of a sensitive nature. The target country rarely has laws on procedural discovery that permit the breadth of information gathering allowed by the Federal Rules of Civil Procedure. The foreign government often views the furnishing of such information pursuant to legal process as a breach of its sovereignty because that government would not permit such infor-

¹² [1927] P.C.I.J., ser. A, No. 10. For an excellent overview of this debate on the effects doctrine and its application by the Federal Republic of Germany as well as its potential application by the Commission of the European Communities, see Deringer, *Extra Territorial Application of Anti-trust Laws—Modern Trends*, 1 INT'L CONT. L. & FINANCE REV. 323 (1980).

¹³ But see Haight, *International Law and the Extraterritorial Application of the Antitrust Laws*, 63 YALE L.J. 639, 642 (1954) (stating that the court criticized the effects doctrine as a "basic misconception regarding the international law competence of the United States"). See generally, Kintner & Griffin, *Jurisdiction Over Foreign Commerce Under the Sherman Antitrust Act*, 18 B.C. INDUS. & COM. L. REV. 199 (1977); Rahl, *Foreign Commerce Jurisdiction of the American Antitrust Laws*, 43 ANTITRUST L.J. 521 (1974).

¹⁴ See British Aide-Memoire to the Commission to the European Communities, reprinted in I. BROWLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 310 (3d ed. 1979).

¹⁵ Note, *Discovery of Documents Located Abroad in U.S. Antitrust Litigation: Recent Developments in the Law Concerning the Foreign Illegality Excuse for Nonproduction*, 14 VA. J. INT'L L. 747 (1974).

mation gathering to take place under its own laws. Further, compliance with U.S. discovery requests often conflict with the target national's own standards of commercial confidentiality. The pill is especially bitter where it is thought that the overbroad discovery will be used to assert offensive substantive antitrust effects jurisdiction. For these reasons, the procedural aspects of a U.S. extraterritorial antitrust case are often objectionable.

Finally, from a substantive standpoint, the objectives of U.S. antitrust laws are often in conflict with contrary legislation or executive policy of the state in which the relevant activity took place. "[S]uch legislation reflects national economic policy which may not coincide, and may be directly in conflict, with that of other states."¹⁶ For the foreign sovereign to permit and aid enforcement of U.S. antitrust laws in such cases would thus undermine that state's own, contrary, economic policies and laws.

U.S. courts have, relatively recently, begun to recognize the international tensions described. Two principal doctrines are being evolved by the courts in response to problems created by these tensions. The first doctrine was developed by the United States Supreme Court in *Societe Internationale v. Rogers*¹⁷ where the Court held that it would be unjust, in the absence of bad faith, to punish a defendant for failing to comply with a discovery order when such compliance would subject him to criminal sanctions in his own country.¹⁸ The Court did not adopt a hard and fast rule in that case but opted instead for a balancing approach by which decisions would be made on a case by case basis as to whether sanctions for noncompliance with discovery orders should be imposed despite foreign nondisclosure laws.¹⁹

A balancing approach is also used in the second principal doctrine developed by the courts in cases where there may be a conflict of laws or policies between the United States and another sovereign state. United States Courts of Appeals in the Third, Fifth, and Ninth Circuits have held that the direct and substantial effects of the acts complained about do not provide a sufficient basis by themselves for subject matter jurisdiction of an extraterritorial nature. In *Timberlane Lumber Co. v. Bank of*

¹⁶ *Rio Tinto Zinc Corp. v. Westinghouse Electric Corp.*, [1978] 1 All E.R. 434, 475 (House of Lords 1977).

¹⁷ 357 U.S. 197 (1958).

¹⁸ Interestingly, the action of the Swiss Federal Attorney to prevent disclosure in the *Societe* case was directly aimed at the specific litigation, although the action was consistent with Swiss policy. *Societe Internationale v. Brownell*, 225 F.2d 532, 539 (D.C. Cir. 1955).

¹⁹ See *In re Westinghouse Electric Corp. Uranium Contracts Litigation*, 563 F.2d 992, 997 (10th Cir. 1977) (discussing *Societe Internationale*). It has been stated, however, that some "cases have nevertheless been characterized by an almost automatic deference to such nondisclosure laws." Note, *Foreign Nondisclosure Laws and Domestic Discovery Orders in Antitrust Litigation*, 88 YALE L.J. 612, 615 (1979) (citing *In re Chase Manhattan Bank*, 297 F.2d 611 (2d Cir. 1962) (Panamanian law); *First National City Bank v. IRS*, 271 F.2d 616 (2d Cir. 1959), *cert. denied*, 361 U.S. 948 (1960) (Panamanian law); *In re Equitable Plan Co.*, 185 F. Supp. 57 (S.D.N.Y. 1960) *modified sub nom. Ings v. Ferguson*, 282 F.2d 149 (2d Cir. 1960) (Canadian law)).

America, N.T. & S.A.,²⁰ the Ninth Circuit Court of Appeals recognized the need for comity in foreign relations and adopted a balancing approach to jurisdiction, weighing the following factors:

the degree of conflict with foreign law or policy, the nationality or allegiance of parties and the locations of principal places of businesses of corporations, the extent to which enforcement by either State can be expected to achieve compliance, the relative significance of effects on the United States as compared with those elsewhere, the extent to which there is explicit purpose to harm or affect American commerce, the foreseeability of such effect, and the relative importance to the violations charged of conduct within the United States as compared with conduct abroad.²¹

The Court of Appeals for the Third Circuit adopted a similar approach in *Mannington Mills, Inc. v. Congoleum Corp.*²² as did the Fifth Circuit in *Industrial Investment Development Corp. v. Mitsui & Co. Ltd.*,²³ both of which were decided in 1979. Further, the U.S. Department of Justice has adopted this balancing approach as part of its proper exercise of prosecutorial discretion in enforcing antitrust laws in U.S. foreign commerce.²⁴

Although the latter balancing approach is viewed as a positive step, many foreign governments remain dissatisfied. The *Timberlane* approach gives foreign businessmen and their governments little assurance that their actions outside the United States, if approved by most nations' laws, will not be subject to sanctions in U.S. courts. Such businessmen and their governments could, perhaps, have some confidence that their interests will be adequately represented through bilateral, diplomatic negotiations between states when conflicts have arisen out of acts done in one nation that have affected entities in the other. When the decision is made unilaterally by adjudication in U.S. courts, however, neither foreign businessmen nor their governments can be confident that their interests and contrary views of the proper law will be fully considered.²⁵

²⁰ 549 F.2d 597 (9th Cir. 1976).

²¹ *Id.* at 614. The factors essentially follow those specified in RESTATEMENT (SECOND) FOREIGN RELATIONS LAW OF THE UNITED STATES § 40 (1965).

²² 595 F.2d 1287, 1297 (3d Cir. 1979). It has been pointed out that the tests of the *Timberlane* and *Mannington Mills* decisions reflect a different approach. In *Timberlane*, the court considered whether jurisdiction was present by determining whether the effects on U.S. commerce were substantial enough relative to foreign policy concerns to justify the assertion of extraterritorial jurisdiction. 549 F.2d at 613-14. In *Mannington Mills*, however, the court adopted a two step test, determining first whether jurisdiction existed because of the intended effects of the actions of defendant and second whether jurisdiction should be exercised if it existed. 595 F.2d at 1292. See 20 HARV. INT'L L.J. 667, 672-73 n.51 (1979). It should be noted that the Court of Appeals for the Seventh Circuit did not follow either approach. *In re Uranium Antitrust Litigation*, 617 F.2d 1248, 1253-56 (7th Cir. 1980).

²³ 594 F.2d 48 (5th Cir. 1979), *cert. denied*, 445 U.S. 903 (1980).

²⁴ See, e.g., Speech of D. Flexner, Assistant Attorney General, Department of Justice, to Georgia State Bar (Dec. 6, 1979); ANTITRUST GUIDE, *supra* note 10, at 6-7.

²⁵ See, e.g., Blair, *The Canadian Experience*, in GRIFFIN, *supra* note 10, at 67 & 70 n.11. Also, "[i]t is clear that the filing of amicus briefs by foreign governments, formal protests by foreign governments and the two existing multilateral conventions have been of limited success in reducing tensions and resolving disputes." GRIFFIN, *id.* at xii (citations omitted).

For example, under U.S. law there is virtually no valid excuse for a defendant in a law suit to fail to appear before the court. In a purely domestic context, absent fraud, failure to appear generally does and should lead to entry of a default judgment against the nonappearing party. Under U.S. law it is possible and appropriate to appear in court to assert as a defense that the court lacks jurisdiction over the matter or the person without thereby necessarily conceding that one accepts the court's jurisdiction. The same principle does not apply in many foreign jurisdictions, however. A foreign enterprise whose home laws may recognize a subsequent action in its own courts by the U.S. plaintiff (in the current action in the U.S. court) to enforce a U.S. money judgment has a most difficult choice. If he makes a special appearance before the U.S. court to contest subject matter jurisdiction, he may be deemed by his own courts to have submitted to personal jurisdiction, thus making it easier for the plaintiff to sue to enforce a successful judgment.²⁶ If he fails to appear, he risks the application of sanctions against his U.S. assets upon entry of a default judgment.

This international tension has been exacerbated to a volatile extent by the ongoing *Westinghouse Uranium Antitrust Litigation*.²⁷ The circumstances that led to this litigation arose in the 1960's when the U.S. Government announced a continued embargo on the importation of uranium, an action which closed off "a major portion of the world's market to businessmen who had theretofore sold into [the U.S.] market."²⁸ The Atomic Energy Commission (AEC) had, for years, encouraged foreign uranium producers to exploit their uranium resources to enhance U.S. access to uranium for national security. Thereafter, however, large domestic uranium deposits were discovered and began to be exploited. The U.S. Government made the decision to impose an embargo on the importation of foreign uranium for sale to private customers (utilities) in the U.S. market. The AEC also stopped U.S. governmental purchases of

²⁶ Amicus Brief of the Government of the United Kingdom at Exhibit B—Memorandum by the Solicitor to the U.K. Dep't of Trade, *In re Uranium Antitrust Litigation*, 480 F. Supp. 1138 (N.D. Ill. 1979) (citing a Court of Appeals case, which probably applies in Canada and Australia as well as the United Kingdom).

²⁷ See note 7 *supra*. For other articles discussing the case, see generally GRIFFIN, *supra* note 10; Augustine, *Obtaining International Judicial Assistance Under the Federal Rules and The Hague Convention on the Taking of Evidence Abroad: An Exposition of the Procedures and a Practical Example—In re Westinghouse Uranium Contract Litigation*, 10 GA. J. INT'L & COMP. L. 101 (1980); Merhige, *The Westinghouse Uranium Case: Problems Encountered in Seeking Foreign Discovery and Evidence*, 13 INT'L LAW. 19 (1979); Comment, *The International Uranium Cartel: Litigation and Legal Implications*, 14 TEX. INT'L L.J. 59 (1979).

²⁸ *Confirmation Hearings on John H. Shenefield, Nominee, Associate Attorney General: Hearings Before the Senate Committee on the Judiciary*, 96th Cong., 1st & 2nd Sess. 73 (1979-1980). The embargo was originally imposed in 1964 when Congress provided that the U.S. Atomic Energy Commission "to the extent necessary to assure the maintenance of a viable domestic uranium industry, shall not offer such services for source or special nuclear materials of foreign origin intended for use in a utilization facility within or under the jurisdiction of the United States." Private Ownership of Special Nuclear Materials Act, Pub. L. No. 88-489, § 16, 78 Stat. 602 (1964) (codified at 42 U.S.C. § 2201(v)(B) (1976)).

uranium from foreign suppliers. It is ironic and significant that the effect of this policy was to establish a blatantly anticompetitive U.S. domestic boycott, a kind of U.S. buyers' cartel, plunging foreign uranium producers into a severely depressed market situation. Not surprisingly, many of the foreign producers, in concert with the governments of their uranium producing countries, organized a sellers' cartel in Paris, in 1972, in an attempt to prop up the price of uranium, then at the "depressed" level of approximately \$6.00 per pound.

Westinghouse Electric Corporation, in the years prior to the formation of this cartel, had entered into numerous contracts with various utility companies for the sale of nuclear reactor plants. The contracts provided that Westinghouse would supply uranium fuel for use in the reactors. "By 1974 Westinghouse had agreed to supply various electric utilities with 80 million pounds of uranium at an average price of \$10.00 per pound,"²⁹ but the world market price of uranium had risen drastically and reached \$42.00 per pound. Westinghouse had been "selling short" and thus owned only 15 million pounds. The cost of supplying the remainder would have been at least \$2 billion, nearly twice the company's recorded assets at the time.³⁰ When Westinghouse confessed that it could not deliver, the utility companies sued Westinghouse for breach of contract.³¹ Westinghouse attempted to defend under the doctrine of commercial impracticability, U.C.C. section 2-615, and also alleged that the sellers' cartel in Paris had taken actions which drastically restricted the availability of uranium and caused prices to increase.³² This defense ultimately failed, and during the period from 1978 to 1980 Westinghouse settled the claims against it for substantial amounts.³³

In 1975, the Justice Department (with whom the senior author of this article was then working) began an investigation into the activities of the cartel.³⁴ In the fall of 1976, the Justice Department began a grand jury investigation of the cartel. The Department in May 1978 concluded that there was little evidence on which price fixing violations of U.S. antitrust laws could be proved.³⁵ The doctrine of comity was also a fac-

²⁹ Augustine, *supra* note 27, at 135 (citations omitted).

³⁰ *Id.*

³¹ *In re Westinghouse Electric Corp. Uranium Contracts Litigation*, 405 F. Supp. 316 (Jud. Pan. Mult. Lit. 1975); 436 F. Supp. 990 (Jud. Pan. Mult. Lit. 1977).

³² 436 F. Supp. at 995.

³³ The aggregate pretax cost of the settlements to Westinghouse has been reported to be roughly \$721 million. *See* WESTINGHOUSE ELECTRIC CORP. ANNUAL REPORT 29, 37 (1979); *see also* WESTINGHOUSE ELECTRIC CORP. ANNUAL REPORT 29, 37 (1978).

The value to the utilities involved would be a much higher figure. For the most accurate reports of individual settlements *see* NUCLEONICS WEEK (1978-1980 issues).

³⁴ An article in FORBES magazine was perhaps the first public description of the existence of the cartel. FORBES, Jan. 15, 1975, at 19.

³⁵ The Justice Department made this decision, according to John Shenefield, based on several factors. The uranium cartel had a minimal impact on U.S. commerce; the only sale into the United States during the period of evidenced cartel activity was one of future delivery at a price only one dollar higher than the world price at the time the cartel was formed (approximately \$7 versus \$6), and the price of uranium did not jump up dramatically until significantly

tor in the Department's decision not to prosecute.³⁶

Concurrently with the Justice Department's investigation, Westinghouse filed suit against thirty foreign and domestic uranium producing corporations in the District Court for the Northern District of Illinois on October 15, 1976, alleging worldwide conspiracy to restrain trade in violation of U.S. antitrust laws. That suit is still pending and decisions in a number of interlocutory appeals related to discovery requests have been handed down.³⁷

Even though there has been no full trial on the merits as of yet, the private treble damage action and the investigation by the Justice Department have provoked a significant international backlash. The fact that the suit was filed and investigation undertaken as well as the voluminous extraterritorial discovery requests for both the investigation and the suit have outraged the governments involved. There are two principle reasons for this reaction. First, the U.S. Government is believed to have initiated the uranium price problems by enacting the uranium embargo in the 1960s. Second, governments such as Australia, South Africa, and Canada view uranium as one of their major national resources. These countries took steps as governments to save an important national industry which was being jeopardized by the U.S. policy of embargoing uranium imports. They believe that it is inappropriate for U.S. courts unilaterally to attempt to adjudicate a problem created by acts of U.S. and foreign governmental policy. The *Westinghouse* case has thus greatly exacerbated international tensions in this area of the law.

Because of the application of the effects doctrine by U.S. courts and especially as a result of the *Westinghouse* case, many foreign states who believe that their sovereignty has been infringed have enacted retaliatory legislation. Early reaction involved the passage of discovery blocking statutes³⁸ designed to fit the exception to sanctions for refusing to comply

after the period for which there was evidence of the cartel's operation. Foreign governments were very much involved in the cartel and enacted laws requiring the foreign producers to charge higher prices. See *Confirmation Hearings*, *supra* note 28, at 27-33.

The Justice Department did prosecute the Gulf Oil Corporation for participation in a boycott of Westinghouse export sales of uranium and nuclear equipment to foreign markets. Gulf entered a plea of *nolo contendere*. [1970-1979 Transfer Binder] TRADE REG. REP. (CCH) ¶ 45,078. This boycott, however, is not a central element of the suit brought by Westinghouse.

³⁶ *Confirmation Hearings*, *supra* note 28, at 32. Comity "is the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws" *Hilton v. Guyot*, 159 U.S. 113, 164 (1895).

³⁷ See note 7 *supra*.

³⁸ The early discovery blocking statutes include: Business Records Protection Act, 1947, ONT. REV. STAT. c. 54 (1970) (a reaction to *In re Subpoenas Duces Tecum Addressed to Canadian Int'l Paper Co.*, 72 F. Supp. 1013 (S.D.N.Y. 1947)); Business Concerns Records Act, 1964, QUE. REV. STAT. c. 278 (1964); Economic Competition Act of June 28, 1956, art. 39, Stb. 401, *as amended by* Act of July 16, 1958, Stb. 413 (Netherlands reaction to discovery of foreign oil company documents arising out of *In re Investigation of World Arrangements*, 13 F.R.D. 280 (D.D.C. 1952); an act actually prohibiting compliance with decisions of foreign courts that would affect economic competition); Atomic Energy Control Act 1970, CAN. REV. STAT. c. A-

with discovery orders that was developed in *Societe Internationale*.³⁹ Such legislation is defensive in nature, being designed to impede the discovery process of extraterritorial actions.

Recently, however, retaliatory acts have become more wide-ranging. In 1979, the Federal Parliament of Australia enacted a law giving the Commonwealth Attorney-General discretion to order that a foreign antitrust judgment not be enforced or that only a specific portion be enforced.⁴⁰ Great Britain has gone one step further in passing an act that would not only give authorities the discretion provided in the Australian Act but would also provide a mechanism whereby a defendant in foreign antitrust proceedings could recover the portion of the judgment declared unenforceable in Great Britain (generally, the punitive two-thirds of a private treble damage action) if the original defendant has assets located in the United Kingdom.⁴¹ A similar bill introduced in the Canadian Parliament on July 11, 1980 is expected to pass.⁴²

The enactment of such retaliatory legislation, the progression of those acts, and the lengths to which states have gone to oppose U.S. extraterritorial enforcement of antitrust laws indicate the hostility with which such extraterritorial actions are received. The current international situation creates a very difficult task for any new U.S. antitrust law aimed at expanding extraterritorial enforcement. It is in this context that the reporting requirements of the proposed Cartel Restriction Act of 1979 must be considered.

House Bill 4661 would require U.S. entities to report to the Justice Department and the Federal Trade Commission the following three kinds of joint anticompetitive activities: (1) the establishment of prices, (2) the allocation of customers or markets, and (3) the restriction of production or availability of any product or service.⁴³ These activities would have to be reported: (1) when the U.S. entity or its foreign subsidiary is engaged in such conduct with a competing foreign firm,⁴⁴ (2) when it or its foreign subsidiary is required or requested by a foreign state to engage in such conduct,⁴⁵ or (3) when it knows that its foreign partner in a joint venture is engaging in such activities with a competitor

19 (1970) and the Uranium Information Security Regulations, STAT. O. & R. 76-644 (1976), promulgated under the Act (reaction to *Westinghouse*); Foreign Proceedings (Prohibition of Certain Evidence) Act 1976, Austl. Act No. 121 (1976) (reaction to *Westinghouse*). See generally Note, *supra* note 15.

³⁹ See text accompanying notes 17-19 *supra*. Some such acts were not enacted in direct retaliation to U.S. suits. See, e.g., Shipping Contracts and Commercial Documents Act 1964, c. 87, (United Kingdom); S+GB, C.P., COD. PENN. § 271 (1971) (Switzerland).

⁴⁰ Foreign Antitrust Judgments (Restriction of Enforcement) Act 1979, No. 13, Austl. Acts (1979). See generally 20 HARV. INT'L L. J. 663 (1979).

⁴¹ Protection of Trading Interests Act 1980, c. 11.

⁴² [1980] 316 INT'L TRADE REP.'S U.S. EXPORT WEEKLY (BNA) C-2.

⁴³ H.R. 4661, *supra* note 1, sec. 2, § 20(a)(1).

⁴⁴ *Id.* § 20(a)(1)(A).

⁴⁵ *Id.*

involving the joint venture's product or service.⁴⁶ The U.S. entity would be required to report within twenty days of the onset of the activity, of the date of the foreign state's requirement or request, or of the date on which the entity learned of the joint venture partner's activity. Failure to report would result in a fine of up to \$20,000 for each day during which the violation occurs with a maximum limit of \$1 million for each violation.⁴⁷ The Bill would also authorize a penalty of up to \$25,000 against any corporate officer or director who knowingly fails to report, with a prohibition of indemnification by the company.⁴⁸

The purpose of the reporting requirements of the Bill is to give U.S. antitrust officials an early warning system in order to alert them to potential international cartel activities. The reports that would be required of U.S. entities would enable U.S. antitrust officials to employ diplomatic or legal means to prevent or limit the effects of trade restraints that are fostered by foreign governments, multinational corporations, and other interests antithetical to competition.⁴⁹ The reporting requirements of the Bill are, in part, a response to the *Westinghouse* case and facts discovered in hearings held by the Commerce Oversight and Investigations Subcommittee of the House Committee on Interstate and Foreign Commerce in which Representative Albert Gore, Jr., the Bill's principal sponsor, participated.⁵⁰

Until the United States can clarify its own ambivalent attitudes about international cartels, can find some consensus internationally as to which cartels are objectionable, and can fashion consistent rules and procedures for the proper application of U.S. antitrust law to objectionable cartels, it is desirable to bring early cartel activity to the attention of the federal officials in charge of antitrust enforcement and those in charge of U.S. international relations. Notifying these officials will combine diplomatic, state-to-state negotiations with restrained antitrust enforcement by the experts responsible for formulating and implementing national

⁴⁶ *Id.* § 20(a)(2). The Federal Trade Commission must notify the Secretary of State, the Office of the United States Trade Representative, and the Securities and Exchange Commission when it receives such a report. *Id.* § 20(b).

⁴⁷ *Id.* § 20(c)(1).

⁴⁸ *Id.* § 20(c)(2)(A).

⁴⁹ 1980 Hearings, *supra* note 3 (statement of Rep. Albert Gore, Jr., sponsor of the Bill). For a thorough discussion of the impetus behind the Bill, see Gore, *The Cartel Restriction Act of 1979: Response to a Global Economic Problem*, 12 VAND. J. TRANSNAT'L L. 273 (1979).

The legal codification aspects of the Bill, see notes 3-5 *supra*, would supplement the reporting requirements by assuring that the mere presence of a sovereign act in a cartel would not preclude a court from examining the motivations behind the anti-competitive activity: 1980 Hearings, *supra* note 3 (statement of Rep. Albert Gore, Jr.). These codification efforts are important to the reporting requirements of the Bill and are themselves highly controversial. Both the Justice and State Departments have opposed them. See notes 3-5 *supra*. For the sake of better focus, however, this article discusses the reporting requirements alone with proposals for their improvement.

⁵⁰ See 1980 Hearings, *supra* note 3 (statement of Rep. Albert Gore, Jr.). Many of the comments and proposals of this article are derived from the testimony of one of its authors, Douglas E. Rosenthal, in these Hearings.

antitrust policy. These officials may oppose, to the extent practical, objectionable international cartel activities and approve unobjectionable activity. To a large degree, the reporting requirements of the Bill would do just that, and to that extent they are laudable.

It is necessary to pay significantly greater, less rhetorical, and more sophisticated attention to international cartel activities. By bringing such cartels and potential cartels out into the open where they can be scrutinized, the U.S. Government will be better able to deal with them in their formative stages. Action could be taken before the parties and concerned governments are locked into an inextricable course of conduct that will make attempts at enforcement of U.S. antitrust laws a further source of international tensions.

There are several general problems with the reporting requirements, however, that must be addressed before making proposals for change. First, the mere enactment of a new antitrust law directed at extraterritorial actions is likely to be met with renewed hostility by those states that now feel threatened by what they perceive as U.S. contempt for their sovereignty and their authority to regulate internal economic activities.⁵¹ Enactment of controversial House Bill 4661 in the face of clear messages from these governments would itself exacerbate these international tensions if conciliatory elements are not embodied within the Bill.

Second, the United States must accept the fact that it no longer has the economic leverage to force its particular view of the proper economic order on the rest of the world. Compromises must be made more often than in the past. The United States has recognized that all cartels are not objectionable. Orderly marketing agreements, certain international commodity stabilization treaties, and perhaps even nuclear non-proliferation agreements are international cartels adhered to by the United States, and these cartels, like some domestic regulated monopolies, may be justified. If it is to be said that certain international cartels are appropriate, then candor requires at least some tolerance when others form a cartel that foreign governments deem appropriate. Thus, cartels should only be opposed when they are indeed harmful and opposition can be effective; needless interference should be avoided on all levels.

Third, the reporting requirements appear to reach beyond the scope of U.S. jurisdiction that has so far been sanctioned by the courts. Whereas U.S. jurisdiction is limited to activities that have a direct affect

⁵¹ Representative Gore has stated that foreign nations such as Britain, Australia, and Canada have shown contempt for the extraterritorial reach of U.S. antitrust laws by enacting retaliatory legislation. *1980 Hearings, supra* note 3 (statement of Rep. Albert Gore, Jr.). Such a viewpoint ignores the legitimate interests of those states which have viewed the extraterritorial reach of U.S. antitrust laws as showing contempt for their very sovereignty. Because they would likely perceive House Bill 4661 in the same manner, further foreign retaliatory legislation may follow enactment of the Bill in its present form. Such an international slugging match is not in the best interests of anyone. Compromises must be made on each side if either group's interests are to be effected.

on U.S. commerce,⁵² the activities the Bill requires to be reported contain no such limitation. The reporting requirements should be made consistent with limitations on U.S. extraterritorial jurisdiction.

Fourth, the requirements that reports must be made with respect to the activities of all subsidiaries and joint venture partners are impractical and overly broad. It is not possible for officers and directors of U.S. entities to know every activity of their joint venture partners or even their subsidiaries. The reporting of activities of joint venture partners and subsidiaries should only be required if a more definite standard of actual knowledge is added to the Bill.

Fifth, the reporting requirements may have the counterproductive effect of making it more difficult for U.S. businessmen to compete internationally. U.S. concerns would be required to set up a monitoring system to spot conduct that should be reported, an added cost of business. The reporting requirements are also rather difficult to interpret. It is relatively easy to know that when one is asked to set the price of widgets at \$5, one would have to report; but it is more difficult to know what activity "may be construed to relate to" the substantive standards of the Bill.⁵³ For instance, when it is mentioned at the breakup of a meeting that "it sure would be easier if you and I weren't going head to head in Chile's widget market," would one have to report? Such ambiguities as well as the requirements themselves may intimidate U.S. businessmen and may make foreign businesses reluctant to deal with U.S. entities. Another part of the danger of reduced competition comes from the fact that the only incentive to report under the Bill is the negative incentive of avoiding the potential fines.⁵⁴ The Bill would be less likely to intimidate U.S. concerns if it provided some positive incentive for reporting.

Specific suggestions for improving the reporting requirements of House Bill 4661 follow. These suggestions are an attempt to meet the general objections outlined above as well as more specific objections to be mentioned. These suggestions are intended to be consistent with the general purpose of the Bill.

First, the reporting requirements should be made consistent with a restrained view of U.S. sovereignty. As noted earlier, most nations of the world do not consider as appropriate the U.S. practice of requiring foreign persons residing abroad to provide information in connection with U.S. judicial proceedings and law enforcement investigations.⁵⁵ Further, while U.S. law deems foreign subsidiaries of American enterprises to be components of U.S. persons and thus subject to U.S. jurisdiction, all

⁵² See notes 9 & 10 and accompanying text *supra*.

⁵³ See 1980 Hearings, *supra* note 3 (statement of William T. Lake).

⁵⁴ The further negative incentive of avoiding potential antitrust suits has always been present, although further down the line. It should be noted that positive incentives for U.S. entities to report would make the Bill more likely rather than less likely to intimidate foreign entities because their Bill-covered activities would more often come to light.

⁵⁵ See note 15 and accompanying text *supra*.

states consider those subsidiaries incorporated and doing business within their territories to be *their* nationals. The United States does not have the clout or the right unilaterally to impose its legal values on others when its domestic law is not accepted international law. If the Cartel Restriction Act is to attempt to generate a new consensus and a climate for international dealing which will allow objectionable international cartels to be identified and limited by mutual agreement, the reporting requirements should be limited to U.S. persons residing in the United States. The Bill should not seek to impose reporting requirements on foreign persons or foreign subsidiaries of U.S. parents.

Second, the reporting requirements should be limited both substantively and jurisdictionally to a small class of conduct as to which there is a significant possibility of substantial adverse impact to U.S. persons. The Bill does so substantively by requiring reports only on potential activities of price fixing, allocation of markets or customers, or limitation of production or supplies. A fourth category of substantive conduct should be added, that of international boycotts for an economic purpose or with an economic effect. Boycotts, like other forms of substantive conduct included in the Bill, are generally treated as one of the more serious forms of anticompetitive conduct.⁵⁶ Otherwise, the substance of the activities required to be reported is not objectionable.

Jurisdictionally, however, the reports should be required only when those substantive activities are likely to have a direct and substantial effect on U.S. markets or are likely directly and substantially to foreclose U.S. export competition. Such a limitation is consistent with U.S. views of proper extraterritorial jurisdiction.⁵⁷ If the reporting requirements are so limited, many types of agreements will be excluded. For example, proposed legislation so limited would not reach international joint venture agreements having only an indirect impact on the United States, nor would it reach restrictive licenses between an actual and potential competitor. This change would prevent what would otherwise amount to unreasonable burdens on reporting entities, chilling export and joint venture opportunities of U.S. entities, and unnecessarily antagonizing friendly foreign states.

Third, the reporting requirements should apply only when control persons of U.S. entities have actual knowledge of participation or a request to participate in the activities covered by the Bill. The law should encourage compliance in order to promote the early identification of cer-

⁵⁶ *United States v. General Motors Corp.*, 384 U.S. 127 (1966); *Klors, Inc. v. Broadway Hale Stores, Inc.*, 359 U.S. 207 (1959); *Fashion Originators Guild of America, Inc. v. FTC*, 312 U.S. 457 (1941); *Eastern States Retail Lumber Dealers Ass'n v. United States*, 254 U.S. 600 (1914).

⁵⁷ See text accompanying notes 9-10 *supra*. It is important to note that the Justice Department, the State Department, and the Federal Trade Commission all had this same difficulty with the scope of the reporting requirements proposed by the Bill. 1980 *Hearings*, *supra* note 3 (statements of John H. Shenefield, William T. Lake, and Ronald B. Rowe, who is the Assistant Director, Bureau of Competition, Federal Trade Commission).

tain important cartel activity. It should not intimidate persons who are required to report. Further, it is neither fair nor desirable to hold a U.S. business executive responsible for judgment errors by subordinates, especially subordinates working for foreign subsidiaries, when that executive has no actual knowledge or any reasonable basis for having actual knowledge of such cartel involvement.

Fourth, applying the same lines of reasoning, the requirements should provide a positive incentive to report. When a control person of a U.S. entity learns that a foreign subsidiary has entered into cartel activities requiring reporting, he and the corporation should be given an inducement to report and should not be put in the position of potentially subjecting themselves to criminal and civil antitrust liability, including treble damage actions, as a direct result of their compliance with these reporting requirements. Such a situation would arise whenever cartel participation is discovered after the fact. Requiring the individual corporate officers to so report and subject themselves to potential criminal liability would risk a violation of the fifth amendment's prohibition against forced self incrimination.⁵⁸ Additionally, the fact that they might be able to avoid a conviction because of constitutional protections would not likely make them any more eager to report. Further, the potential liability for all parties resulting from a combination of criminal and civil actions by the government, and especially from private treble damage actions, may be so great as to make the potential fine under House Bill 4661 irrelevant to a corporation that might consider taking the chance of not being discovered. Thus, while the only present incentive in reporting is the avoidance of a fine, there are many serious disincentives to reporting. Such disincentives might prevent the Bill from serving its intended purpose and should not be permitted.

Therefore, a mechanism along the following lines should be devised to give U.S. persons a positive incentive to report.⁵⁹ After the reporting requirements have been fulfilled, the reporting entity should be given a reasonable opportunity to terminate its participation in the international

⁵⁸ U.S. CONST. amend. V.

⁵⁹ The idea for this mechanism is similar, but of independent origin, to the approach recently announced by the Antitrust Division of the Department of Justice towards voluntary disclosure of antitrust violations. The Antitrust Division will, apparently, seriously consider lenient treatment of corporations or officers who voluntarily report their wrongdoings prior to detection. Several of the factors that are weighed in that decision have been adopted here either explicitly or implicitly. These are the considerations of whether the corporation has made restitution to injured parties, whether the corporation promptly terminated its activity after discovering it, and whether the Division could have reasonably expected that it would have become aware of the activity in the near future had the corporation not reported it. Shenefield, *The Disclosure of Antitrust Violations and Prosecutorial Discretion*, Remarks Before The 17th Annual A.B.A. Corporate Counsel Institute (Oct. 4, 1978), reprinted in 48 ANTITRUST L.J. 463 (1980).

Whereas the Division seems to have adopted a balancing approach to determining whether to recommend leniency in the ordinary voluntary disclosure case, *id.* at 466, we are proposing a more predictable rule for the international cartel context. This would best assure that cartel activities are reported, as that is the primary object of the Bill.

cartel and agree to make restitution by mutual settlement or by litigating in a court of law the amount of *actual* damages sustained by those within U.S. jurisdiction who can prove that they were proximately injured by the cartel. If the reporting entity undertakes such curative conduct in good faith, it should be exempted from any further liability as a result of its limited participation in the international cartel. The exemption should include both criminal and civil sanctions by U.S. antitrust enforcement agencies as well as the punitive provisions of the private treble damage law. This "safe harbor" mechanism would increase the likelihood of compliance with the reporting requirements, would give businessmen more confidence about the potential effects of the Bill when competing internationally, and would better promote the Bill's purpose of early identification of important international cartel problems.

The "safe harbor" mechanism would not be available to persons who reported only after their cartel participation was made public or was discovered by law enforcement agencies. It would only be available to persons acting in good faith when their conduct was not known but for the reporting. This proposal, drafted carefully into the Bill, should greatly enhance the Act's ability to thwart objectionable cartel activity.

Fifth, consistent with the foregoing, where the report is of a request by a foreign person or state to participate in international cartel activity, the reporting person should be given the opportunity of seeking a transaction review from the antitrust enforcement agency.⁶⁰ If, after reviewing the proposed transaction, the agency determines either that the firm's potential participation in the international cartel would not violate U.S. law or that it would not be subject to the jurisdiction of U.S. courts, such determination should provide the reporter with immunity against a subsequent private treble damage action by plaintiffs who seek to litigate the same facts reviewed by the antitrust enforcement agency. Such a provision would go far towards encouraging reports of requests, thereby illuminating cartel activity at a very early stage.

Sixth, the Justice Department should be given exclusive jurisdiction

⁶⁰ The Justice Department presently has a Business Review Procedure along these lines. 28 C.F.R. § 50.6 (1980). The formal clearance procedure does not expressly exempt that cleared reporting entity from further liability under private treble damage actions, but generally such actions would be difficult to win after clearance had been obtained from the Justice Department.

We propose a formal immunity, however, because the experts in government enforcement should be able to make some final decisions in the international area. For one thing, private actions can arouse grave international reactions regardless of whether or not they are eventually won by the plaintiff, as the *Westinghouse* case illustrates. Additionally, the government enforcement agencies can best represent the interests of the United States in the international area by balancing a vigorous desire to enforce U.S. antitrust laws with the desire to promote competition in the long run and the desire to promote international harmony. A carefully restrained program of enforcing those laws, when enforcement would be beneficial, and avoiding those cases that would create more trouble than they are worth, can best be run by government antitrust enforcement agencies. Once such decisions are made in the international area, private actions should be barred.

over the receipt and evaluation of all reports as opposed to sharing such jurisdiction with the Federal Trade Commission. One reason exclusive jurisdiction is necessary is that international cartel activities for which reports would be required involve potential criminal liability, and only the Justice Department has jurisdiction for criminal antitrust enforcement. In addition, international cartels are extremely complex and require a high degree of expertise, and the Justice Department has considerably greater expertise in the area of foreign commerce than does the Commission. Furthermore, as a Department of the Executive Branch, the Justice Department is able to seek the views of the Departments of State, Commerce, and Treasury, as well as the United States Trade Representative, among others, when evaluating implications of the possibilities for resisting various types of international cartel activity. Because the Federal Trade Commission is a semiautonomous regulatory agency, it has not developed the same interdepartmental consultation channels. Lack of these communication channels limits the Commission's competence to act in this area. Thus, on balance, the Bill's purpose would be better effected by granting exclusive jurisdiction for receipt and evaluation of reports to the Justice Department, recognizing that the Department can draw on the expertise of the FTC when necessary.

Finally, the Cartel Restriction Act should require other departments of the Executive Branch to consult the Department of Justice for its view on the antitrust law and policy implications of any U.S. Government initiatives to organize or facilitate international cartel agreements. If the Department had known in the 1960's that the U.S. Government was going to establish an embargo to prevent foreign producers from marketing uranium in the United States to the detriment of the producers and U.S. utilities and electrical power consumers alike,⁶¹ the Department most likely would have opposed that policy quite vigorously in accord with its present policy of competition advocacy in international trade. The personnel of the Justice Department could have anticipated many of the harmful consequences that have resulted from this embargo and could conceivably have stopped such activity at the earliest and best time possible. Because the United States deems it desirable at times to take actions which have anticompetitive effects, such required interagency consultations within our own government would aid the prior consideration of such potential ramifications as occurred in the uranium industry. Adding this requirement to the Bill would certainly strengthen its purpose.

In conclusion, the reporting requirements of the Cartel Restriction Act could be amply strengthened and sensibly restrained by the above proposals. The form of the Bill proposed herein would substantially enhance the enforcement of U.S. antitrust policies in a manner that is consistent with U.S. international obligations and interests. These provisions would enable enforcement agencies to oppose objectionable

⁶¹ See text accompanying notes 27-32 *supra*.

cartels while maintaining necessary respect for the sovereignty of U.S. trading partners. The provisions would also indicate that the U.S. Congress does not intend to enact its own retaliatory legislation to counter foreign retaliatory legislation, but rather intends to promote its antitrust policies in a manner more conducive to international harmony.

