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Trends

Extraterritorial Application of United States Economic Laws: Britain Draws the Line

Some observers believe they have sighted signals of a trend toward greater ethnocentricity in the United States, at least in the sense of a return to a policy of national economic self-sufficiency and independence. Discussing, and discounting, these signals, Professor Detlev F. Vagts of Harvard Law School notes in a recent article that:

> The endeavor of U.S. authorities to extend the reach of American legal rules indicates a recognition by the United States of the impact of overseas events. However, this ethnocentric effort threatens to override or supplant foreign rules with more familiar American precepts. At times, it has an acute tendency to place the United States on a collision course with other nations jealous of their sovereign prerogatives or hostile to American policy. Moreover, the pejorative connotations attached to the word *extraterritorial* are indicative of the ease with which an international issue may be created.[1]

Such an issue has arisen in respect to the application of American economic laws to British individuals and firms who or which are not doing business in the United States but whose conduct affects American commerce. It may be overstating matters to describe jurisdictional relations between the two countries as being on a collision course, but tempers are clearly becoming frayed, particularly on the British side, and not without reason.

Some background to the present state of affairs may help place it in perspective. The attitude of American courts on the general question of extraterritorial application of American economic laws finds much of its origin and development in antitrust cases. The first foreign commerce antitrust case to reach the Supreme Court was *American Banana Co. v. United Fruit Co.*,[2]

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[1]Vagts, *Trends in International Business Law: Towards a New Ethnocentricity?* 1 Nw. J. Int'l L. & Bus. 11, 15-16 (1979).

[2]213 U.S. 347 (1909).

decided in 1909. The Court, per Justice Holmes, adopted a restrictive interpretation of the extraterritorial reach of the Sherman Act. Plaintiff, an American corporation, alleged that defendant, also an American corporation, had monopolized and restrained the banana trade between Central America and the United States. The acts and contracts complained of took place solely in Central America and included substantial involvement by the Costa Rican government. The Supreme Court held that the complaint did not state a cause of action, construing the Sherman Act as not applicable to acts occurring outside the territorial jurisdiction of the United States, at least where they were not wrongful in the nation where they were committed. In often-quoted dictum Justice Holmes said:

> The general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done. . . . For another jurisdiction, if it should happen to lay hold of the actor, to treat him according to its own notions rather than those of the place where he did the acts, not only would be unjust, but would be an interference with the authority of another sovereign, contrary to the comity of nations, which the other state concerned justly might resent.
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> The foregoing consideration would lead in case of doubt to a construction of any statute as confined in its operations and effect to the territorial limits over which the lawmaker has general and legitimate power. 'All legislation is prima facie territorial.'[3]

But in 1913, the Court modified its *American Banana* holding in *United States v. Pacific & Arctic Railway & Navigation Co.*,[4] in which it sustained an indictment alleging a conspiracy between an American corporation and foreign corporations to restrain and monopolize steamship and rail transportation between United States ports and Canada and Alaska. The Court indicated that to deny jurisdiction would be to put the transportation routes beyond the control of either the United States or Canada. Four years later, the Court held in *Thomson v. Cayser*[5] that a combination formed in a foreign country between a group of steamship lines operating between the United States and South Africa was within the reach of the Sherman act because "the combination affected the foreign commerce of this country and was put into operation here." A decade later, the Court in *United States v. Sisal Sales Corp.*[6] affirmed an injunction under the Sherman Act and section 73 of the Wilson Tariff Act against a conspiracy entered into in the United States between American banks and corporations and a Mexican firm to monopolize import trade in sisal, a Mexican plant used to make binder twine. Most of the acts took place outside the United States. In upholding the jurisdictional reach of the antitrust laws, the Court, per Justice Reynolds, distinguished the case from *American Banana* on the grounds that the conspiracy was entered

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[3] 213 U.S. at 356.
[4] 228 U.S. 87 (1913).
[5] 243 U.S. 66, 88 (1917).
[6] 274 U.S. 268 (1927).

into in the United States, that acts took place in the United States and that there were effects within the United States.[7]

The growing emphasis on effects within the United States culminated in *United States v. Aluminum Co. of America* (*Alcoa*),[8] which for all practical purposes put an end to *American Banana*'s reign as authority on the jurisdictional issue. One of the issues in *Alcoa* was whether the Sherman Act applied to a contract to establish export quotas made in Switzerland between foreign corporations. Recognizing that the strong public policy embedded in the antitrust laws would be undermined if extraterritorial jurisdiction were denied,[9] the Court of Appeals for the Second Circuit, per Judge Learned Hand, uttered the dictum which has since become both shorthand for, and verbal symbol of, judicial rationalization of the extraterritorial application of American economic laws, *viz*:

> [A]ny state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends. . . .[10]

As developed, Judge Hand's test is essentially one of whether the conduct has "intended and actual" or "substantial and foreseeable" effects within the state which is asserting its jurisdiction.[11]

The "effects test" has proven to be controversial, not least because it fails to take into account the possibility, indeed near certainty, that it could lead to a vast overlap of national assertions of jurisdiction based, on the one hand, upon the territorial sovereignty to which Justice Holmes referred, and, on the other hand, the impact territoriality which the effects test itself champions.[12]

That overlap was not long in manifesting itself. In 1951, just a few years after *Alcoa,* a federal district court in New York applied the antitrust laws

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[7]The foregoing summary of early cases involving extraterritorial application of the antitrust laws is from S.C. OPPENHEIM & G.E. WESTON, FEDERAL ANTITRUST LAWS: CASES AND COMMENTS 783-86 (3d ed. 1968).

[8]148 F.2d 416 (2d Cir. 1945).

[9]*See also* Joseph Muller Corp. Zurich v. Société Anonyme de Gérance, 451 F.2d 727 (2d Cir. 1971).

[10]148 F.2d at 443.

[11]*Id.* at 443-44; Steele v. Bulova Watch Co., 344 U.S. 280, 285-89 (1952); Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 704-705 (1962).

[12]A.D. NEALE, a British civil servant, observes in his treatise, THE ANTITRUST LAWS OF THE UNITED STATES OF AMERICA 363 n.1 (2d ed. 1970) that:

> To be fair to Judge Hand, it should be noted that he qualified his proposition by important addenda which his critics do not always acknowledge. He noted that some agreements made outside the United States might actually affect American commerce, though not intended so to do. Because of the 'international complications likely to arise from an effort in this country to treat such agreements as unlawful', he thought that Congress could not have intended the Sherman Act to cover them. Also there might be agreements which, though intended to affect American imports, did not actually do so; and he was prepared to assume that these should not be covered. Thus he applied his rule only to agreements which were both intended to affect American commerce and shown actually to have had some effect. In practice this qualification might keep the situations covered by Judge Hand's view of American jurisdiction within relatively modest bounds. But even the assertion of jurisdiction over foreign activities abroad which purposely affect American imports clearly conflicts with the principle that a nation's laws should have sway only within its own territories.

extraterritorially to a British company which conspired with others to divide world markets.[13] "[T]he law is crystal clear," the court said. "A conspiracy to divide territories, which affects American commerce, violates the Sherman Act."[14] If one were to point to a specific time when British attitudes on the extraterritoriality issue hardened, it could well be as far back as this case.[15]

And hardened they have, unfortunately both in the sense of becoming less conciliatory and in the sense of becoming somewhat oblivious to considerable evidence that some American courts and regulatory authorities have made concessions unilaterally that go far in meeting the most urgent British demands. In both senses of the word, the attitude of the British establishment is illustrated by the remarks of John Nott, Secretary of Trade, at a press conference held October 31, 1979 to announce the introduction into the House of Commons of legislation aimed at countering what the British perceive as a continuing encroachment by United States regulatory authorities on British sovereignty.

> The Protection of Trading Interests Bill . . . will strengthen, in a variety of ways, our defenses against U.S. practices which are not only widely regarded as unacceptable internationally but are having a most damaging effect on the commercial activities of British companies.
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> It is one thing for a firm to be expected to abide by the laws of an overseas country whilst it is doing business in that country. It is quite another thing to be expected to abide by the laws of that country, to accept the judgment of its courts or the requirements of its authorities, when operating elsewhere.
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> . . . The time is right for legislation on two counts. First, there are two large treble damage antitrust cases currently going on in the U.S. that could result in enormous financial penalties to several companies in the U.K. Second, more generally, the tide of opinion in the U.S. appears to be running strongly in favour of the application of their economic policies outside their territorial jurisdiction. We must be ready to respond.[16]

I will return to the two treble damage suits in a moment. The larger issue, however, is the "tide of opinion" in the United States which Mr. Nott identifies as strongly ethnocentric. The reference is not just to antitrust law, one should note, it applies as well to trends which appear to the British to characterize enforcement of American securities, commodity and futures trading and banking laws and regulations.[17]

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[13]United States v. Imperial Chemical Industries Ltd., 100 F. Supp. 504 (S.D.N.Y. 1951), *final decree issued* 105 F. Supp. 215 (S.D.N.Y. 1952).

[14]100 F. Supp. 592.

[15]*See, e.g.*, British Nylon Spinners Ltd. v. Imperial Chemical Industries, Ltd., [1952] 2 All E.R. 780 (C.A.).

[16]Department of Trade, Press Notice ("Protection of Trading Interests Bill — Statement by John Nott"), 31 October 1979, Ref. 452, at 1-2. *See generally* Hacking, *The Increasing Extraterritorial Impact of U.S. Laws: A Cause for Concern Amongst Friends of America*, 1 NW. J. INT'L L. & BUS. 1 (1979); and Gordon, *Trends*, 13 INT'L LAW. 371, 373-77 (1979).

[17]Such matters as attempts, or perceived threats of attempts, to impose disclosure requirements on British firms, or to force British subsidiaries of United States firms to obey American legal policy in dealing with the Arab boycott of companies that trade with Israel, or to oblige London branches of United States banks to comply with American banking laws and regulations, are mentioned in newspaper accounts accompanying the proposed Bill. *See, e.g.* Interna-

With respect to banking laws and regulations, comment must await developments occasioned by the situation in Iran. But it is not too early to suggest that British perceptions about the trend in American antitrust and securities law enforcement do not appear to be fully supported by actual judicial and administrative events.

In the securities field, for example, a stream of underpublicized rulings from the influential Court of Appeals for the Second Circuit has established what seems to be a presumption against its possession of subject matter jurisdiction in suits whose subject matter is predominantly foreign. The most recent example is to be found in the court's affirmation of a judgment dismissing an action brought under the antifraud provisions of the Securities Exchange Act of 1934,[18] by foreign financial underwriters against a Swiss computer sales company. Plaintiffs in *Fidenas AG* v. *Compagnie Internationale Pour L'Informatique C11 Honeywell Bull*[19] alleged a fraud and conspiracy of worldwide proportions involving events and parties in at least six countries, including the United States. In its decision, the Second Circuit traced its developing policy in cases involving "predominantly foreign" subject matter and concluded that such disputes are "rightfully resolved in the courts of another land."[20]

From 1971 to 1975, plaintiffs (a Swiss resident of German nationality, along with Swiss and Bahamian companies his family controlled) helped underwrite the private placement of a series of promissory notes issued by a Swiss computer sales company (defendant HBS). The notes proved to have been fraudulently prepared by HBS's chief financial officer, who apparently invested the proceeds of their sale in a Canadian natural gas exploration company. When that company went bankrupt, the bulk of the proceeds was lost. When HBS denied responsibility and declined to honor the notes as they fell due, suits were instituted in the United States and Switzerland.

Some of the notes had been placed with a New York corporation which had resold them to other financial institutions. However, none of the purchasers was a party in the *Fidenas* case, a fact noted by the Second Circuit which declined to consider whether subject matter jurisdiction might lie if an American purchaser of the notes had brought suit in a federal court, or if a class or derivative action had been brought in which the group represented included American "victims," or if the SEC had initiated enforcement proceedings.

Plaintiffs alleged that they had lost their principal American customer and, at least in their estimation, had begun to suffer the consequences of a reputation tarnished by involvement with the sale of the HBS notes. They also alleged fraudulent activity in the United States, including a cover-up by

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tional Herald Tribune, Nov. 1, 1979, at 7; N.Y. Times, Nov. 1, 1979, at D 11; N.Y. Times, Dec. 1, 1979, at 27; Financial Times, Nov.1, 1979, at 9.

[18] 15 U.S.C. § 78a *et seq.* (1971).

[19] [1979] FED. SEC. L. REP. (CCH) ¶ 96,947 (2d Cir. Aug. 6, 1979).

[20] *Id.*

HBS's American parent company. However, these activities apparently did not involve defendants. In any event, the Second Circuit regarded as conclusory plaintiff's allegations that they were fraudulent. Whatever further discovery in the case might show to have been the scope of the activity within the United States, the court said, the essential core of the alleged fraud took place in Switzerland; any activities in the United States were clearly secondary and ancillary and did not meet the tests which the Second Circuit, in earlier cases, had established for determining subject matter jurisdiction in cases involving the extraterritorial reach of the 1934 Act.

The Act itself is of little help to anyone concerned with how far its territorial reach is meant to extend. The only provision on point, the Second Circuit said, says merely that the Act's provisions do not apply to "any person insofar as he transacts a business in securities without the jurisdiction of the United States, unless he transacts such business in contravention of such rules and regulations as the [Securities and Exchange] Commission may prescribe as necessary or appropriate to prevent the evasion of this [statute]."[21] No rules have been promulgated by the SEC elaborating upon this provision.

Lacking statutory guidance, the Second Circuit over the past decade has taken to outlining for itself the general contours of subject matter jurisdiction under the federal securities laws. In *Schoenbaum v. Firstbrook*[22] the court said Congress intended the 1934 Act to have extraterritorial application in order to protect domestic investors who have purchased foreign securities on American exchanges, and to protect the domestic securities market from the effects of improper foreign transactions in American securities. Thus, it concluded that subject matter jurisdiction may lie in cases involving violations which take place outside the United States, when the transactions involve stock registered and listed on a national securities exchange and are detrimental to the interests of American investors.[23]

But in *Leasco Data Processing Equipment Corp. v. Maxwell,*[24] the Second Circuit cautioned that the 1934 Act's antifraud provision is much too inconclusive for the court to infer a Congressional intent to impose rules governing conduct throughout the world in every instance where an American company has bought or sold a security. More recently, in *Bersch v. Drexel Firestone, Inc.,*[25] it said that "when . . . a court is confronted with transactions that on any view are predominantly foreign, it must seek to determine whether Congress would have wished the precious resources of United States courts and law enforcement agencies to be devoted to them rather than leave the problem to foreign countries." Having this in mind, the court held that the 1934 Act's antifraud provisions:

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[21] 15 U.S.C. § 78dd(b) (1976) (originally enacted as § 30(b) of the 1934 Act).

[22] 405 F.2d 200, 206 (2d Cir.), *aff'd in relevant part,* 405 F.2d 215, 217 (2d Cir. 1968) *(en banc), cert. denied,* 395 U.S. 906 (1969).

[23] 405 F.2d at 208.

[24] 468 F.2d 1326, 1334 (2d Cir. 1972).

[25] 519 F.2d 974, 985 (2d Cir.), *cert. denied,* 423 U.S. 1018 (1975).

(1) apply to losses from sales of securities to Americans resident in the United States whether or not acts (or culpable failures to act) of material importance occurred in this country; and

(2) apply to losses from sales of securities to Americans resident abroad if, but only if, acts (or culpable failures to act) of material importance in the United States have significantly contributed thereto; but

(3) do not apply to losses from sales of securities to foreigners outside the United Stats unless acts (or culpable failures to act) within the United States directly caused such losses.[26]

In *IIT v. Vencap, Ltd.*,[27] handed down the same day as *Bersch*, the Second Circuit considered the question of subject matter jurisdiction in the context of a case in which a foreign plaintiff had purchased securities having an American connection. It held that the effects of the transaction in this country were not substantial enough to justify subject matter jurisdiction, but it left open the possibility of jurisdiction based on certain American conduct under the theory that Congress did not intend "to allow the United States to be used as a base for manufacturing fraudulent security devices for export, even when these are peddled only to foreigners."[28] At the same time, it warned that the basis of jurisdiction is limited "to the perpetuation of fraudulent acts themselves and does not extend to mere preparatory activities or the failure to prevent fraudulent acts where the bulk of the activity was performed in foreign countries."[29] "Admittedly," it conceded, "the distinction is a fine one. But . . . the line has to be drawn somewhere if the securities laws are not to apply in every instance where something has happened in the United States, however large the gap between the something and a consummated fraud and however negligible the effect in the United States or on its citizens."[30]

In the *Fidenas* case, the court said the transactions alleged were on any view predominantly foreign, "and we would be no less than astonished were we to learn that 'Congress would have wished the precious resources of United States courts and law enforcement agencies to be devoted' to a case of this nature. Fraud there might have been, and plaintiffs may very well have been damaged by its perpetuation. But the dispute here presented is rightfully resolved in the courts of another land."[31]

More generally, extraterritorial application of United States economic laws has also been restricted in recent years by refinements in the concept of due process, especially its implications for in personam and in rem jurisdiction over foreign defendants. In *International Shoe Co. v. Washington*,[32] the Supreme Court held that the existence of at least "minimum contacts" be-

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[26]519 F.2d at 993.
[27]519 F.2d 1001 (2d Cir. 1975).
[28]*Id.*at 1017.
[29]*Id.* at 1018.
[30]*Id.*
[31][1979] FED. SEC. L. REP. (CCH) ¶ 96,947 (2d Cir. Aug. 6, 1979).
[32]326 U.S. 310 (1945).

tween the defendant and the forum are necessary to sustain a court's in personam jurisdiction against a challenge to its conformity to the Constitution's due process requirement. More recently, in *Shaffer v. Heitner,*[33] the court has extended that notion to quasi in rem jurisdiction by holding that as a matter of due process some nexus must be shown to exist between property which is the basis of jurisdiction and the cause of action itself.[34]

Perhaps even more important, especially in terms of their effect on assertions of the extraterritorial reach of American antitrust laws, have been several recent judicial pronouncements suggesting that American courts are becoming more sensitive to the limits which international law and comity impose on national regulatory competence.[35] One thinks especially of the development by the Ninth Circuit, in *Timberlane Lumber Co. v. Bank of America,*[36] and more recently the Third Circuit, in *Mannington Mills, Inc. v. Congoleum Corporation,*[37] of an approach to jurisdictional questions characterized by a conflicts-like balancing of the policy interests represented by the Sherman Act, on the one hand, and those represented by considerations of international comity, on the other. In effect, these decisions reinstate Justice Holmes's dictum, *supra,* if not quite his holding, on jurisdiction.

The Justice Department, for its part, now acknowledges that considerations of comity should be weighed in any determination of whether United States antitrust laws should be applied to overseas conduct. Its *Antitrust Guide for International Operations,* issued in 1977, observes that any such application "should avoid unnecessary interference with the sovereign interests of foreign nations."[38] Similar, indeed even more pointed, policy pronouncements were made contemporaneously with the issuance of the *Guide* by leading Justice Department officials.[39] In a paper delivered last September at a conference held at the University of North Carolina School of Law,[40] Joel Davidow, Director of the Antitrust Division's Office of Policy Planning, gave a few illustrations of how the extraterritorial reach of the Sherman Act permissible under Judge Hand's formula is limited by considerations of comity. Assume, he said, that two rival American firms each discover a supply of a rare metal in Antarctica needed primarily in the United States, and

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[33]433 U.S. 186 (1977).

[34]The precise scope of *Shaffer* is still being developed in recent cases. *See, e.g.,* Marketing Showcase, Inc. v. Alberto-Culver Co., 457 F. Supp. 1004 (S.D.N.Y. 1978); and Amoco Overseas Oil Co. v. Compagnie Nationale Algérienne de Navigation, 459 F. Supp. 1242 (S.D.N.Y. 1978).

[35]*See* Gordon, *Trends,* 13 INT'L LAW 371, 373-377 (1979).

[36]549 F.2d 597 (9th Cir. 1976).

[37]595 F.2d 1287 (3d Cir. 1979).

[38]ANTITRUST DIVISION, U.S. DEP'T OF JUSTICE, ANTITRUST GUIDE FOR INTERNATIONAL OPERATIONS (1977), *reprinted in* [1977-78 Extra Edition] TRADE REG. REP. (CCH), No. 266, at 6-7.

[39]*E.g.,* Address by Michael J. Egan, Associate Attorney General, before the International Bar Association, Business Law Section, November 3, 1977; address by Griffin B. Bell, Attorney General of the United States, before the American Bar Association, August 8, 1977.

[40]Davidow, U.S. Antitrust and Doing Business Abroad: Recent Trends and Developments, paper delivered at Conference on Antitrust Aspects of International Terrorism, Chapel Hill, North Carolina, September 28, 1979 [hereinafter Davidow].

then conspire to sell it to American buyers at secretly fixed prices. "Application of the Sherman Act to this scheme would probably be held not to involve any jurisdictional, international law, comity or balancing considerations, simply because there are no conflicting factors to balance," Mr. Davidow observed.[41] But assume that a challenge to a rationalization cartel among two German firms in Germany which cartel was legal in Germany in regard to a range of products sold worldwide only 2 percent of which reach the United States. "In those circumstances, assertion of jurisdiction under the Sherman Act to punish or prevent the arrangement would undoubtedly raise jurisdictional, international and political issues. The new comity-balancing test . . . would probably lead to dismissal on the grounds that the United States' minor contacts with and interest in the transaction is outweighed by Germany's contacts and interests."[42]

The Justice Department's practice appears to confirm the seriousness with which it views the importance of comity, at the same time providing an example of the domestic political consequences which can result from its doing so. According to accounts appearing in the *New York Times* just a few weeks ago,[43] in April, 1978, the Department rejected a staff recommendation to indict a number of companies, mostly foreign, on felony antitrust charges growing out of their involvement in a foreign uranium cartel.[44] To be sure, successful prosecution of the charges might not have been easy, since, for one thing, although the world price of uranium increased dramatically during the period under investigation, the impact of the operation of the cartel itself may not be easy to gauge because the world price of oil, an alternative fuel, was increasingly rapidly during the same period. Moreover, the cartel apparently sought to avoid sales to the United States in order to steer clear of American antitrust laws, thus further clouding the impact of its activities on American consumers.[45] Finally, the *Times*' account suggests that the Justice and State Departments, and the Central Intelligence Agency, were aware of an arrangement to increase uranium prices worldwide before the group of uranium mining companies held its first meeting.[46] If so, and if it could be shown that the arrangement had at least tacit support from one or another arm of the executive branch, the Justice Department's prosecution of the case might well have been further complicated.

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[41] *Id.* at 3.

[42] *Id.*

[43] *See* N.Y. Times, Dec. 4, 1979, at 1; *id.*, Dec. 8, 1979, at 31.

[44] The *New York Times* reported that the Department ended its investigation when one of the companies, Gulf Oil Corporation, pleaded no contest to a single misdemeanor involving price fixing. The *Times*'s account quoted the staff recommendation as saying that starting in early 1972 and continuing up to at least the fall of 1975 each of the named companies was a participant in "a highly organized conspiracy which had as its expressed purpose stabilizing and increasing the price of uranium and which was intended to and did in fact substantially and adversely impact on U.S. interstate and foreign commerce." N.Y. Times, Dec. 4, 1979, at D 11.

[45] The *Times*'s account, however, cites an internal Justice Department memorandum to the effect that some American utilities had purchased uranium for future delivery from the cartel members and had to pay higher prices as a direct result of the cartel's activities. *Id.* There is also the matter of Westinghouse Electric Corporation's civil suit, *infra.*

[46] *Id.* at 1.

However, diplomatic implications, rather than problems of prosecution, appear to have been principally responsible for the Justice Department's decision not to prosecute. The *Times* quotes the memorandum containing the staff recommendation in favor of prosecuting as saying the staff had "no misapprehension as to the consequences of our bringing this case: there will be a diplomatic furor with the countries affected."[47] "Consequently," the memorandum was quoted as saying, "we believe that it is appropriate as a matter of comity and prosecutional discretion to limit our choice of defendants."[48]

The investigation of the cartel's activities was hampered in a number of countries whose nationals allegedly took part in the cartel by laws which are designed to keep documents there from being used in furtherance of American antitrust (and, for that matter, securities laws) actions.[49] In fact, it is often with respect to questions of jurisdiction over information that the international battle over the Sherman Act's applicability to foreign defendants and conduct is waged, sometimes on the further grounds that the information is confidential, or involves matters of state. In his North Carolina speech, Mr. Davidow conceded that "it is now fairly well settled that a rigid foreign prohibition against removing information provides a defense against a charge of contempt of a subpoena in an American investigation or case."[50] He then added (more pointedly than his audience could have realized) that "greater efforts are being made to solve these issues diplomatically by informing relevant foreign governments early, employing voluntary requests when possible, and clarifying safeguards for ensuring the confidentiality of sensitive material which is produced."[51]

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[47]*Id.* at D 11. The British and Canadian governments were said to have been particularly sensitive to the prospect of prosecution of their nationals by the United States Government in respect of acts committed outside the United States. *Id.* The *Financial Times* reported recently that since 1945 at least nineteen governments have protested to the United States about its assertion of jurisdiction in international antitrust cases. *See* Cheeseright, Donne, Hargreaves & Hermann, *Overseas Backlash Against Antitrust Laws: Pushing Back the Boundary of U.S. Jurisdiction,* Financial Times, Nov. 3, 1979, at 11. [hereinafter cited as Cheeseright, *et al.*]

[48]N.Y. Times, Dec. 4, 1979, at D 11.

[49]In one of the private actions related to the activities of the cartel, Westinghouse Electric Corporation sought to obtain testimony concerning it in London, causing Lord Denning to note that efforts by Westinghouse to obtain evidence showing the existence of the conspiracy had failed in Australia, Canada, France and South Africa. "We are told," he said, "that in those countries regulations have been passed so as to forbid the documents of the cartel being disclosed." *In re* Westinghouse Elec. Corp. Uranium Contracts Litigation, M.D.L. Docket No. 232, [1977] 3 W.L.R. 430, 434 (C.A.), *as quoted* in Mehrighe, *The Westinghouse Uranium Case: Problems Encountered in Seeking Foreign Discovery and Evidence,* 13 INT'L LAW. 19, 22 (1979). *See also* Carter, *Obtaining Foreign Discovery and Evidence for Use in Litigation in the United States: Existing Rules and Procedures, id.* at 5, 7.

[50]Davidow, at 8, citing Société Internationale v. Rogers, 357 U.S. 197 (1958); and *In re* Westinghouse Electric Corporation Uranium Contracts Litigation, 563 F.2d 992 (10th Cir. 1977).

[51]Davidow, at 8, citing *In re* Westinghouse Electric Corporation Uranium Contracts Litigation, *supra,* note 49; and Federal Maritime Commission v. DeSmedt, 268 F. Supp. 972 (S.D.N.Y. 1967). *But see In re* Grand Jury Subpoena (United States v. Field), 532 F.2d 404, *reh. denied,* 535 F.2d 660 (5th Cir.), *cert. denied,* 429 U.S. 940 (1976). *Supra* note 40. Mr. Nott noted

However, as Mr. Davidow noted, "the major single activity of the Antitrust Division is not prosecution but investigation."[52] During the past five years, the Antitrust Division has expanded its Foreign Commerce section from seven lawyers to (as of the time of Mr. Davidow's remarks) twenty-two, "with a more than corresponding increase in active investigation."[53] Moreover, sections dealing with energy and transportation also investigate foreign developments in those fields, apparently with particular emphasis on the role of the leading international petroleum companies in the world oil market.[54] Mr. Davidow observed that:

> The [Antitrust] Division's investigations may seek documents or interviews in foreign countries when doing so seems necessary and feasible, and in accord with the law of the other nations. In order to avoid diplomatic incidents in that regard, a regular practice of informing affected governments of such investigations has been instituted, and is operating quite satisfactorily.[55]

Not so satisfactorily to the British, judging by legislation, entitled the Protection of Trading Interests Act 1979 (Act),[56] introduced by the British government into the House of Commons on November 15, 1979. According to the Explanatory Memorandum which accompanied the bill, the Act has six substantive provisions. Clause 1 provides a number of means by which the British government may counter measures which are taken or proposed to be taken by or under the laws of a foreign country for regulating or controlling international trade, and which are or would be damaging to the trading interests of the United Kingdom.[57] First, it authorizes the Secretary of State to issue orders specifying the measures concerned. Second, it authorizes him to make further orders requiring persons in the United Kingdom who carry on business in the foreign country to notify him of any requirements or prohibitions imposed or threatened to be imposed on them under such measures, including any requirement to submit any contract or other document for approval thereunder.[58] Third, he is authorized to prohibit compliance with such measures.

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in his London press conference a few weeks later that "We have tried over the years to deal with a worsening situation through negotiation but with little success." Press Notice, *supra* note 16, at 2.

[52]Davidow at 7.

[53]*Id.* at 14.

[54]*Id.*

[55]*Id.*

[56]The Act supersedes and repeals the Shipping Contracts and Commercial Documents Act 1964, together with amendments to it which appear in paragraph 18 of Schedule 2 and paragraph 24 of Schedule 3 to the Criminal Law Act of 1977.

[57]The test is simply that "it appears to the Secretary of State . . . that those measures, in so far as they apply or would apply to things done or to be done outside the territorial jurisdiction of [the foreign] country by persons carrying on business in the United Kingdom, are damaging or threaten to damage the trading interests of the United Kingdom." Act, § 1(1)(b).

[58]It may be recalled that the 1976 Antitrust Improvements Act requires that prior to any merger or acquisition of substantial size detailed information regarding the products and markets of both firms must be submitted to the Federal Trade Commission and the Justice Department's Antitrust Division. 90 Stat. 1390, 15 U.S.C. § 18a(a) (1976). International mergers are subject to these requirements. Mr. Davidow noted that "care has been taken to avoid asking

Clause 2 provides that where a person in the United Kingdom has been or may be required to produce to a court, tribunal or authority of another country commercial documents which are "not within the territorial jurisdiction of" that country, or where commercial information may be compelled from them, the Secretary of State may give directions prohibiting compliance with that requirement.[59] The test for applying this provision is that it appears to the Secretary that the foreign requirement "infringes the jurisdiction of the United Kingdom or is otherwise prejudicial to the sovereignty of the United Kingdom"[60] or that "compliance . . . would be prejudicial to the security of the United Kingdom or to the relation of the government of the United Kingdom with the government of any other country."[61]

Clause 3 imposes penalties for failure to comply with the requirements in the first two clauses. Up to this point, the Act does not appear to differ too markedly from similar anti-antitrust legislation enacted in other countries. Clause 4 is somewhat unique to the United Kingdom, in that it provides that in proceedings under the Evidence (Proceedings in Other Jurisdictions) Act 1975 British courts shall not comply with a request made by a foreign court when the Secretary of State has given a certificate that the request infringes United Kingdom jurisdiction or is otherwise prejudicial to the United Kingdom. This appears merely to codify the decision reached by the Law Lords in the suit successfully brought by Rio Tinto Zinc Corporation against Westinghouse Electric Corporation to block the latter's attempt to obtain testimony in Britain for use in litigation in the United States concerning the uranium cartel, *supra*.[62]

However, the last two clauses of the Act are unique and indicate how intense feelings in Britain have become on the extraterritoriality issue. Clause 5 provides that judgments for multiple damages given in civil proceedings by courts of overseas countries shall not be enforceable in the United Kingdom;[63] further, that judgments given in overseas countries based on competition laws which have been specified by an order made by the Secretary of State shall not be enforceable in the United Kingdom.[64] Clause 6

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for burdensome information unrelated to operations in or directed toward the U.S." Davidow at 6-7, citing 16 C.F.R. §§ 802.50-802.52 (1979).

[59]Act § 2(1)(a). Section 2(3) adds that a requirement of the sort referred to in § 2(1)(a) "is also inadmissible—(a) if it is made otherwise than for the purposes of civil or criminal proceedings which have been instituted in the overseas country or of civil proceedings whose institution in that country is contemplated; or (b) if it is made wholly or mainly for the purpose of obtaining discovery of documents before the trial of any such proceedings."

[60]Act § 2(2)(a).

[61]*Id.* § 2(2)(b).

[62]*See* note 49, *supra*.

[63]Act § 5(1). ("[N]o court in the United Kingdom shall entertain proceedings at common law for the recovery of any sum payable under such a judgment.")

[64]Act § 5(2)(b). The order to which this refers is one made by the Secretary of State "in respect of any provision of rule of law which appears to him to be concerned with the prohibition or regulation of agreements, arrangements or practices designed to restrain or restrict competition in the carrying on of business of any description or to be otherwise concerned with the promotion of such competition as aforesaid." *Id.* § 5(4).

enables United Kingdom citizens, United Kingdom corporations and other persons carrying on business in the United Kingdom to recover from the party in whose favor a multiple damages award was given "so much of the damages paid to or obtained by him under the judgment as exceeds the sum assessed by [the foreign] court as compensation for the loss or damage sustained by him."[65]

The idea, as well as the effect, of multiple damages awards is especially irritating to the British. In his remarks to the press, Mr. Nott described multiple damage awards as "one of the most objectionable of all American legal devices."[66] An article appearing the next day in the *Financial Times* noted: "In the U.K. view the treble damages system is nothing more than a lawyer's ramp."[67]

If so,it is a steep one. "I should perhaps make it clear," Mr. Nott said, "that we are not talking here of just a few million pounds either way; there are cases active now, involving British companies, in which billions of pounds are at stake."[68] The most prominent of these cases, at least to date, grows out of Westinghouse's alleged failure to honor supply contracts with a number of American utility companies. Among other defenses, Westinghouse pleaded commercial impracticability, citing supply restricting activities of the uranium producers' cartel. Westinghouse's potential liability to the utilities being in the neighborhood of $2 billion, its treble damage suit against the uranium producers asks for $6 billion, the $2 billion for which it could be liable multiplied to give a punitive effect.

Another pending case involves allegations of antitrust arrangements in transatlantic shipping, an area whose politics have frequently been influenced by antitrust considerations. The Department of Justice is alleging that seven European and United States shipping groups violated antitrust laws in arriving at the common tariff structures which are the basis of the Atlantic shipping conference's pricing system. These shipping groups, which include a major British company, agreed last June to pay fines totalling about $6 million, without admitting guilt.[69] Following that, the Federal Maritime Commission began a full-scale inquiry into the conference's activities and a number of private damage suits have been initiated by customers of the shipping lines.[70] Other transnational industrial groups, even ones enjoying a

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[65] *Id.* § 6(1). This provision does not apply where the person against whom the judgment was given is an individual who was ordinarily resident in the overseas country at the time when the proceedings in which the judgment was given were instituted or a corporation which had its principal place of business there at that time. *Id.* § 6(2). Nor does it apply if the person against whom the judgment was given carried on business in the overseas country through a branch or establishment in that country and the proceedings there were concerned with activities exclusively carried on in that country through the branch or establishment. *Id.* § 6(3).

[66] Press Notice, *supra* note 16, at 1.

[67] Cheeseright, *UK Fights Antitrust Laws—Damages System 'a Ramp'*, Financial Times, November 1, 1979, at 9, col. 6.

[68] Press Notice, *supra* note 16, at 1.

[69] *See* Cheeseright, *et al.*, *supra* note 47, at 11.

[70] *Id.*

measure of quasi-official international authority because of the support given to them by national governments and public international organizations, are said to be concerned with the implications of the transatlantic shipping industry's antitrust problems.[71]

American regulatory officials are themselves caught in something of a self-made bind. The Justice Department's decision not to seek an indictment against the uranium producers' cartel, for example, occasioned severe criticism from the Senate Judiciary Committee in December, 1979, when John H. Shenefield, who had been serving as Acting Associate Attorney General since the previous August, was being considered by the Committee for the position on a permanent basis. While one might assume that the Senate criticism was launched with a view primarily to domestic politics, even the accounts of the Department's actions carried by the *New York Times,* in a front page story, were tinged with implications of scandal.[72] Having created a tradition for itself of vigorous and independent enforcement of the antitrust laws, the Justice Department now is apt to be accused of bowing to political pressures even if it does no more than to yield to the logic of Holmes's dictum, the trend of recent judicial pronouncements and the dictates of global economic interdependence.

There is clearly a growing burden on Congress to address itself to national economic policy issues in the global framework such interdependence requires. But Congress does not always seem especially anxious to do so, particularly where an issue's domestic implications seem more politically imminent than its overseas ones. This aspect of ethnocentricity is perhaps epitomized by the Foreign Corrupt Practices Act (FCPA),[73] particularly as it appears to be in the process of being administered by the SEC and the Justice Department. A hint of what may be forthcoming is offered by a settlement reached in August 1979 in a suit brought against International Telephone and Telegraph Company by the SEC under the FCPA in which ITT agreed "to take reasonable steps" to implement and enforce a previously passed resolution of its board of directors "requiring *the ITT system* to obey the laws of the jurisdictions in which it does business, prohibiting corrupt business practices and directing certain procedures to ensure compliance with the requirements and prohibitions of such resolution."[74] Under the terms of the consent decree, ITT also agrees not to change or deviate from the policies and procedures stated in the resolution without the approval of its board of directors, prior notice to the SEC, and full disclosure to its stockholders in a current report.[75] Agreeing to abide by its own directors' order to carry on its business

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[71] *E.g.,* the Geneva-based International Air Transport Association, which has been clashing with the Civil Aeronautics Board over the possibility its immunity from American antitrust laws will be removed. *See* Cheeseright *et al., supra* note 47, at 12.

[72] N.Y. Times, Dec. 4, 1979, at 1.

[73] 15 U.S.C. §§ 78dd-1 and 78dd-2.

[74] SEC v. ITT, [1979] FED. SEC. L. REP. (CCH) 96,948 (D.D.C. Aug. 8, 1979) (emphasis added).

[75] *Id.*

lawfully is surely little more than a self-serving gesture in itself, one might say, especially inasmuch as the company did not admit any wrongdoing in the process. But the implications of the judgment and consent are more apparent when one recognizes that ITT, with its worldwide operations, had implicitly agreed to assure compliance by the officers of its foreign subsidiaries, albeit compliance with local, not necessarily American, anticorruption laws.

In seeking to enforce FCPA, the SEC last April proposed rules which would require companies to file statements indicating whether their systems of internal accounting control provide "reasonable assurances" that specified internal accounting objectives are being met.[76] The statements would also have to describe any "material weaknesses" in internal accounting controls which have been communicated to the companies by their independent accountants, and to state the reasons why these weaknesses have not been corrected. By September, the SEC had received almost a thousand comments on the proposed rule, most opposed to it. As Washington attorney Jennifer A. Sullivan notes in the January, 1980 issue of *International Practitioner's Notebook,* "the opposition is based in part on the belief that requiring corporate managers to certify as to compliance with a statutory provision, under which they may be exposed to a criminal liability, is repugnant to the constitutional privilege against self-incrimination."[77] That, together with a recent holding by a federal district court in New York that "the proxy rules simply do not require management to accuse itself of antisocial or illegal policies,"[78] render the future of the proposed rules in doubt.

Even if the SEC is constrained to tone down the enthusiasm with which it administers the FCPA, foreign apprehension is not apt to be assuaged so long as the Justice Department's enforcement of the Act's criminal law provisions remains uncertain.[79] The Department has been establishing a review procedure under which a company may obtain review by the Department's Criminal Division of a proposed transaction and a ruling by that Division of its enforcement intentions should the transaction be effectuated.[80] But Ms. Sullivan notes that the review process already faces difficulties. One is that the Criminal Division's letter would apply only to parties that join in the request, leaving open its effect on others. Another is that a review letter from the Justice Department would not bind other agencies, notably the SEC. A third is that it does not cover that part of the FCPA which requires the maintenance of accurate and reasonably detailed books and records and the

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[76]Securities Exchange Act Release No. 15772 (April 30, 1979). *See* Sullivan, *SEC, Justice Department Proposes Corrupt Practices Act Rules,* INT'L PRACT. NOTEBOOK, No. 9 (January 1980).

[77]*Id.*

[78]Amalgamated Clothing v. J. P. Stevens & Co., 475 F. Supp. 328, 331 (S.D.N.Y. 1979).

[79]The SEC has adopted rules indicating that settlement of an SEC enforcement action does not extend to possible or pending criminal action. Securities Act Release No. 6111 (Aug. 23, 1979).

[80]*See* 28 C.F.R. § 50.17 (1976).

establishment, *supra,* of effective internal accounting controls—one of the broadest provisions in the FCPA.

In a recent speech, Assistant Attorney General Philip B. Heyman indicated that the Justice Department will give high priority to situations, *inter alia,* in which a foreign government is making an effort to enforce antibribery policies; a company has a history of payments to foreign officials; senior management is involved either actively or passively; the company has been less than diligent in monitoring employees' activities; or there have been deliberate or persistent violations of FCPA.[81] The last three of these are unlikely to reduce apprehension abroad over the zeal with which FCPA will be enforced.

There is, therefore, some basis for concluding, as the British appear to have concluded, that the United States is currently being swept by a tide of ethnocentric regulatory enthusiasm. But one is disposed to add, especially in light of recent judicial pronouncements signalling a very different trend, that the tide may also be no more than one of the many conflicting forces buffeting American social opinion at this juncture in our national history. That other, especially globally oriented, forces are not so readily apparent to some observers may be a reflection of a parochial zeal of another kind: the kind which renders it easier to pay attention to trends which prove one's point than to ones which undermine it. The present writer, it should be noted, is not invariably immune from this kind of zeal himself.

[81] Speech by Philip B. Heymann, Pierre Hotel, New York, New York, November 8, 1979, cited in Sullivan, *supra* note 76.