The Protection of Trading Interests Act

Introduction

On March 20, 1980, the United Kingdom enacted legislation designed to "provide protection from requirements, prohibitions, and judgments imposed or given under the laws of countries outside the United Kingdom and affecting the trading or other interests of persons in the United Kingdom." The Protection of Trading Interests Act 1980 (Trading Interests Act) represents an attempt by the British government to shield its citizens and their economic interests from the extraterritorial reach of the United States antitrust laws. The dispute between the British and American governments over the proper reach of antitrust laws is not of recent origin; in fact, it has continued uninterrupted for thirty-five years. The United States view of jurisdiction in the antitrust area has been the cause of diplomatic protests, international disputes, intense criticism and even protec-

*Mr. Rosen is a law student at Georgetown University.

1Protection of Trading Interests Act, 1980, c. 187, Preamble [hereinafter cited as Trading Interests Act].


3The dispute began in 1945 with United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945). See notes 19 to 21 & accompanying text infra.


6See, e.g., Jennings, Extraterritorial Jurisdiction and the United States Antitrust Laws, 33
tive legislation by foreign governments. However, the Trading Interests Act represents an escalation to a new level of battle: retaliatory legislation.

The Trading Interests Act includes a "claw-back" provision, a sweeping new measure that allows a British citizen, a British corporation or a "person carrying on business in the United Kingdom" to recover back in the British courts from a winning opponent in a foreign court any noncompensatory damages awarded by that foreign court. The consequences of this measure could make it impossible, in practice, for any multinational corporation to recover a treble damage judgment in the United States against another multinational corporation that has assets in the United Kingdom. Many scholars feel this could severely damage the effectiveness of United States antitrust laws. Other provisions in the Act potentially could have an equally damaging effect on antitrust litigation.

This article first will outline the applicable jurisdictional doctrine, the Alcoa test, and the alleged conflict between that doctrine and some basic principles of international law. A chronological study of the United States-United Kingdom legislative and judicial confrontations over the extraterritorial application of United States antitrust law will follow. Third, the Trading Interests Act will be analyzed with regard to international law and comity principles. Finally, this article will discuss the importance of the Act in light of recent developments in the extraterritorial application of antitrust laws.

I. The Conflict over Extraterritorial Reach: United States Antitrust Law

In 1890, the United States Congress passed an act "to protect trade and commerce against unlawful restraints and monopolies." Section one of the act states: "Every contract, combination . . . or conspiracy, in

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9Trading Interests Act, supra note 1, § 6(1)(c).
10Id.
11Assuming the defendant in the United States action does business in the United Kingdom. Note, however, that under section six of the Trading Interests Act, note 1 supra, the plaintiff corporation could still recover in the United States court and keep the one-third compensatory portion of the damage award.
12See, e.g., Gordon, Extraterritorial Application of United States Economic Laws; Britain Draws the Line, 14 INT'L LAW. 151 (1980).
13For example, section 5, a "nonenforcement" provision, prohibits courts in Great Britain from enforcing foreign antitrust judgments in the United Kingdom. Trading Interests Act, supra note 1, § 5.
14See notes 19 to 21, infra and accompanying text, for an explanation of the Alcoa doctrine.
restraint of trade or commerce among the several States, or with foreign nations" is declared illegal, and every person making such an arrangement is guilty of a misdemeanor punishable by fines, imprisonment, or both.16 That Act, labelled the Sherman Antitrust Act, was supplemented in 1914 by the Federal Trade Commission17 and Clayton18 Acts. These three statutes provide the framework for United States antitrust policy.

In 1945, the United States Court of Appeals, Second Circuit, applied United States antitrust laws to international disputes in United States v. Aluminum Co. of America19 (the Alcoa case). Judge Learned Hand stated:

It is settled law ... that any 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; and these liabilities other states will ordinarily recognize.20

This doctrine became known as the "effects" or "intended effects" doctrine, and it has guided United States courts in the area of subject-matter jurisdiction for the last thirty-five years.21

II. Principles of International Law

International law recognizes the right of a nation to apply its laws extraterritorially to conduct which is "inimical to the public interest" and which has been denounced by that nation as "criminal."22 According to the United States Supreme Court, the test of whether a law is "criminal" or "penal," as opposed to "civil," is "whether the wrong sought to be redressed is a wrong to the public, or a wrong to the individual..."23 Thus, the Sherman Act, in the eyes of the United States government, is a "penal" statute in the international law sense,24 even though the availability of equitable relief results in the statute being called "civil" for purposes of domestic antitrust law.25

In order to justify an extraterritorial application of its laws, a nation must

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16Id.
19148 F.2d 416 (2d Cir. 1945). Judge Hand ruled that Aluminum Limited, a Canadian corporation, violated the Sherman Act in forming, along with other corporations, including the Aluminum Company of America, an international cartel. He held that the effects were felt in the United States and that that was sufficient to make the cartel violative of the United States antitrust laws.
20Id. at 443.
21In 1975 the Supreme Court clarified the explanation of the "intended effects" doctrine in Fleischmann Distilling Corp. v. Distillers Co., 395 F. Supp. 221 (S.D.N.Y. 1975). The Court noted that intent is necessary; however, it may be presumed from the natural consequences of the defendant's actions.
22See Jennings, supra note 6, at 146-48; Harvard Research, supra note 6 at 466-74.
24See E. Kintner & J. Griffin, Antitrust Jurisdiction over Foreign Commerce, 18 B.C. INDUS. & COM. L. REV. 199, 220 (1977) [hereinafter cited as Kintner & Griffin].
25Id.
have some interest in the activity that is being regulated. This interest is recognized when a nation's citizen has committed the offense, when a nation's national interest is injured by the offense, when the nation has custody of the person committing the offense and the offense is one which is generally condemned, and when the citizen of a nation is injured by the offense. In addition, some governments, including the United States and Great Britain, recognize that a nation may assert jurisdiction when any constituent element of the offense is consummated within that state.

In numerous treatises, legal scholars discuss the principle, termed the "objective" territorial approach, and they defend it almost unanimously. However, the scholars disagree on the question of how far "objective" territoriality may be extended in the field of economic regulation. Critics of the Alcoa "intended effects" test argue that jurisdiction can only be asserted when the effects are direct and physical, such as in homicide cases. They claim that the effects of economic crimes are too remote and too difficult to establish to provide an appropriate basis for jurisdiction. The universality of condemnation of manslaughter makes the extraterritorial application of a state's legislation acceptable in a murder case. But the extraterritorial

26Id.
30U.S. DEP'T OF STATE REPORT ON EXTRATERRITORIAL CRIME AND THE CUTTING CASE 57 (1887) (cited in Kintner & Griffin, supra note 24 at 220).
32See, e.g., A.D. NEALE, ANTITRUST LAWS OF THE U.S.A. 360-72 (2d ed. 1970) [hereinafter cited as NEALE]; Akehurst, Jurisdiction in International Law, 46 BRIT. Y.B. INT'L L. 145 (1973); W. FUGATE, FOREIGN COMMERCE AND THE ANTITRUST LAWS (2d ed. 1973). R.Y. Jennings, a leading British scholar in the field of antitrust jurisdiction, has noted that "the objective application [of the territorial principle] has been adopted into general jurisprudence." Jennings, supra note 6 at 156.
33See, e.g., Jennings, supra note 6 at 175:

The objective application of the territorial principle is certainly now part of the general principles of law recognized by civilized nations; and there seems to be no good reason why it should not be used in the enforcement of antitrust laws. The United States courts cannot be expected to refuse jurisdiction over agreements which primarily intend, and produce, illegal activities within United States territory. But it may, with respect, be submitted that the Alcoa pattern of case goes too far when "jurisdiction" is assumed over foreigners' foreign agreements, merely because it has been possible to allege some "effects" on United States imports or exports, and because the agreement would have been illegal if made in the United States. This kind of jurisdiction seems to offend in two ways. First, since this jurisdiction is rested by the court on the objective test of territorial jurisdiction, it must be kept within the confines of that concept. But to extend that concept to cover effects in the sense of mere repercussions—sometimes repercussions ancillary to the purpose of the scheme as in the Alcoa case—is not only to extend it beyond the limits covered by authority but also to reduce it to an absurdity. Practically unlimited extraterritorial jurisdiction cannot reasonably be found on a territorial principle. Secondly, even allowing a most liberal view of the limits of extraterritorial jurisdiction, these cases still offend against the ultimate limit
application of less universally recognized laws to promote competition is more open to question. Advocates of the "effects" doctrine indicate, on the other hand, that because most states have some sort of rules against unfair competition or economic coercion, an extraterritorial application should be acceptable. Thus, the international legal rule with regard to the exercise of extraterritorial jurisdiction in the antitrust area is, at the least, unclear.

A. Criticism of Extraterritoriality

The British are the strongest and loudest critics of the "effects" doctrine. One commentator summarized the British objection to the United States view of extraterritorial jurisdiction as follows:

international law will permit a State to exercise extraterritorial jurisdiction provided that State's legitimate interests (legitimate that is to say by tests accepted in the common practice of States) are involved; but against this must be set also the legitimate and reasonable interests of the State whose territory is primarily concerned, for the extraterritorial exercise of jurisdiction must not be permitted to extend to the point when the local law is supplanted; where in fact it becomes an interference by one State in the affairs of another . . . . A state has a right to extraterritorial jurisdiction where its legitimate interests are concerned, but the right may be abused, and it is abused when it becomes essentially an interference with the exercise of the local territorial jurisdiction.34

In the antitrust area, the British have found the United States view "particularly objectionable."35 The British feel, as do many other governments,36 that:

(1) The formation of a cartel and other activities against which antitrust legislation is directed are not universally recognized as unlawful. Offences in the antitrust category are wholly different from such offences as piracy which are universally regarded as unlawful.

(2) The assertion of extraterritorial jurisdiction in antitrust matters represents an extension of the economic policy of one state which is likely to conflict with that of other states. . . . 37

B. The Timberlane and Mannington Mills Cases

In 1976, the Ninth Circuit Court of Appeals attempted to mitigate foreign objections to the extraterritorial reach of the United States antitrust laws.

because they are an attempt to export into other countries and to make operate there what are after all peculiarly American political notions.


34Jennings, supra note 6, at 153.


37British Government Brief, supra note 35 at 25.
In *Timberlane Lumber Co. v. Bank of America*,38 the court of appeals seemed to curtail severely the reach of the "effects" doctrine. "The effects test by itself is incomplete because it fails to consider other nations interests. . . . What we prefer is an evaluation and balancing of the relevant considerations in each case, . . . a 'jurisdictional rule of reason'.”39

In 1979, the Third Circuit Court of Appeals followed the *Timberlane* approach of applying a conflict-of-laws analysis to the jurisdictional question. In *Mannington Mills, Inc. v. Congoleum Corp.*,40 the court used a two-pronged test. First, it applied the *Alcoa* "effects" doctrine to determine whether subject matter jurisdiction existed. Then it used the *Timberlane* "rule of reason" test to determine whether such jurisdiction should be exercised.41

The considerations set out in *Mannington Mills* provide the framework for a comparative relations test. First, *Mannington Mills* suggests that courts determine which state has the preponderant interest in having its law apply to the conduct in question.42 Second, the nationality of the defendant is an important consideration.43 A third *Mannington Mills* consideration would favor declining jurisdiction where a foreign State is being sued for anticompetitive conduct.44 Fourth, *Mannington Mills* suggests that courts consider the possibilities for effective enforcement of a prospective judgment before asserting antitrust subject matter jurisdiction in the international context.45 A fifth consideration is whether an order under the relevant circumstances would be acceptable in the United States if made by the foreign nation.46 Finally, *Mannington Mills* suggests that the courts inquire whether a treaty exists which addresses the antitrust issue before asserting jurisdiction.47 However, to announce the demise of the *Alcoa* doctrine would be premature. As will be discussed shortly, in *Westinghouse Electric Corporation v. Rio Algom Corp.*48 the *Alcoa* doctrine was reincarnated under the guise of a "balancing" test.49

III. The United States-United Kingdom Dispute

The dispute between the United States and Great Britain over the problem of antitrust jurisdiction started soon after the *Alcoa* decision. In 1952, "the high-water mark of jurisdictional claims"50 may have been reached in

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38549 F.2d 597 (9th Cir. 1976).
39 *Id.* at 611-12.
40595 F.2d 1287 (3d Cir. 1979).
41 *Id.* at 1297-98.
42 *Id.*
43 *Id.*
44 *Id.*
45 *Id.*
46 *Id.*
47 *Id.*
48 No. 76-C-3940 (N.D. Ill., filed Oct. 15, 1976).
49 See notes 64-76 & accompanying text infra.
50 Jennings, supra note 6 at 167.
United States v. Imperial Chemical Industries. In that case, a United States federal court directed a British corporation to refrain from asserting its British patents against any American manufacturer that has made products under American patents. The "effects" doctrine clearly was applied here since the United States court was instructing a foreign corporation on how to utilize its own property in its own country. In addition, this decree included a provision ordering Imperial Chemical Industries (ICI) to reassign to du Pont, an American corporation, certain British patents under which British Nylon Spinners (BNS), a non-party British company, held exclusive licenses and rights to assignment of the patents. British Nylon Spinners sought and obtained an injunction in the United Kingdom restraining ICI from complying with the American decree. The British judges emphatically stated that consideration of comity should have restrained the American court from asserting extraterritorial jurisdiction.

British legislative reaction to the "effects" doctrine began in 1964 with the Shipping Contracts and Commercial Documents Act (Shipping Act). In the early 1960s the United States Federal Maritime Commission (Commission) was investigating the freight rates charged by the member lines of certain transatlantic shipping conferences. The Commission suspected that these conferences were restraining trade in the United States. In connection with this investigation, the Commission requested the production of documentary evidence that was in the possession of certain British shipping companies. As a result of public pressure the British Parliament passed the Shipping Act. This Act authorized certain government officials to prohibit any person in the United Kingdom from complying with a discovery order of a foreign court, tribunal, or authority that would "constitute an
infringement of the jurisdiction which, under international law, belong to the United Kingdom.”

The British soon realized, however, that the Shipping Act was insufficient to deter United States discovery procedures. For example, in In re Ampicillin Antitrust Litigation, Beechams, one of Great Britain’s leading pharmaceutical producers, was ordered by the District Court for the District of Columbia to produce certain documents. The British Department of Trade and Industry, relying on the authority vested in it by virtue of the Shipping Act, ordered Beechams not to produce the sought after documents. Judge Sirica in the American district court ruled that Beechams failure to comply with discovery orders warranted the “negative resolution of facts” sanction under Rule 37(b). The judge indicated that Beechams failed to satisfy the court that “it has taken all affirmative steps required to achieve compliance with the court’s discovery orders.” The Department of Trade relented and permitted the production of all documents except thirty-six which were treated as confidential.

In the late 1970s the conflict over the extraterritorial application of the United States antitrust laws reached new heights in two separate actions threatening the survival of two of Britain’s largest industries: the Westinghouse Uranium case and the Ocean Shipping case.

A. The Westinghouse Uranium Case

On October 15, 1976, the Westinghouse Electric Corporation filed suit in the United States district court for the Northern District of Illinois against
members of an alleged international uranium cartel charging them with price fixing, market division, refusals to deal with certain uranium purchasers, and other Sherman Act violations.65 Nine foreign defendants refused to appear before the court, and a default judgment was entered against them in January 1979.66 On appeal, amici curiae briefs were filed on behalf of the governments of Australia, Canada, South Africa and the United Kingdom. The British government's brief presented two jurisdictional questions: (1) whether subject matter jurisdiction existed; and (2) if it did exist, whether it should be exercised.67

The British first argued that the extraterritorial application of the United States antitrust laws was "inconsistent with international law."68 The brief quoted from the British government's submission to the House of Lords in reaffirmed in 1966 by regulation of the Atomic Energy Commission implementing the 1964 Legislation. 31 Fed. Reg. 16,479 (Dec. 23, 1966). These regulations had the effect of denying to non-United States producers of uranium almost three-fourths of the world market. See Notes for Editors (British Embassy) (available upon request from the British Embassy); British Government Brief, supra note 35 at 9. United States companies, on the other hand, continued to sell uranium outside the United States in direct competition with foreign uranium producers. In response to the United States protection measures, foreign uranium producers joined together in an international marketing arrangement, a "cartel," to divide territorially the non-United States demand.

In the late 1960s and early 1970s the Westinghouse Electric Corporation [hereinafter cited as Westinghouse] contracted to build nuclear power stations. As an inducement for these contracts, Westinghouse agreed to supply future orders of uranium for a specified set price (with a small cost of living escalation clause). Following a large and unexpected rise in the price of uranium in 1974, Westinghouse notified its customers that it was unable to fulfill the uranium contracts due to "commercial impracticability." Subsequently, sixteen United States and three Swedish power utilities brought suit against Westinghouse for breach of contracts.

On October 15, 1976, Westinghouse, in response, brought suit in the Northern District of Illinois against twenty United States and foreign uranium producers, claiming a violation of the Sherman Act and alleging that the international cartel caused a lack of supply of uranium and forced the steep rise in uranium prices. The total amount of treble damages claimed by Westinghouse is approximately six billion dollars. For further discussion of the proceedings, see, e.g., The Lord Hacking, The Increasing Extraterritorial Impact of U.S. Laws: A Cause for Concern Amongst Friends of America in PERSPECTIVES ON THE EXTRATERRITORIAL APPLICATION OF U.S. ANTITRUST AND OTHER LAWS 155 (J. Griffin ed. 1979).

65Westinghouse Electric Corp. v. Rio Algom, Ltd., No. 76-3940 (N.D. Ill., filed Oct. 15, 1976). Named in the complaint were: Rio Algom Ltd.; Rio Algom Corporation; Rio Tinto Zinc Corporation Ltd.; RTZ Service, Ltd.; Rio Tinto Zinc Corporation; Conzinc Rio Tinto of Australia Ltd.; Mary Kathleen Uranium Ltd.; Panocontinental Mining Ltd.; Queensland Mines Ltd.; Nuclear Fuels Corporation; Anglo-American Corporation of South Africa, Ltd.; Engelhard Minerals and Chemicals Corporation; Denison Mines Ltd.; Noranda Mines Ltd.; Gulf Oil Corporation; Gulf Mineral Canada Ltd.; Kerr-McGee Corporation; Anaconda Company; Getty Oil Company; Utah International Inc.; Phelps Dodge Company; Western Nuclear, Inc.; Homestake Mining Company; Atlas Corporation; Reserve Oil and Minerals Corporation; United Nuclear Corporation; Federal Resources Corporation; and Pioneer Nuclear, Inc. Also, the Uranium Institute was named as a co-conspirator along with other unnamed co-conspirators.

66480 F. Supp. 1138 (N.D. Ill. 1979), aff'd, 617 F.2d 1248 (7th Cir. 1980).

67See British Government Brief, supra note 35 at 7.

68Id. at 24.
The application of the effects doctrine is regarded by Her Majesty's Government as being particularly objectionable in the field of antitrust legislation:

1. The formation of a cartel and other activities against which anti-trust legislation is directed are not universally recognized as unlawful.

2. The assertion of extraterritorial jurisdiction in anti-trust matters represents an extension of the economic policy of one state which is likely to conflict with that of other states.

Second, they argued that the effects test as formulated in Alcoa is no longer accepted by United States courts as "settled law." The British claimed that a critical discussion of the Alcoa test, as was undertaken in the recent Timberlane and Mannington Mills decisions, undermined its continuing viability as the standard of extraterritorial jurisdiction of the Sherman Act.

Applying its own version of the Mannington Mills analysis, the appellate court reviewing the Westinghouse case noted that the district court had considered these factors: the complexity of the multi-national and multi-party action; the seriousness of the charges asserted; and the "recalcitrant attitude of the defaulters." The court concluded that, by considering these factors and determining that jurisdiction should be asserted, the district court did not abuse its discretion, and the judgment was affirmed. However, the court of appeals also concluded that, for reasons of judicial economy, a hearing on damages based on the default judgment should not be held until the domestic defendants' liability has been resolved.

The Westinghouse trial is scheduled to begin in September 1981.

The flaw in the "rule of reason" analysis attempted by Judge Prentice Marshall in the Westinghouse case lies in the fact that it is, in reality, not

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49[1978] 2 W.L.R. 81 (H.L. 1977). Discovery of evidence concerning the existence of a cartel was relevant to Westinghouse's "commercial impracticability" defense in the contracts litigation, and was essential to Westinghouse's antitrust action. In October 1976, a federal judge in Virginia issued letters rogatory to the High Court of Justice in England seeking documents possessed by Rio Tinto Zinc Corporation (RTZ) and certain RTZ officials. The English Court of Appeal upheld the letters rogatory, but at the ensuing deposition RTZ officials refused to testify, asserting the American Fifth Amendment privilege against self-incrimination, and refused to produce documents, asserting the British privilege against self-incrimination. The Justice Department tried to resolve the issue by granting use immunity to the RTZ officials, but the officials still refused to testify or to produce the documents. The appeal was taken to the House of Lords, which denied the validity of the letter rogatory.

50 Supra note 35.

51Id. at 23.

52The brief quoted John H. Shenefield, then-Assistant Attorney General in charge of the Justice Department's Antitrust Division: "The list of factors suggested [in Timberlane] suggests that parties and the Court must now give consideration to all of the factors that have been argued so vigorously by the foreign parties in past controversies. This new role for the district court is long overdue." Remarks by John H. Shenefield, "Extraterritorial Impact of U.S. Antitrust Laws," before the American Bar Association (ABA) Section of International Law (Aug. 9, 1978), reprinted in 5 TRADE REG. REP. (CCH) ¶ 50,386, at 55,857.

53"Westinghouse Electric Corp. v. Rio Algom Ltd., 617 F.2d 1244, 1255 (7th Cir. 1980).

54Id.

55Id. at 1263.
even similar to the *Timberlane-Mannington Mills* balancing. Instead of utilizing the factors recommended by *Mannington Mills* and *Timberlane*, the *Westinghouse* court "balanced" three aspects of the case which are clearly biased against the defaulting parties. The entire "considerations of comity" idea stressed by the *Mannington Mills* and *Timberlane* courts was replaced by the *Westinghouse* court with its own "balancing test." In effect, Judge Marshall ignored the "comparative relations" doctrine espoused in *Mannington Mills* and *Timberlane* praised by legal commentators and reverted to the effects doctrine as enunciated in *Alcoa*.

B. The Ocean Shipping Case

The second incident to spark British anger involved the international shipping industry. In June 1979, a federal grand jury indicted seven European shipping companies for fixing freight rates on container shipments. Included in the indictments were the consortia Atlantic Container Line and Dart Container Line, which numbered as members the Cunard and Bibby Shipping Lines of the United Kingdom. All seven shipping companies pleaded no contest and paid fines totaling $6.1 million (U.S.).

The fines provoked an angry reaction in Great Britain. In Parliament, Under-Secretary of Trade Norman Tebbit promised a reappraisal of cooperation with the United States on antitrust matters:

"Shipping is an international activity, affecting the interests of both countries. Any questions that arise should therefore be dealt with jointly, and we consider it wrong in principle for the United States to exercise unilateral control over shipping between the two countries, in disregard both of [British] economic interests and shipping policies."

The major issue in the case was a political, rather than a legal one. Under the European legal system, shipping lines are free to fix rates on their routes using the traditional conference system. In addition, they may also give discounts to certain customers. British Secretary of Trade John Nott noted that British anger was primarily directed at the fact that

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78 *Id.* at A-31.

79 *Id.* at A-30.

80 *Id.* at A-31.

81 *Id.* at A-30. During the Parliament's debates on the Trading Interests Act, Trade Secretary John Nott stressed the reason for the British and, in fact, European system. "The policy of the British government, along with that of all European governments, has been to avoid detailed regulatory intervention in the commercial aspects of international shipping. We believe that to be the best way of achieving efficient and effective shipping services and protecting the interest of the consumer." 972 Parl. Deb. H.C. (5th ser.) 1538 (1979).

the violations of the Sherman Act which attracted the fines would not have been illegal in the United Kingdom.\textsuperscript{83}

The importance of these two cases to Great Britain lies in the possible effects they can have on two of Great Britain's largest industries.\textsuperscript{84} The British government noted in its \textit{amicus curiae} brief to the Seventh Circuit Court of Appeals in the \textit{Westinghouse} case:

> if Westinghouse through an enormous default judgement in this very controversial case is given a claim which it may seek to enforce against RTZ's [the British defaulters, Rio Tinto-Zinc Corporation Limited and RTZ Services Ltd.] assets, a major portion of the British-owned mining interests throughout the world may be in jeopardy. Such a result . . . would unjustifiably and severely injure the general economic interests of the United Kingdom, as well as the particular British companies concerned and their shareholders.\textsuperscript{85}

In addition, the grand jury indictments against the British shipping lines set off a rash of large private treble damage suits against those lines, and "The consequences for shipping companies are potentially financially crippling,"\textsuperscript{86} Secretary Nott said.

\section*{IV. The Protection of Trading Interests Act}

On September 14, 1979, Nott addressed the British-American Chamber of Commerce in Los Angeles. In his speech he stated:

> I shall be introducing new legislation designed to give better protection to British companies and individuals against attempts by any other country . . . to impose on them unilaterally their own domestic economic policies and regulations. One of the effects of these proposals, if Parliament approves them, will be that a range of U.S. judgements, including those in antitrust, will not be enforceable in the United Kingdom.\textsuperscript{87}

The Protection of Trading Interests Acts,\textsuperscript{88} proposed in November 15, 1979 and passed by Parliament on March 20, 1980, is actually an even harsher measure. It can be divided into three sections: (1) a "discovery" section,\textsuperscript{89} a "nonenforcement" section,\textsuperscript{90} and a "clawback" provision.\textsuperscript{91}

\begin{itemize}
\item \textit{Id.}
\item "Some of the other countries involved in the \textit{Westinghouse} case have even more at stake. For example, Australia, in its \textit{amicus curiae} memorandum, noted that: Australia's export income from minerals and mineral products of 4.7 billion dollars in 1977/78 represented 39 percent of the total national export income that year. . . . With regard to uranium, Australia is on the verge of becoming a major exporter. As of 30 June 1978 the reasonably assured uranium resources of Australia recoverable at less than \$80 per kilogram represents about 18 percent of the Western world's estimated resources in that category.\textit{Supra} note 36 at 5-6.
\item British Government Brief, \textit{supra} note 35 at 5-6.
\item \textit{92}972 \textit{PARL. DEB. H.C.} (5th ser.) 1539 (1979).
\item Address by Secretary John Nott, British-American Chamber of Commerce in Los Angeles, California (September 14, 1979) \textit{quoted in British Government Brief, supra} note 35 at 31-32.
\item \textit{Trading Interests Act, note 1 supra.}
\item \textit{Id.} \textsection 2.
\item \textit{Id.} \textsection 5.
\item \textit{Id.} \textsection 6.
\end{itemize}
The discovery section permits the British Secretary of State to prohibit persons or corporations in the United Kingdom from furnishing commercial information or producing commercial documents to a court, tribunal or authority in a foreign country. The standard for those decisions is broadly defined. He may prohibit compliance if he decides that:

a. The requirement to produce documents or information would infringe the jurisdiction of the United Kingdom, or is otherwise prejudicial to the security of the United Kingdom.

b. Compliance with the requirement would be prejudicial to the security of the United Kingdom or to the relations of the government of the United Kingdom with the government of any other country (emphasis supplied).

c. The requirement is made for purposes other than for civil or criminal proceedings which have been instituted in the overseas country.

d. The requirement is upon persons or corporations in the United Kingdom not to produce the documents, but merely to state which of the documents are in their possession.

The discovery section is not novel legislation. As was mentioned previously, the Shipping Act authorized government officials to prohibit compliance with foreign discovery orders which would "constitute an infringement of the jurisdiction which, under international law, belongs to the United Kingdom." However, the discovery provision in the Trading Interests Act broadens and strengthens the powers of the Secretary. Under the Shipping Act, the government officials were authorized to prohibit compliance with requests for documents or requests for "commercial information to be compiled from documents" only if the requests would constitute an infringement of United Kingdom jurisdiction under principles of international law. Under the Trading Interests Act, the Secretary is authorized to prohibit compliance with a broader range of requests for some extremely discretionary reasons. For example, he may prohibit compli-

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92 Id. § 2(1).
93 Id. § 2(2)(a).
94 Id. § 2(2)(b).
95 Id. § 2(3)(a).
96 Id. § 2(3)(b).
97 "See notes 55 to 63 & accompanying text supra.
98 "Shipping Act, supra note 55, § 2(1). Note that the discovery provisions in the Trading Interests Act apply solely to the Secretary of the State while the Shipping Act authorizes five government officials to take the necessary action. Id. § 2(2).
99 "During the debates in the House of Lords, Lord Mackay of Clashfern, one of the sponsors of the Act, emphasized that:
100 [the 1964 Act (Shipping Act) has been reasonably effective here, but time has shown that it was not wide enough. We have reached the conclusion that we should be able to control the production of documents from the United Kingdom in any circumstances except those in which, if the application were made through our courts, those courts would order production under the Evidence (Proceedings in Other Jurisdictions) Act 1975 as a matter of course."

404 PARL. DEB. H.L. (5th ser.) 561 (1980).
The nonenforcement section provides that "no court in the United Kingdom shall entertain proceedings at common law for the recovery of any sum payable under [a judgment awarding multiple damages or any trade regulation or antitrust judgment]." The British feel that this is merely a codification of existing policy. In fact, British courts have generally refused to enforce United States multiple damage awards "either on the grounds that such awards are penalties or that enforcement would be contrary to (British) public policy." In a diplomatic note to the State Department, the British Embassy noted that "Clause 5 (the nonenforcement provision) clarifies a question of U.K. law. . . ." However, the provision does provide statutory means by which United States treble-damage antitrust judgments can be automatically avoided. In addition, as was stressed in a note from the United States to the British, the clause is a direct affront to the United States-United Kingdom Convention on Recognition and Enforcement of Judgments in Civil Matters which "contemplate enforcement of the compensatory portion of [a multiple damage award]." Most important, this provision provides further evidence of a trend among the United States' foreign allies toward the worldwide nonenforcement of American antitrust decisions. For example, on March 15, 1979, the Australian Federal Parliament enacted the Foreign Antitrust Judgement (Restrictions of Enforcement) Act 1979 which, much like the nonenforcement provision in the Trading Interests Act, renders antitrust judgments of foreign courts unenforceable in Australia. Similar legislation has been enacted in South Africa.

The bulk of the controversy revolving around the Trading Interests Act has involved clause six, commonly called the "claw-back" provision. A novel idea, clause six provides that where a foreign court has given a judgment and multiple damage award against a citizen of the United Kingdom, a corporation incorporated in the jurisdiction of the United Kingdom, or any person "carrying on business in the United Kingdom," a "qualifying defendant" may, in a British court, recover back from the "multiple-dam-

100 Trading Interests Act, supra note 1 § 2(3)(a).
101 Id. § 5(1), (2).
102 404 PARL. DEB. H.L. (5th ser.) 561-62 (1980). Lord Mackay of Clashfern noted, however, that the case of Huntington v. Atrill cast some doubt on this judicial policy. See note 23 supra & accompanying text.
103 British Embasy, Note No. 225 to U.S. Dep't of State (November 27, 1979) [hereinafter cited as British Note].
104 5 INT. LEGAL MATERIALS 636 (1966).
105 United States Embassy, Note No. 56, to British Secretary of State for Foreign and Commonwealth Affairs 4 (November 9, 1979) [hereinafter cited as U.S. Note]. Negotiation on this point in the convention has been underway since 1971.
106 See notes 121 to 123 & accompanying text infra.
The claim may be made even if the award winner is not within the jurisdiction of the British court, so the "clawback" threat might prevent the award winner from establishing operations in Great Britain.

The only "qualifying defendants" who may not initiate a "claw-back" proceeding are individuals who are "ordinarily resident" in the foreign country in which the multiple damage award was given and those who "carried on business in the overseas country and the proceedings in which the judgement was given were concerned with activities exclusively carried on in that country." This will prevent American treble damage losers and those foreigners who fall within the "territorial" application of United States antitrust laws from taking advantage of the British "claw-back" provision; however, the remaining "qualifying defendants" still constitute a large number of foreign litigants.

In order to adequately analyze the potential effects of the Trading Interests Act, it is helpful to apply the Act hypothetically to, for example, the Westinghouse proceedings. The major advantage of the Act is the convenience it provides for the government officials involved. For example, had the "discovery" provision of the Trading Interests Act been applied to the controversial and technical discovery controversy in the Westinghouse case, the House of Lords would not have been forced to resort to questionable reasoning in order to deny Westinghouse's discovery requests. Under the Trading Interests Act, the Secretary of State would have prohibited compliance with the discovery orders extrajudicially on the premise that the orders or compliance with the orders would be prejudicial to the security of the United Kingdom. In addition, if the Westinghouse court awards a treble damage judgment to Westinghouse, the nine defaulting foreign defendants, including the non-British defendants, can all go to a British court and bring "claw-back" actions in Great Britain to recover the non-compensatory aspects of the treble damage awards. Finally, these treble damage awards would be unenforceable in the United Kingdom.

The "claw-back" provision provoked an immediate reaction. It sparked long parliamentary debates in both the House of Lords and the House of Commons. The United States ambassador to Great Britain, in a diplomatic note to the British Secretary of State, stated:

We are seriously concerned by Clause 6, both in overall concept and in specific details. As far as we are aware, this provision has no precedent anywhere in the

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109 Trading Interests Act, supra note 1 § 6(1), (2).
110 Id. § 6(5).
111 Id. § 6(3).
112 Id. § 6(4).
113 See note 69 supra.
world. In our view, it raises serious questions under the very principles of international law and comity to which Her Majesty's Government is committed.\footnote{U.S. Note, supra note 105 at 4.}

Despite the international law implications, during the Parliamentary debates on the Trading Interests Act the strongest argument against adoption of the Act was that it would not succeed in deterring the American courts from acting extraterritorially against British interests.\footnote{See 404 Parl. Deb. H.L. (5th ser.) 568 (1980).} One member of the House of Lords expressed the fear that United States defendants to "claw-back" proceedings would remove all assets from Great Britain before they could be attached.\footnote{Id.} However, Douglas Rosenthal, the former head of the Department of Justice Antitrust Division's Foreign Commerce Section noted that the proposal "could have a significant impact on a small number of cases," and that the potential seizure of assets of American companies is "a serious business."\footnote{Associated Press, Dec. 19, 1979.}

A. \textit{Could the Act Have Been Prevented?}

In 1953, Justice Jackson prophetically warned the United States judiciary:

\begin{quote}
In dealing with international commerce we cannot be unmindful of the necessity for mutual forbearance if retaliations are to be avoided; nor should we forget that any contact which we hold sufficient to warrant application of our laws to a foreign transaction will logically be as strong a warrant for a foreign country to apply its law to an American transaction.
\end{quote}

Unfortunately, certain courts have been unmindful of Jackson's stated "necessity" and the result is retaliation. The cure is not a simple one; however, a strict application of the \textit{Timberlane-Mannington Mills} balancing test and other foreign compulsion defenses is a step in the right direction. Commentators have stressed the fact that international law supports the adoption of a comparative relations analysis to decide the applicability of the Sherman Act to extraterritorial conduct.\footnote{Lauritzen v. Larsen, 345 U.S. 571, 582 (1953).} A comparative relations test such as the one adopted by Judge Marshall in the \textit{Westinghouse} case, only serves to exacerbate the situation.

B. \textit{Relevance of the Act: The Past and the Future}

The Protection of Trading Interests Act illustrates clearly a strong and determined campaign by the British and other governments to end the widespread extraterritorial action applications of law that United States courts have exercised in the past. At least ten foreign countries have enacted "counterlegislation" against the extraterritorial application of foreign competition law to matters which they view as coming under their sov-
ereignty. Australia and South Africa have enacted nonenforcement of judgments laws. France has been the most recent addition to the group of countries that have enacted "discovery" measures. "Claw-back" provisions are being discussed by several foreign governments. This trend indicates the frustration felt by foreign governments in fighting the extraterritorial antitrust idea in cases such as In re Ampicillin Antitrust Litigation. The results of the Westinghouse and Shipping Conference cases could prove economically tragic to numerous foreign countries and, predictably, their frustration has turned to anger.

A clear illustration of the British position was expressed by Under-Secretary Tebbit during the House of Commons debates: "The late Sir Winston Churchill said that jaw-jaw was better than war-war. For years we tried jaw-jaw. We have now been driven to law-law." The crucial question in analyzing this Act is whether "law-law" is an alternative, even a reluctant alternative, to "jaw-jaw." While introducing the act in Parliament, Secretary Nott quoted from an American newspaper and may have inadvertently answered this question: "Maintaining international competition is the proper business of diplomats and negotiation, not federal judges and litigation." Using laws to undo another country's legislation is entirely contrary to principles of comity and international cooperation. However, one member of the House of Lords did proffer a possible solution to this issue. He said, "... the introduction of this bill should not prevent further efforts by discussion and agreement between our two countries." This writer would agree.

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121 By 1970, Belgium, Canada, Denmark, Finland, France, India, the Netherlands, Norway, Sweden and the United Kingdom had passed one form or another of "counter-legislation" against the extraterritorial application of foreign competition law to matters which they view as coming under their sovereignty. INTERNATIONAL LAW ASSOCIATION, REPORT OF THE FIFTY-FOURTH CONFERENCE AT THE HAGUE 178 (1970).

122 See notes 107-8, supra.

123 See text of French law in Appendix A, infra.

124 See notes 59-63, supra.


126 Id at 1543. Nott was quoting from the Wash. Post, Nov. 4, 1979, § C at 6.

Appendix

N° 339
SÉNAT
SECONDE SESSION ORDINAIRE DE 1979-1980

PROJET DE LOI
MODIFIÉ PAR L’ASSEMBLÉE NATIONALE
relatif à la communication de documents et renseignements
d’ordre économique, commercial ou technique
à des personnes physiques ou morales étrangères.

TRANSMIS PAR
M. LE PREMIER MINISTRE
A
M. LE PRÉSIDENT DU SÉNAT

(Renvoyé à la commission des Affaires économiques et du Plan.)
L'Assemblée nationale a modifié, en première lecture, le projet de loi dont la teneur suit:

Projet de Loi

Article premier.

Le titre de la loi n° 68-678 du 26 juillet 1968 relative à la communication de documents et renseignements à des autorités étrangères dans le domaine du commerce maritime, est modifié ainsi qu'il suit :

« Loi relative à la communication de documents et renseignements d'ordre économique, commercial, industriel, financier ou technique à des personnes physiques ou morales étrangères. »

Art. 2.

I. — L'article premier de la loi n° 68-678 du 26 juillet 1968 susvisée est ainsi rédigé :

« Art. premier. — Sous réserve des traités ou accords internationaux, il est interdit à toute personne physique de nationalité française ou résidant habituellement sur le territoire français et à tout dirigeant, représentant, agent ou préposé d’une personne morale y ayant son siège ou un établissement, de communiquer par écrit, oralement ou sous toute autre forme, en quelque lieu que ce soit, à des autorités publiques étrangères, les documents ou les renseignements d’ordre économique, commercial, industriel, financier ou technique dont la communication est de nature à porter atteinte à la souveraineté, à la sécurité, aux intérêts économiques essentiels de la France ou à l’ordre public, précisés par l’autorité administrative en tant que de besoin. »

II. — Il est inséré, après l’article premier de la loi n° 68-678 du 26 juillet 1968 susvisée, un article premier bis ainsi rédigé :

« Art. premier bis. — Sous réserve des traités ou accords internationaux et des lois et règlements en vigueur, il est interdit à toute personne de demander, de rechercher ou de communiquer, par écrit, oralement ou sous toute autre forme, des documents ou renseignements d’ordre économique, commercial, industriel, financier ou technique, tendant à la constitution de preuves en vue de procédures judiciaires ou administratives étrangères ou dans le cadre de celles-ci. »

Art. 3.

L’article 2 de la loi n° 68-678 du 26 juillet 1968 susvisée est ainsi modifié :

« Art. 2. — Les personnes visées aux articles premier et premier bis sont tenues d’informer sans délai le ministre compétent lorsqu’elles se trouvent saisies de toute demande concernant de telles communications. »

Voir les numéros :
Assemblée nationale (6e législ.): 1771, 1814 et in 8° 324.
Transports aériens. — Transports maritimes.
Art. 4.

L'article 3 de la loi n° 68-678 du 26 juillet 1968 précitée est ainsi modifié :

« Art. 3. — Sans préjudice des peines plus lourdes prévues par la loi, toute infraction aux dispositions des articles premier et premier bis de la présente loi sera punie d'un emprisonnement de deux mois à six mois et d'une amende de 10.000 F à 120.000 F ou de l'une de ces deux peines seulement. »

Délivéré en séance publique, à Paris, le 24 juin 1980.

Le Président,

Signé : JACQUES CHABAN-DELMAS.