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Foreign Statutory Response to Extraterritorial Application of U.S. Antitrust Laws

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FOREIGN STATUTORY RESPONSE TO EXTRATERRITORIAL APPLICATION
OF UNITED STATES ANTITRUST LAW

I. Introduction

In theory, "jurisdiction is . . . territorial; it cannot be exercised by a state outside its territory . . . ."¹ In fact, states frequently apply their laws extraterritorially, by asserting jurisdiction over their nationals located in other countries. Intergovernmental disputes commonly result. For the individuals or entities involved, such conflicts can generate problems of considerable proportion.

Multinational corporations are particularly vulnerable. The typical multinational corporation strives to adhere to the laws of each country in which it conducts business. That goal is not always attainable. For example, assume the laws of State A, where part of a company is located, require the entire corporation to follow a pattern of behavior that is inconsistent with the laws of State B, where another part of the corporation is located. Compliance with the laws of one state violates the laws of the other.² The choice is often painful, but transnational companies are increasingly obliged to make it.

2. A similar situation occurred when President Reagan decided to prohibit American made equipment or technology from being used in constructing Russia's natural gas pipeline. The United States government ordered a French subsidiary of Dresser Industries, Inc., Dallas, Tex., not to ship three compressors manufactured in France but of American design. The French government demanded that Dresser's subsidiary honor French contracts with the Russians and ship the equipment. On August 26, 1982, the compressors were loaded aboard a vessel bound for the Soviet Union. The Commerce Department immediately announced trade sanctions against Dresser's subsidiary, barring it from receiving further American products or technology.
Additional complications occur when jurisdiction is claimed over foreign corporations not present within the borders of the nation attempting to assert authority. The United States has sought to extend its antitrust law in precisely that manner, a practice marked by bitter international debate. One foreign tribunal has characterized American claims to jurisdiction as "excessive and an invasion of sovereignty." Other countries have reacted with a variety of countermeasures ranging from diplomatic protest to legislation designed to subvert American attempts at foreign discovery and, in some cases, nullify American judgments abroad.

By no means is criticism of United States regulatory policy limited to antitrust matters. Attempts to regulate or investigate companies domiciled and operating completely outside the United States by the Securities & Exchange


5. See, e.g., British protests, reprinted in International Law Association, Report of the Fifty-First Conference, 404, 579, 582 (1964) [hereinafter cited as ILA].

6. E.g., Protection of Trading Interests Act 1980, c.11.

Commission, the Federal Trade Commission and the Federal Maritime Commission have also provoked foreign diplomatic and judicial rebuke.

This comment will outline the international response to extraterritorial application of United States antitrust law, focusing primarily on foreign statutory enactments. Following a brief review of United States antitrust legislation, American case law will be analyzed. The next section of the inquiry will consist of an examination of the so-called "blocking statutes" of eight major United States trading partners. Finally, alternative solutions to the conflict will be outlined.

II. United States Antitrust Law

The antitrust law of the United States has been described as "perhaps the most fundamental and pervasive adoption of the competitive system to be found in the national laws of any country." The Sherman Act is the core of American antitrust law. Section 1 forbids "[e]very contract, combination in the form of trust or otherwise or conspiracy in restraint of trade or commerce among the several states, or with foreign nations." Section 2 bans

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monopolies and attempts or conspiracies to monopolize "any part of the trade or commerce among the several states or with foreign nations."\(^{15}\)

The Sherman Act is supplemented by similarly designed statutes. The Clayton Act,\(^ {16}\) most notable of these, is directed against the formation of monopolies through anti-competitive practices. A related statute is the Wilson Tariff Act,\(^ {17}\) which protects American imports from agreements in restraint of free trade. Paradoxically, Congress has also enacted the Webb-Pomerene Export Trade Act.\(^ {18}\) It permits certain anti-competitive actions by United States exporters in the international market. Given the vociferous American response to like practices by foreign exporters in the same market, it is not surprising that the United States is accused of applying a double standard.\(^ {19}\)

It is the Sherman Act which is most often invoked in the international forum. A properly stated claim for relief under the Act consists of two conjunctive elements. Subject matter jurisdiction is established by a showing that the facts of the alleged violation constitute restraint of trade or commerce "among the several states, or with foreign nations."\(^ {20}\) A substantive violation of the Act is found if the alleged facts demonstrate actual "restraint of trade or commerce."\(^ {21}\) Both elements must be proven to prevent dismissal of the complaint.\(^ {22}\) When applied abroad, however,


\(^{19}\) See Pettit & Styles, supra note 3, at 699.


\(^{22}\) Timberlane Lumber Co. v. Bank of America, 549 F.2d 597 (9th Cir. 1976).
uncertainty exists as to the Sherman Act's jurisdictional scope and the elements required to state a claim for relief. The confusion stems largely from the erratic course of American case law.23

III. American Case Law and the Extraterritorial Reach of United States Antitrust Law

Although the text of the Sherman Act twice refers to "foreign nations",24 it fails to give any indication as to the extent of its extraterritorial reach. The statute's legislative history is no more enlightening. It has, therefore, devolved to the federal courts25 to delineate the limits of the Sherman Act's jurisdictional sweep. That task implicitly requires that a balance be struck between fulfilling a congressional mandate to enforce United States antitrust law, while avoiding judicial encroachment on the foreign policy prerogatives of the executive and legislative branches.26 After some ninety years, federal courts still grapple with the problem, often with inconsistent results.

American Banana Co. v. United Fruit Co.27 was the first antitrust case concerning foreign commerce to reach the Supreme Court of the United States. Both parties were American corporations. Plaintiff alleged that trade in bananas between Costa Rica and the United States was monopolized by the defendant with the assistance of the Costa Rican government. The Court, per Justice Holmes, held that

23. See Ongman, supra note 3, at 765-6.
26. See Comment, supra note 3, at 1247.
the complaint failed to state a cause of action. The Sherman Act was interpreted as ineffective when applied to acts committed outside the United States, particularly when not illegal in the country in which they occurred. Justice Holmes wrote:

[T]he 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.

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.28

Two years later, the "territorial" approach taken in American Banana was qualified by the Court's decision in United States v. American Tobacco Co.29 The defendant American corporation executed an agreement in England to allocate tobacco markets and thereby reduce competition in the United States. Although the agreement was reached outside the United States, the Court nonetheless determined that both interstate and foreign trade were affected in violation of the Sherman Act.

American Tobacco was followed in 1913 by United States v. Pacific & Artic Railway & Navigation Co.30 The Supreme Court upheld the indictment of an American corporation and several Canadian companies which had allegedly contrived

28. Id. at 356 (emphasis added).
29. 221 U.S. 106 (1911).
30. 228 U.S. 87 (1913).
to monopolize rail and steamship routes between Canada and the United States. The Court reasoned that to deny jurisdiction, "would put the transportation route described in the indictment out of the control of either Canada or the United States." 31

In Thompse v. Cayser, 32 the court held that an association of steamship companies, formed in London in order to monopolize the carriage of goods between the United States and South Africa, was subject to the Sherman Act. The Court noted that, "the combination affected the foreign commerce of this country and was put into operation here." 33

In 1927, American Banana was further diluted by United States v. Sisal Sales Corp. 34 In Sisal the Supreme Court affirmed an injunction issued under the Sherman Act and section 73 of the Wilson Tariff Act. The defendants, several American corporations and a Mexican company, pursuant to an act by the Mexican legislature, conspired to monopolize the importation of sisal into the United States. Distinguishing American Banana, Justice Reynolds remarked that although most of the conspiratorial acts took place outside the United States, there were, nevertheless, "forbidden results within the United States." 35

The increased stress placed on "results" produced within the United States alluded to in Sisal was fully embraced in United States v. Aluminum Co. of America. 36 In Alcoa, foreign aluminum ingot producers agreed to fix prices and allocate aluminum production. The agreement was made in

31. Id. at 106.
33. Id. at 88.
34. 274 U.S. 268 (1927).
35. Id. at 276.
36. 148 F.2d 416 (2d Cir. 1945).
Switzerland and, in effect, established export quotas. The Court of Appeals for the Second Circuit, in an opinion by Judge Learned Hand, determined that if extraterritorial jurisdiction were not sustained, enforcement of United States antitrust laws would be seriously impaired. Judge Hand wrote, "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 . . . ." That edict became the basis of the so-called "effects doctrine", one of the most controversial elements of the foreign application of American antitrust law. In essence, the Alcoa test, as developed, is whether the effects produced within the United States are intended or foreseeable. If so proven, the burden then shifts to the defendant who must show that no actual effects occurred.

The "effects doctrine" was first squarely relied upon in United States v. Imperial Chemical Industries, Ltd., in which a British corporation and other foreign companies agreed to allocate world chemical markets. The court stated, "a conspiracy to divide territories, which affects American commerce, violates the Sherman Act." The "effects doctrine" was extended to perhaps its ultimate reach in United States v. Watchmakers of Switzerland.

37. Id. at 443.
38. See Ongman, supra note 3, at 751 n.23.
39. 148 F.2d 416, 443-4 (2d Cir. 1945).
40. Id.
Swiss watch manufacturers and their United States subsidiaries were ordered to dissolve a cartel they had formed through what was termed a "gentleman's agreement". The cartel had the tacit approval of the Swiss government. It restricted the export of American watches to Switzerland and to areas where the market for Swiss watches was strong. Restraints were also imposed on the export of watch parts and watchmaking machinery to the United States.

The court found that the cartel violated section 1 of the Sherman Act and section 73 of the Wilson Tariff Act by unreasonably restricting the manufacture, import and sale of watches to the United States. Threats by the Swiss government to take the case to the International Court of Justice caused the United States Department of Justice to request the American court to modify its order so as not to interfere with Swiss internal economic policy.

Another line of cases, also pertaining to extraterritorial application of American economic laws, has begun to erode the expansive reach permitted under the "effects doctrine". The basis for these decisions is due process. In International Shoe Co. v. Washington, the Supreme Court set forth a "minimum contacts" test which must be met before in personam jurisdiction can be asserted. More recently, in Shaffer v. Heitner, the Court articulated the requirement that in a quasi in rem proceeding, a nexus must exist between the cause of action and the subject property.

43. 1963 Trade Cas. (CCH) ¶ 70,600 (S.D.N.Y. 1962).
44. 326 U.S. 310 (1945).
45. See U.S. Const. amend. V.
In addition to considerations of due process, some observers recently note a more deferential stance by the American judiciary in applying United States antitrust law abroad. Decisions such as Timberlane Lumber Co. v. Bank of America and Mannington Mills, Inc. v. Congoleum Corporation, indicate that courts are beginning to weigh principles of international law and comity in their deliberations.

In Timberlane, an American lumber importer accused the defendant of seeking to monopolize trade in Honduran lumber. The plaintiff also alleged that the defendant had enlisted the cooperation of a Honduran court that granted "embargoes" against Timberlane's Honduran subsidiaries. In deciding the case, Judge Choy found the Honduran court's connection with the case factually too trivial to trigger the act of state doctrine as a defense. The significant feature of Timberlane is, however, the court's formulation of a three-tiered jurisdictional test, to be applied when acts of foreign sovereigns are interfused with alleged antitrust violations:

[The antitrust laws require in the first instance that there be some effect -- actual or intended -- on American foreign commerce before the federal courts may legitimately exercise subject matter jurisdiction under those statutes. Second, a greater showing of burden or restraint may be necessary to demonstrate that the effect is sufficiently large to present cognizable injury to the plaintiffs and, therefore, a civil violation of the antitrust laws . . . . Third, there is the additional question which is unique to the international setting of whether the interests of, and links to, the United States -- including the magnitude of the effect on American commerce

47. 549 F.2d 597 (9th Cir. 1976).
48. 595 F.2d 1287 (3d Cir. 1979).
49. "Embargo" is defined as a "court ordered attachment registered with the Public Registry." 549 F.2d 597, 604-5 (9th Cir. 1976).
50. 549 F.2d 597, 606 (9th Cir. 1976).
-- are sufficiently strong vis-a-vis those of other nations, to justify an assertion of extraterritorial authority.\textsuperscript{51}

A similar approach was taken in Mannington Mills. The plaintiff sought triple damages, alleging the defendant fraudulently secured foreign patents and restrained export trade by enforcing those patents in other countries. In determining whether extraterritorial jurisdiction should be exercised, the court set forth a comparative relations test based on Timberlane. The test expanded the number of factors weighed to ten, eight of which address transnational issues.\textsuperscript{52}

The Seventh Circuit tacitly acknowledged the Timberlane and Mannington Mills tests in In re Uranium Antitrust Litigation.\textsuperscript{53} In Uranium, Westinghouse Electric Corporation

\textsuperscript{51} 549 F.2d 597, 613 (9th Cir. 1976) (emphasis in original; citations omitted).
\textsuperscript{52} Those factors are:
1. Degree of conflict with foreign law or policy;
2. Nationality of the parties;
3. Relative importance of the alleged violation of conduct here compared to that abroad;
4. Availability of a remedy abroad and the pendency of litigation there;
5. Existence of intent to harm or affect American commerce and its foreseeability;
6. Possible effect upon foreign relations if the court exercises jurisdiction and grants relief;
7. If relief is granted, whether a party will be placed in the position of being forced to perform an act illegal in either country or be under conflicting requirements by both countries;
8. Whether the court can make its order effective;
9. Whether an order for relief would be acceptable in this country if made by the foreign nation under similar circumstances;
10. Whether a treaty with the affected nations has addressed the issue.

595 F.2d 1287, 1297 (3d Cir. 1979) (footnote omitted).
\textsuperscript{53} 617 F.2d 1248 (7th Cir. 1980).
accused the defendants of fixing world uranium prices and attempting to divide global markets.\textsuperscript{54} In upholding the district court's assumption of jurisdiction, the court of appeals found no abuse of discretion,\textsuperscript{55} noting that the Alcoa test was the proper standard and that Mannington Mills was not the law of the Seventh Circuit.\textsuperscript{56} The opinion dismissed the test articulated in Timberlane as "obiter dicta" but pointed out that the jurisdictional "rule of reason" utilized in Timberlane provides an adequate framework in which to determine whether jurisdiction should be asserted.\textsuperscript{57}

As the federal courts slowly move toward greater awareness of international law and comity in applying extraterritorial jurisdiction in antitrust cases, the United States Department of Justice is also shifting its position. In 1977, the Department issued its Antitrust Guide for International Operations.\textsuperscript{58} It recommends that in considering whether American antitrust laws should be enforced outside the United States, comity should be weighed to "avoid unnecessary interference with the sovereign interests of foreign nations."\textsuperscript{59}

The seeming trend toward increased ethnocentricity by

\textsuperscript{54} Westinghouse had long term contracts to supply domestic and foreign utilities with uranium. In 1964, the United States banned all imports of uranium. In retaliation, the governments of Canada, France, South Africa, Australia and Great Britain approved measures designed to strengthen their uranium industries which caused the price per pound of uranium to rise from $6 in 1972 to $40 in 1976. As a result, Westinghouse abrogated its utility contracts and claimed two billion dollars in damages. The company used that amount as a foundation for a six billion dollar triple damages action against the defendants.

\textsuperscript{55} 617 F.2d 1248, 1256 (7th Cir. 1980).
\textsuperscript{56} 617 F.2d 1255 (7th Cir. 1980).
\textsuperscript{57} Id. at n.25.
\textsuperscript{59} Id. at 6-7.
American courts and the Department of Justice is perceived by other nations as superficial. Several United States trading partners have enacted "blocking statutes". Typically, these laws have a dual purpose. First, they seek to circumscribe the ability of American litigants to acquire evidence, particularly commercial documents. Secondly, they are designed to render enforcement of United States judgments abroad ineffective.

IV. Foreign Statutory Enactments Designed to Block Extraterritorial Application of United States Antitrust Law

A. The United Kingdom

The British consistently, and at times acrimoniously, object to American attempts to prejudice English trading interests through "long arm" enforcement of United States commercial laws. In 1980, Parliament passed the Protection of Trading Interests Act 1980. It is the most extensive attempt by any nation to prevent foreign assertions of extraterritorial jurisdiction. In the words of the British Secretary for Trade, the Act was promulgated to "reassert and reinforce the defenses of the United Kingdom against attempts by other countries to enforce their economic and commercial policies unilaterally on us."62

Although the Act applies to all other nations, it is no secret that it was fashioned principally to thwart encroachments by the United States on British jurisdiction.

60. Although the courts in Timberlane and Mannington Mills articulated concern for issues of international law and comity, no court has yet denied jurisdiction on those grounds.
Disputes between the two nations on the issue date back at least thirty years. In order to put the Protection of Trading Interests Act 1980 into proper perspective, a brief review of the Anglo-American conflict is instructive.

The genesis of the dispute centered around the shipping industry. Since 1909, the British have permitted "conferences" (cartels) between shipowners which, from the English point of view, increase efficiency and stability. Conferences are exempt from British legislation designed to increase competition.

In form, the American approach seems similar. In substance, a broad disparity exists. The Alexander Report of 1914 acknowledged the desirability of cooperation between shipowners and recommended that conference systems be partially exempt from antitrust regulation. The Report was adopted as section 15 of the Shipping Act of 1916, which authorizes the Federal Maritime Commission (FMC) to approve all liner conference agreements. Exemptions from antitrust law are conferred with FMC approval.

On its face, the American procedure appears to be quite reasonable, however, several systemic refinements have provoked conflict between the United States and other maritime nations. First, American case law has extended the reach of United States jurisdiction over foreign nationals, including those located wholly outside the United States. Additionally, with respect to shipping conferences, the courts

require the FMC to consider antitrust issues more carefully before granting exemptions. Secondly, a philosophical difference exists between English and American antitrust remedies. The British regard American antitrust triple damage awards as penal. Civil actions to enforce trade restriction laws are virtually unknown in England. The American private litigant seeking triple damages is perceived, therefore, as an abnormal yet dangerous threat. Thirdly, American discovery rules are far more comprehensive than British counterparts. For example, the Hart-Scott-Rodino Antitrust Improvements Act authorizes the service of "civil investigative demands" on individuals, corporations or third parties, including foreign nationals, not directly under investigation. Discovery of documents procured from a non-party to a suit using the procedure, carries with it the potential hazard for the producing party of antitrust prosecution should the Department of Justice find evidence of a violation in the discovered information.

Several instances of Anglo-American disagreement stand-out. In 1952, a federal grand jury investigated the foreign

67. We regard the civil action -- I refer here to triple damages -- as being penal rather than compensatory, and consequently consider that in international dealings at least these proceedings should be subject to the limitations that we would regard as appropriate to criminal proceedings. John Nott, Hansard H.C., col. 1151 (1979), reprinted in Huntley, The Protection of Trading Interests Act 1980: Some Jurisdictional Aspects of Enforcement of Antitrust Laws, 30 Int'l & Comp. L.Q. 213, 220 (1980) [hereinafter cited as Huntley].
68. Articles 85 and 86 of the Treaty of Rome (1958) as incorporated into British law, might afford a private cause of action, however, no English court has yet addressed the issue.
petroleum industry. Among the corporations examined was
the Anglo-Iranian Oil Company. The British government
ordered the company not to produce any of the documents
sought by the grand jury.\textsuperscript{71}

In 1960, a United States grand jury investigation\textsuperscript{72}
focused on the shipping industry. It prompted eleven na-
tions and over two hundred foreign shipowners to dispute
the FMC's purported authority to require that documents,
not located in the United States and concerning commercial
transactions occurring outside the United States, be filed
with the FMC. The British formally protested twice during
the investigation.\textsuperscript{73}

Attempts to reconcile the opposing interests of the
United States and other maritime nations proved fruitless.
In 1964, the British Minister of Transport introduced in
the House of Commons the Shipping Contracts and Commercial
Documents Act 1964.\textsuperscript{7} The Act's purposes were twofold,
first to shelter British shipowners from broad American
claims of jurisdiction and secondly, to give the English
government some leverage with which to negotiate settle-
ments.\textsuperscript{75}

\begin{itemize}
    \item \textsuperscript{71} Her Majesty's Government consider it contrary
to international comity that you or your officers
should be required, in answer to a subpoena couched
in the widest terms, to produce documents which
are not only not in the United States of America,
but which do not even relate to business in that
country.

\textit{Reprinted in ILA supra note 5, at 569.} An order from a
sovereign not to comply with a foreign court subpoena is
generally a valid defense for failure to produce the re-
quested evidence.

\item \textsuperscript{72} \textit{Re Grand Jury Investigation of the Shipping Industry,}

\item \textsuperscript{73} \textit{Reprinted in ILA supra note 5, at 404, 579, 582
(1964).}

\item \textsuperscript{74} Shipping Contracts and Commercial Documents Act 1964,
c.87, \textit{repealed by Protection of Trading Interests Act 1980,}
c.11 § 8.

\item \textsuperscript{75} 698 Parl. Deb., H.C. (5th ser.) 1278 (1964).
\end{itemize}
The Act authorized the British Secretary of State to forbid production of commercial information to foreign courts or governmental agencies if to do so would "infringe" on English jurisdiction. It therefore afforded protection to British subjects under the act of state doctrine.

From 1964 to 1979, confrontational rhetoric between the United States and Great Britain eased. American courts, as in Timberlane, and Mannington Mills, evidenced increased flexibility in their approach to the jurisdictional issue. On the diplomatic front, the Organization for Economic Cooperation and Development arranged an agreement between the United States and other seafaring nations concerning statistical data the FMC desired to obtain from foreign shipowners.76 The United States agreed that if the foreign governments would use their good offices to acquire the information voluntarily, the FMC would not attempt to procure it by asserting claims of extraterritorial jurisdiction.

The relative calm was shattered by two events. First, Westinghouse Electric Corporation brought suit against a British Company, Rio Tinto Zinc (RTZ), alleging that RTZ was a member of an international uranium cartel.77 Westinghouse attempted to elicit testimony from the English directors of RTZ. Ultimately, the British House of Lords had to decide whether the American courts had a right to such evidence.78 The British Attorney General intervened in the case, arguing strenuously that English sovereignty

76. OECD, Restrictive Business Practices of Multinational Enterprises 61 passim (1942).
would be violated by a ruling to the contrary.  

The Westinghouse litigation highlighted several weaknesses of the Shipping and Commercial Documents Act 1964, most serious being the difficulty of proving an "infringement" of British jurisdiction. For that reason the Act was not utilized by the British government to block RTZ's directors' testimony, precipitating the need for a decision by the House of Lords prohibiting the testimony on other grounds. 

A second reason for renewed conflict between the United States and England again involved the shipping industry. In 1978, Congress passed a bill which permitted the FMC to exclude a carrier from American ports for rebating on bills of affreightment, a practice common to conference systems. President Carter vetoed the bill, but a modified version was enacted in 1979. Then, in June of that year, a federal grand jury indicted a number of individuals and British shipping lines alleging various criminal antitrust violations. Several defendants entered pleas of nolo contendere to avoid having to defend the action. They were assessed the maximum fines allowable. Subsequently, thirty private

79. Id. at 589-95.
80. The House of Lords held that the United States court's investigation of the British company was a violation of international law and contrary to the Evidence (Proceedings in Other Jurisdictions) Act 1975, c.34 §§ 1(b), 5(1)(b). In re Westinghouse Uranium Contract, [1978] A.C. 547, 616-7, 650-1. The Law Lords were particularly concerned that information obtained in a civil action might be used by the United States Department of Justice to initiate criminal antitrust actions against British corporations.
84. Id.
litigants filed triple damage actions based on the original prosecution. The British government protested at each state of the proceeding. 85

These events, coupled with a long history of confrontation and the election of a conservative government, propelled the Protection of Trading Interests Act 1980 into existence. 86

The act took effect on March 20, 1980. It is divided into eight sections. Section 1 requires persons affected by "overseas measures" 87 to notify the Secretary of State. The Secretary may prohibit compliance if he determines that British trading interests would be otherwise adversely effected. Section 1 is a virtual re-enactment of the Shipping Contracts and Commercial Documents Act 1964, except that dependence upon "jurisdictional infringement" is eliminated.

Section 2 covers commercial documents and other information. The Secretary of State may forbid compliance with "requirements" 88 by foreign courts or authorities to

87. "Overseas measures" are defined as those "taken by or under the law of any overseas country for regulation or controlling international trade" if "they apply or would apply to things done or to be done outside the territorial jurisdiction of that country by persons carrying on business in the United Kingdom". Protection of Trading Interests Act 1980, c.11 § 1(1)(a)-(l)(b).
88. "Requirements" are defined as either a request or demand from "a foreign court or authority addressed to a person in the United Kingdom or demand to produce documents or information to a person specified in the requirement." Protection of Trading Interests Act 1980, c.11 § 2(5).
Section 3 provides a maximum fine of £1,000 for failure to comply with orders issued by the Secretary of State pursuant to the Act. Section 3 does not apply to "a person who is neither a citizen of the United Kingdom and Colonies nor a body corporate incorporated in the United Kingdom."

Section 4 supplements section 2 by superseding various sections of the Evidence (Proceedings in Other Jurisdictions) Act 1975. The thrust of section 4 is to ban production of evidence in pre-trial discovery proceedings.

Section 5 forbids British courts from enforcing multiple damage awards or compensatory antitrust judgments. Claims for contribution to damages are also disallowed. The section anticipates actions brought under section 4 of the Clayton Act.

Section 6 is called the "clawback" provision. It contains the most novel aspect of the Act and from the American viewpoint, the most controversial. It allows "qualifying defendants" to recover damages paid either voluntarily or

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89. Section 2 was designed to stop so-called "fishing expeditions", i.e., wide ranging requests for information and documents in the hope that a violation will be revealed. See, e.g., Radio Corp. of America v. Rauland Corp., [1956] 1 All E.R. 549.
90. Protection of Trading Interests Act 1980, c.11 § 3(4).
91. Protection of Trading Interests Act 1980, c.11 § 3(3).
92. Protection of Trading Interests Act 1980, c.11 § 3(2).
93. Evidence (Proceedings in Other Jurisdictions) Act 1975, c.34.
94. Protection of Trading Interests Act 1980, c.11 § 5(3).
96. Protection of Trading Interests Act 1980, c.11 § 5(2).
97. "Qualifying defendants" are defined as, "citizens of the United Kingdom or its territories, a body incorporated therein, or a person conducting business in the United Kingdom." Protection of Trading Interests Act 1980, c.11 § 6(3).
by attachment against property pursuant to a foreign judgment. Section 6 applies only to the non-compensatory element of any award and is recoverable directly from either the successful plaintiff or a third party entitled to contribution. It permits a British defendant that has paid a triple damage award to a foreign plaintiff to recover two-thirds of the judgment from any assets the foreign plaintiff may have within British jurisdiction. Section 6 is a clear manifestation of British disdain of private triple damage actions.

During the bill's pendency in Parliament the United States urged that section 6 be eliminated. In a diplomatic note, the American government stated, "we do not understand the theory under which . . . a United Kingdom court [should be entitled to] undo what a United States court has done." Although fears of American countermeasures were expressed in the Parliamentary debates, section 6 of the Act was passed essentially as introduced.

Section 7 provides for reciprocal enforcement of foreign judgments in the United Kingdom that correspond to section 6 judgments. In a sense, section 7 invites other countries to enact similar legislation, allowing defendants who have paid multiple damage awards to recover from a multinational plaintiff in other than or in addition to the United Kingdom.

Section 8 is the Act's definitional section. It repeals the Shipping Contracts and Commercial Documents Act 1964.

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99. Protection of Trading Interests Act 1980, c.11 § 6(1).
100. Diplomatic Note No. 56 at 6 (Nov. 9, 1979), reprinted in Lowe, supra note 85, at 278.
102. Protection of Trading Interests Act 1980, c.11 § 7(1).
103. Protection of Trading Interests Act 1980, c.11 § 8(5).
B. Australia

A plaintiff, seeking redress under United States antitrust law against an Australian citizen or corporation, must contend with two "blocking statutes."

Discovery is governed by the Foreign Proceedings (Prohibition of Certain Evidence) Act 1976. The Act vests the Attorney General with broad discretion to restrict both oral testimony and documentary production before foreign tribunals. The Attorney General may institute controls if he determines that an overseas court is asserting jurisdiction or powers that are inconsistent with international law, the comity of nations or when he is convinced that restrictions are necessary to protect national interests. Judicial review of the Attorney General's decision is not possible.

Judgments are regulated by the Foreign Antitrust Judgments (Restriction of Enforcement) Act 1979. Under it, the Attorney General has discretionary authority to modify or prohibit enforcement of foreign antitrust judgments in Australia. Three conditions precedent limit that power. He must be satisfied that either the judgment was (1) rendered in a manner inconsistent with international law or comity, or (2) that acquiescence to or enforcement of the judgment would prejudice Australian domestic commercial

interests, or (3) that complete or partial recognition of the judgment would jeopardize Australian international trading interests.

In late 1981, an amendment to the Foreign Proceedings (Prohibition of Certain Evidence) Act 1976 was introduced in the Australian Parliament. 108 Clause 5 of the bill incorporates a "clawback" provision similar to section 6 of the British Act. It would allow Australian citizens to recover sums paid under a foreign antitrust judgment if the Attorney General deems it entirely unenforceable in Australia. The Attorney General would also have discretion to decide whether the foreign judgment is only partially enforceable, in which case recovery would be limited to a reduced amount. The amendment would go further than the British Act, however, by permitting recovery not only from a foreign plaintiff corporation, but also from companies affiliated with it having assets in Australia.

Clause 6 of the proposed amendment mirrors section 7 of the English Act in providing reciprocal enforcement procedures to foreign citizens of countries with corresponding legislation.

Currently, the United States Department of Justice and the Australian Attorney General are conducting negotiations seeking "an agreement which [will] lay down the framework for consultation about the national interests involved before court proceedings are started." 109

C. Canada

Under a 1976 amendment to the Combines Investigation

Act, 1923, the Canadian Restrictive Trade Practices Commission is authorized to order Canadian citizens to ignore specific foreign laws or judgments on grounds of national interest. The Commission determines which foreign laws or judgments are counter to Canadian affairs.

The Canadian provinces have concurrent legislative capacity with respect to foreign discovery requests and judgment enforcement. Several have enacted their own blocking statutes.

In 1981, a bill was introduced in the Canadian Parliament. It strongly resembles the British Protection of Trading Interests Act 1980. Clause 3 of the bill would authorize the Attorney General to forbid or limit the production of records located either in Canada or under the control of a Canadian citizen if, in his opinion, such disclosure would seriously compromise Canadian interests. Failure to comply with the Attorney General's order would give rise to criminal liability under clause 6.

Clause 5 affords additional assurance that records subject to a clause 3 order will not be produced by allowing Canadian courts to seize and store such records if satisfied that the order might not be obeyed.

Enforcement of foreign antitrust judgments would be subject to clause 7. Like the Australian bill, recognition or enforcement would be contingent upon a determination by the Attorney General that Canadian commercial interests would not be endangered thereby. Should the Attorney General rule otherwise, the entire judgment could not be

111. Section 92(14) British North American Act 1867.
enforced in Canada.

Clause 8 would enable Canadian citizens and corporations to recover any amount paid pursuant to a judgment declared void under clause 7. Citizens or corporations with substantial connections to the country in which the judgment was rendered would be excluded. The bill also proposes to permit Canadian courts to order the seizure and sale of securities of any Canadian corporation in which the entity against whom recovery under clause 8 has been awarded has either a direct or beneficial interest.

D. The Netherlands

In 1956, the Dutch enacted the Economic Competition Act.114 Under article 39, an exemption must be obtained from the Minister of Economic Affairs before Dutch citizens can comply with foreign laws regulating commercial competition.

The article was drafted specifically to counter enforcement of American antitrust law as applied in the Netherlands. It has been invoked only against the United States.115

The Minister has authority to grant general, partial or conditional exemptions. Willful compliance with foreign antitrust laws or proceedings absent an exemption is a misdemeanor under the Economic Crimes Act.116

E. France

In 1968, France enacted legislation preventing its

115. See Pettit & Styles, supra note 3, at 711.
116. Wet Economishe Delieten, arts. 6, 7, 8.
citizens from furnishing commercial information to foreign governments if to do so would threaten national economic interests or sovereignty. The 1968 law was primarily aimed at thwarting investigations by the United States Federal Maritime Commission.

An amendment to the statute became law on July 16, 1980. It forbids disclosure of virtually all types of commercial information to foreign investigative agencies, tribunals or natural or juridical persons.

Article 1 sets forth the prohibition and the criteria under which it will be enforced. Information may not be disclosed "which would threaten the sovereignty, security, or essential economic interests of France or public order, as defined by government authorities to the extent deemed necessary."

Article 1 -- bis' bars requests in writing or otherwise for "information of an economic, commercial, industrial, financial or technical nature, intended for the constitution of evidence in connection with pending or prospective foreign judicial or administrative proceedings."

117. Law No. 68-678, [1968] J.O. 7267. The law's original purpose was to block investigations by the FMC; it was later utilized to protect French industry as a whole. The statute complemented the French reservation to the Hague Convention of 1968, under which letters of request for pre-trial discovery are not given effect.


120. Id., translated in Herzog, supra note 117, at 383.

Under article 2, persons receiving requests or orders for information from a foreign tribunal are required to notify the relevant ministry immediately.\footnote{122}{Law No. 80-538, [1980] J.O. 1799, art. 2.}

Criminal penalties are sanctioned under article 3. Fines and prison sentences are authorized for any violation of article 1, however, no penalties are provided for violations of article 2.\footnote{123}{Law No. 80-538, [1980] J.O. 1799, art. 3.}

Article 3's legislative history suggests that the drafters felt that the possibility of criminal liability could be used by French defendants in the United States to justify invocation of the Fifth Amendment to the United States Constitution as a defense for failure to produce requested evidence.\footnote{124}{But see Societe Internationale pour Participations Industrielles et Commerciales v. Rogers, 357 U.S. 197 (1958).}

The legislation was enacted hastily and is criticized as being ambiguous.\footnote{125}{See, e.g., Herzog, supra note 117, at 383.} Judicial and administrative statutory construction will be necessary before the full scope of the law becomes apparent.

F. West Germany

German law prohibits execution of foreign requests for testimony or documents without prior authorization by the Federal Minister of Justice.\footnote{126}{OLG München, Beschluss vom 31. 10.80, 9 VA 3/80.} The Minister may restrict or otherwise condition the extent of disclosure allowed. To date, no ordinances granting permission have been issued.

The \textit{de facto} ban on disclosure is not as harsh as it appears. In 1976, the United States and West Germany agreed
to consult one another prior to making requests for information. That agreement is proving to be quite workable.

G. Italy

Generally, foreign discovery procedures will not be given effect in Italy unless they comport with Italian rules of civil or criminal procedure. Additionally, certain professional groups cannot be compelled to reveal confidential information obtained during the course of their employment. These include: attorneys, public officials, public employees, clerics, and physicians.

By recent legislative enactment, shipowners cannot honor foreign demands for commercial documents or other maritime information, unless authorized to do so by the Minister of Justice.

Foreign judgments deemed contrary to Italian public policy, are not recognized or enforced in Italy. Non-compensatory damage awards are not considered in accord with Italian principles of justice. An American judgment for triple damages could not, therefore, be executed in Italy, although a "clawback" recovery would, theoretically, be possible.

H. South Africa

Commercial information in any form cannot be divulged to a foreign tribunal or litigant without prior consent by

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128. C.F.C., art. 249; C.F.P., arts. 351, 352.
129. Act (No. 488) of July 24, 1980.
the Minister of Economic Affairs. The Minister's permission is also required before a foreign judgment can be enforced in South Africa.

V. Conclusion

Ancient principles of sovereignty and territorial jurisdiction provide inadequate frameworks in which to resolve modern disputes among nations with conflicting economic regulatory schemes. Traditional concepts ignore the economic interdependence of states. The self-restraint of comity, for example, is insufficiently defined to effectively control the problems of concurrent jurisdiction posed by modern multinational corporations.

Extraterritorial enforcement of American antitrust law has brought these issues into sharp international focus. The foreign statutory response has been extraordinary. Despite almost universal condemnation, the United States has yet to abandon its evangelical embrace of antitrust enforcement.

Admittedly, there is evidence of increased American sensitivity to the international repercussions involved. The federal courts, as in Timberlane and Mannington Mills,

131. Id.
132. In a recent address, the Director of Planning of the Antitrust Division of the United States Department of Justice, expressed surprise that other nations have not emulated the American approach. Joel Davidow, Extraterritorial Antitrust: an American View, Address to the International Chamber of Commerce, Paris, March 12, 1981.
133. The United States Departments of State and Justice have requested federal courts to encourage foreign governments to file amicus curiae briefs in antitrust litigation involving their nationals.
are beginning to recognize the need to weigh political and international issues before deciding the merits of each transnational antitrust case. But a judicial ad hoc approach is simply inadequate. Balancing legal, political and foreign policy considerations along with the economic consequences both here and abroad is beyond the competency of even the most sophisticated federal judge.

If meaningful solutions are to be achieved, a new "general theory of economic sovereignty"\textsuperscript{134} should be developed. Diplomatic negotiations resulting in either bilateral treaties or international conventions\textsuperscript{135} offer the best solution.

There are signs that the United States is moving in that direction. Attorney General William French Smith recently stated:

\begin{quote}
We do not wish through our laws or their enforcement to impair the sovereignty or rights of other nations. We do not wish to police the world and proscribe foreign conduct merely because it fails to conform to our interests. Nevertheless, we intend to influence the conduct of those international activities that have a foreseeable and substantial impact on the legitimate concerns of our people. In many instances, we trust that multilateral or bilateral accords can ensure due regard for our own interests as well as the interests of other governments and peoples.\textsuperscript{136}
\end{quote}

Until agreements are concluded, continued American attempts to extraterritorially enforce United States

\textsuperscript{134} Lowe, supra note 85, at 281.


\textsuperscript{136} Address by Attorney General, the Honorable William French Smith, to the 29th Congress of the Union Internationale des Avocats in New York, August 31, 1981, reprinted in Pettit & Styles, supra note 3, at 715.
antitrust law will spawn new and more extensive foreign statutory enactments. Agreements are necessary to guide both the judiciary and our trading partners away from the confrontational rhetoric of the past and toward a more reasoned approach to antitrust enforcement.

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