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## The Protection of Trading Interests Act of 1980: Britain's Response to U.S. Extraterritorial Antitrust Enforcement

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## COMMENTS

### The Protection of Trading Interests Act of 1980: Britain's Response to U.S. Extraterritorial Antitrust Enforcement

The extraterritorial enforcement of U.S. antitrust laws has long generated discontent between the United States and several European nations.<sup>1</sup> While not alone in attributing extraterritorial jurisdiction to its antitrust laws, the United States is among the minority in this regard,<sup>2</sup> joined only by the European Economic Community,<sup>3</sup> Austria,<sup>4</sup> and the Federal Republic of Germany.<sup>5</sup> Enforcement of the Sherman<sup>6</sup>

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<sup>1</sup> Extraterritorial jurisdiction extends domestic laws to aliens and foreign corporations who are acting outside the territory of the forum country. U.S. antitrust laws have an extraterritorial reach because U.S. policymakers believe that the transnational nature of today's commerce renders the strictly territorial notion of jurisdiction obsolete. See RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 18 (1965); COMMON MARKET AND AMERICAN ANTITRUST: OVERLAP AND CONFLICTS 392-402 (J. Rahl ed. 1970).

<sup>2</sup> See B. HAWK, UNITED STATES, COMMON MARKET AND INTERNATIONAL ANTITRUST: A COMPARATIVE GUIDE 21 (1979); W. FUGATE, FOREIGN COMMERCE AND THE ANTITRUST LAWS 490-91 (2d ed. 1973).

<sup>3</sup> Treaty of Rome, *done* Mar. 25, 1957, art. 85, 86, 298 U.N.T.S. 11.

<sup>4</sup> The Austrian Cartels Act expressly applies to "cartels concluded abroad but affecting the domestic market" and to "cartels relating to foreign markets." Austrian Federal Act of 22 November 1972 on Rules Concerning Cartels and Provisions Designed to Preserve the Freedom of Competition, § 2(2), *as published in Bundesgesetzblatt* (Austria) (Dec. 12, 1972), *as reprinted in* ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT, 1 GUIDE TO LEGISLATION ON RESTRICTIVE BUSINESS PRACTICES, at Austria § 1.0 (loose-leaf binder) (1980).

<sup>5</sup> German law explicitly recognizes that national antitrust interests may extend beyond territorial boundaries. Art. 98(2) of the German Act states: "This Law applies to all restraints of competition which have effect within the territory to which this Law applies, even if they are caused from outside the territory to which this Law applies." Act Against Restraints of Competition, (Gesetz gegen Wettbewerbsbeschränkungen), July 27, 1957, [1957] *Bundesgesetzblatt* [BGBI] I 1080 (W. Ger.), *as republished* Apr. 4, 1974, [1974] BGBI I 869, *amended*, Law of June 28, 1976, [1976] BGBI I 917.

In addition to the German, Austrian, and Community laws, the Australian Trade Practices

and Clayton Acts<sup>7</sup> extends to activities that occur in the course of foreign commerce which substantially affect either foreign or interstate commerce.<sup>8</sup>

As a result of the overhanging jurisdiction claimed by the United States, a number of foreign countries have legislated to protect their residents from the long arm of U.S. antitrust law.<sup>9</sup> These countries per-

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Act of 1974, ACTS AUSTRAL. P. 397 (1974 Supp.), as amended Act, 1975, No. 63; Act, 1976, No. 88; Act, 1977, No. 81; Act, 1977, No. 151; and Act, 1978, No. 206 extends to extraterritorial actions, although its application thus far has been limited. See Taylor, *The Extraterritoriality of the Australian Antitrust Law*, 13 J. INT'L L. & ECON. 273 (1979).

<sup>6</sup> 15 U.S.C. §§ 1-8 (1976).

<sup>7</sup> Jurisdiction exists under sections 3 and 7 of the Clayton Act only if the seller or buyer is "engaged in commerce", which means either interstate domestic or foreign commerce. 15 U.S.C. §§ 12-27, 44 (1976); 29 U.S.C. §§ 52-53 (1976).

<sup>8</sup> Section 1 of the Sherman Act bars "[e]very contract, combination. . . or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations. . . ." Section 2 makes it a violation of law to "monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations. . . ." 15 U.S.C. § 1 (1976). Although there is no set definition of the Sherman Act's jurisdiction, one expert has suggested that it covers a restraint or monopolization either occurring in the course of foreign commerce, or affecting foreign or interstate commerce. Rahl, *Foreign Commerce Jurisdiction of the American Antitrust Laws*, 43 ANTITRUST L.J. 521, 523 (1974). This articulation of the Act's scope was quoted with approval in *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597, 611 (9th Cir. 1976). The Department of Justice, on the other hand, endorsed a "substantial and foreseeable effect" standard in its ANTITRUST GUIDE FOR INTERNATIONAL OPERATIONS. Citing several leading cases, including *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945), in which the doctrine was first articulated, the GUIDE announced "[w]hen foreign transactions have a substantial and foreseeable effect on U.S. commerce, they are subject to U.S. law regardless of where they take place." ANTITRUST DIVISION, U.S. DEPARTMENT OF JUSTICE, ANTITRUST GUIDE FOR INTERNATIONAL OPERATIONS 6 & n.13 (rev. ed. 1977), reprinted in 799 ANTITRUST & TRADE REG. REP. (BNA) at E-1 (Feb. 1, 1977). See Remarks of Donald L. Flexner, Deputy Assistant Attorney General, Antitrust Division, U.S. Department of Justice, before the Antitrust Law Section of the State Bar of Georgia, Atlanta, Ga., *Antitrust Enforcement in United States Foreign Commerce—'Imperialism' or Realism?*, (Dec. 6, 1979) [hereinafter cited as *Antitrust Realism*]. For a recent digest of pertinent cases, see Annot., 40 A.L.R. Fed. 393 (1978).

<sup>9</sup> Recently, Australia enacted the Foreign Antitrust Judgments (Restriction of Enforcement) Act, 1979, No. 13 (Austl.). That Act was a direct response to the prospect of huge default judgments or punitive damage awards in U.S. antitrust suits against several Australian nationals in the *Westinghouse* litigation. See notes 54-89 *infra* and accompanying text. The Act provides that when a foreign court has rendered a judgment in antitrust proceedings, the Australian Attorney General may declare the judgment unrecognizable or unenforceable in Australia, if he is satisfied that the court exceeded its jurisdiction and that the judgment would or might be detrimental to Australian trade or to a financial or trading corporation formed within the Commonwealth. 1979, No. 13, § 3 (Austl.). See Daily Hansard (Austl.), House of Representatives, Mar. 7, 1979, at 730 (daily ed. of PARL. DEB. (Austl.)).

In addition, Canada and South Africa have modified their laws so as to block information that might otherwise be obtainable to plaintiffs in U.S. antitrust litigation. See Canada's Atomic Energy Control Act of 1970, CAN. REV. STAT. c. A-19 (1970), as implemented by the Uranium Information Security Regulations, STAT. O. & R. 77-836 (1977) (replacing Uranium Information Security Regulations, STAT. O. & R. 76-644 (1976)) and the South African Atomic Energy Act of

ceive antitrust law as a facet of national economic policy and consequently regard the extension of U.S. antitrust jurisdiction beyond national borders as inappropriate.<sup>10</sup> Britain and several other Commonwealth countries have urged the United States to rely on political consultation and negotiation when foreign nationals have seemingly transgressed American antitrust laws in activities abroad.<sup>11</sup> In this manner, competing national policies can be evaluated.<sup>12</sup>

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1967, 15 STAT. REPUB. S. AFR. 1043(1)-1045 (1978); amended by the Atomic Energy Amendment Act of 1978, 15 STAT. REPUB. S. AFR. 1061 (1978). See § 30A of the 1978 amendment to the South African Act in particular, which proscribes communication of information "connected with conversations, discussions, meetings or negotiations of any nature whatsoever, which took place between 1 January 1972 and 31 December 1975, between producers of source material or any derivatives or compounds thereof, whether in or outside the Republic, in connection with the production, importation, . . . use or sale [of uranium]. . . ." 15 STAT. REPUB. S. AFR. 1061 (1978). See generally *In re Uranium Antitrust Litigation*, 480 F. Supp. 1138, 1143 (N.D. Ill. 1979); Schwechter and Shepard, *The Effects of United States Antitrust Laws on the International Operations of American Firms*, 1 NW. J. INT'L L. & BUS. 492, 506-07 (1979).

<sup>10</sup> See Note, *Foreign Nondisclosure Laws and Domestic Discovery Orders in Antitrust Litigation*, 88 YALE L.J. 612, 613 n.5 (1979) [hereinafter cited as *Foreign Disclosure Note*]; 940 ANTITRUST TRADE REG. REP. (BNA), at A-8 (Nov. 22, 1979); Daily Hansard, *supra* note 9, at 736 (view of the Australian Parliament); 946 ANTITRUST & TRADE REG. REP. (BNA), at A-24 (Jan. 10, 1980) (view of Australia). For views of the former British Commonwealth states see generally, [1980] 5 TRADE REG. REP. (CCH) ¶ 50,414. See also *Economic Imperialism*, Wash. Post, Dec. 11, 1979, § A at 14.

The common element among national antitrust laws is their support of economic competition. Only a few nations have adopted the American system of prohibitions, enforced by judicial or administrative civil sanctions, with perhaps criminal penalties and private suits as well. Other countries have adopted a registration system which requires that specified classes of restrictive agreements be registered with public authorities, who generally have the power to require changes in the agreements or to declare them void. J. RAHL & R. KENNEDY, ANTITRUST LAW 2-148 (1979) (unpublished course materials for Antitrust Law, Northwestern University). See Taylor, *supra* note 5, at 273; Baker, *Antitrust Conflicts Between Friends: Canada and the United States in the Mid-1970's*, 11 CORNELL J. INT'L L. 165, 166 (1978).

<sup>11</sup> See [1980] 5 TRADE REG. REP. (CCH) ¶ 50,415; Department of Trade of the United Kingdom, Press Notice Ref. 445, Protection of Trading Interests Bill Published (Oct. 31, 1979) [hereinafter cited as Oct. U.K. Press Notice]; Diplomatic Note from the British Embassy in Washington, D.C. to the U.S. Department of State, Nov. 27, 1979, reprinted in Department of Trade of the United Kingdom, Press Notice Ref. 523, Note No. 225 (Dec. 4, 1979) [hereinafter cited as British Diplomatic Note].

By enacting the Foreign Antitrust Judgments Act, the Australian government sought to transfer the conflict resolution from the U.S. judiciary to bilateral negotiations among policymakers. This Act empowers the Attorney General to refuse recognition of final orders of foreign courts. Daily Hansard, *supra* note 9, at 738.

<sup>12</sup> Foreign countries that object to the extraterritorial scope of U.S. antitrust laws usually have urged either that the alleged international anticompetitive behavior be made a matter for political resolution or that domestic courts defer to the legislative, executive or judicial acts of other nations. At different times, the Australian Parliament, for example, has insisted upon each of these two alternatives. See Daily Hansard, *supra* note 9, at 738; 946 ANTITRUST & TRADE REG. REP. (BNA), at A-24 (Jan. 10, 1980); Dep't of Trade of the United Kingdom, Press Notice (Sept. 14, 1979) [hereinafter cited as Sept. U.K. Press Notice]. The latter alternative is the principle of international comity, which is defined in *Hilton v. Guyot*, 159 U.S. 113 (1895), as one nation "having

Over the past thirty years, foreign reaction to the extraterritorial application of U.S. laws has been manifested in diplomatic protest and the passage of various statutes.<sup>13</sup> The most recent resort by a foreign country to legislation resulted in the British Protection of Trading Interests Act (Trading Interests Act), passed by Parliament in March 1980.<sup>14</sup> The Act shares with several prior foreign statutes the aim of thwarting the exercise of U.S. extraterritorial jurisdiction over foreign citizens.<sup>15</sup> Although the Act's objective resembles that of previous foreign legislation, its scope and its methods are unprecedented.<sup>16</sup>

Prior foreign statutes were defensive in nature and sought to im-

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due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws." *Id.* at 164.

On Sept. 14, 1979, the British Secretary of State for Trade, in a speech to the British-American Chamber of Commerce in Los Angeles stated: "The economic interdependence of the Western nations, particularly the very large financial and business investment between the US and UK requires considerable sensitivity when it comes to the effects of one nation's actions on the other. It demonstrates the desirability of intergovernment discussion rather than unilateral action to solve multilateral problems." Sept. U.K. Press Notice, *supra*, at 16.

<sup>13</sup> *E.g.*, (1) *Canada*—The Business Records Protection Act, ONT. REV. STAT. c. 54 (1970); The Business Concerns Records Act, QUE. REV. STAT. c. 278 (1964); The Atomic Energy Control Act, CAN. REV. STAT. c. A-19 (1970), as implemented by The Uranium Information Security Regulations, STAT. O. & R. 77-837 (1976) (replacing Uranium Information Security Regulations, STAT. O. & R. 76-644 (1976)); (2) *Great Britain*—The Shipping Contracts and Commercial Documents Act, 1964, c. 87, as modified by The Transfer of Functions (Shipping and Construction of Ships) Order, 1965, STAT. INST. No. 145, ¶ 2, and Ministry of Aviation Supply (Dissolution) Order, 1971, STAT. INST. No. 719, ¶ 2(1) (1971); (3) *Australia*—The Foreign Proceedings (Prohibition of Certain Evidence) Act, 1976, No. 121 (Austl.), as amended by The Foreign Proceedings (Prohibition of Certain Evidence) Amendment Act, 1976, No. 202 (Austl.), as implemented by Order of the Attorney General, Austl. Gov't Gaz. No. S. 214 (Nov. 29, 1976); (4) *Netherlands*—Economic Competition Act of June 28, 1956, [1956] Staatsblad voor het Koninkrijk der Nederlanden [Stb.] No. 401, as amended [1958] Stb. No. 413, as reprinted in 2 GUIDE TO LEGISLATION ON RESTRICTIVE BUSINESS PRACTICES, *supra* note 4, at Netherlands § 1.0; (5) *Switzerland*—Codice pénal suisse §§ 271-74 (Dec. 21, 1937) (as amended); (6) *South Africa*—The Atomic Energy Act of 1978, 15 STAT. REPUB. S. AFR. 1061 (1978).

For recent analysis of foreign nondisclosure laws, see Rahl, *Enforcement and Discovery Conflicts: A View from the United States*, in INTERNATIONAL ANTITRUST, FIFTH ANNUAL FORDHAM CORPORATE LAW INSTITUTE 347-55 (B. Hawk ed. 1979); Lever, *Aspects of Jurisdictional Conflict in the Field of Discovery*, in *id.* at 364-74; *Foreign Disclosure Note*, *supra* note 10, at 612; *Note, Discovery of Documents Located Abroad in U.S. Antitrust Litigation: Recent Developments in the Law Concerning the Foreign Illegality Excuse for Non-Production*, 14 VA. J. INT'L L. 747 (1974) [hereinafter cited as *Foreign Excuse Note*].

<sup>14</sup> Protection of Trading Interests Act, 1980, c. 11.

<sup>15</sup> See K. BREWSTER, ANTITRUST AND AMERICAN BUSINESS ABROAD 45-51 (1958); *Foreign Disclosure Note*, *supra* note 10, at 613 n.5; COMMON MARKET AND AMERICAN ANTITRUST: OVERLAP AND CONFLICT, *supra* note 1, at 118.

<sup>16</sup> The underlying purpose of the British Act is, as is the purpose of the 1979 Australian Act, to insulate certain actions of foreign parties from judgment and sanctions by U.S. courts and, failing that, to assure that substantial deference is paid to the policies of the foreign state.

pede U.S. extraterritorial litigation at the discovery<sup>17</sup> and enforcement stages.<sup>18</sup> The Trading Interests Act similarly incorporates a document nondisclosure provision,<sup>19</sup> as well as a restriction on the enforcement of foreign treble damage awards and certain antitrust judgments.<sup>20</sup> The failure of prior British laws to bar what Britain perceives as infringement on its sovereignty by U.S. courts, however, has prompted the Trading Interests Act which, for the first time, includes offensive measures.<sup>21</sup> Specific defendants are now entitled to recover noncompensatory damages paid in a foreign court by attaching any assets of the winning plaintiff located in the United Kingdom.<sup>22</sup> Furthermore, under certain circumstances a winning plaintiff's assets in the United Kingdom are susceptible to attachment by a defendant of a third country as compensation for punitive damages that the defendant has paid.<sup>23</sup> Moreover, this provision is premised on reciprocity so that a losing British defendant may be able to recover against the plaintiff's

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<sup>17</sup> The Quebec Business Concerns Records Act, QUE. REV. STAT. c. 278 (1964), the British Shipping Contracts and Commercial Documents Act, 1964, c. 87, the Australian Foreign Proceedings (Prohibition of Certain Evidence) Act, 1976, No. 121 (Austl.), and the Dutch Economic Competition Act, [1956] Stb. No. 401, *as amended* [1958] Stb. No. 413, are representative. While most of these statutes were not expressly enacted to thwart antitrust discovery, they were all aimed at blocking what was perceived as U.S. encroachment on national sovereignty. However effective these statutes have been in restricting access to information, they have proven inadequate to accomplish their objective since litigation has taken place anyway. See Shifrin, *Antitrust Action Pledged Despite Foreign Laws*, Wash. Post, Aug. 10, 1978, § D, at 1.

<sup>18</sup> The Australian Foreign Proceedings (Prohibition of Certain Evidence) Act, 1976, No. 121 (Austl.), was the first foreign statute to counteract private U.S. antitrust litigation by proscribing the recognition and enforcement of foreign judgments. Australia is, however, only able to prevent recovery of foreign judgments within its own territory. Australian nationals abroad remain vulnerable, as do their foreign based assets. See Daily Hansard, *supra* note 9, at 732, 735.

<sup>19</sup> 1980, c. 11, § 2. See text accompanying notes 120-31 *infra*.

<sup>20</sup> 1980, c. 11, § 6. See text accompanying notes 132-36 *infra*.

<sup>21</sup> To a certain extent, the protection afforded foreign nationals by existing foreign laws has been undermined in the United States by court decisions. In *United States v. First Nat'l City Bank*, 396 F.2d 897 (2d Cir. 1968), the Second Circuit held that the United States' interest in its antitrust discovery procedures outweighed both the German interest in its bank secrecy doctrine and the potential liability the defendant Bank faced for not producing German-based documents sought in a grand jury investigation. Such decisions clearly notify foreign defendants that U.S. judicial proceedings will not always be modified to accommodate foreign interests. See Note, *The Use of Section 40, Restatement (Second), The Foreign Relations Law of the United States to Determine Whether to Compel the Production of Documents Abroad*, 6 HARV. LEGAL COMMENTARY 43 (1969) [hereinafter cited as *Restatement Note*]; Shifrin, note 17 *supra* and *Foreign Excuse Note*, note 13 *supra*. Additionally, the federal courts treat a failure to respond to or to contest a complaint as a confession, leading to a default judgment and liability for full damages. See, e.g., *In re Uranium Antitrust Litigation* (Westinghouse Elec. Corp. v. Rio Algom), 617 F.2d 1248 (7th Cir. 1980). Foreign statutes that pre-date the Trading Interests Act do not mitigate this result.

<sup>22</sup> 1980, c. 11, § 6. See text accompanying notes 137-49 *infra*.

<sup>23</sup> 1980, c. 11, § 7. See text accompanying notes 150-52 *infra*.

assets in an otherwise disinterested third country.<sup>24</sup>

To promote the objectives of the Act, the Secretary of State is granted unusually broad enforcement powers including some previously exercised by the judiciary. For example, a decision to release information for evidentiary purposes to litigants in foreign courts is no longer made solely by the judiciary.<sup>25</sup> The Protection of Trading Interests Act authorizes the Secretary of State to prohibit compliance with a foreign court's letter of request if the information sought infringes on British sovereignty or would prejudice national security or foreign trade relations.<sup>26</sup> By transferring this authority to a political official, Parliament has enabled the government to respond flexibly and aggressively to suits by U.S. litigants that intrude on British sovereignty.

Although clearly a reaction to the pending *Westinghouse* uranium cartel litigation<sup>27</sup> and the potentially huge judgments involved, the impact of the Protection of Trading Interests Act extends beyond that litigation. First, the Act poses major new obstacles to the successful resolution and enforcement of U.S. extraterritorial antitrust suits against foreign defendants.<sup>28</sup> Second, it represents an attempt by Britain to induce the United States to alter the application of its antitrust laws with regard to the activities of foreign nationals beyond U.S. territory.<sup>29</sup> Presently, a private party is encouraged to sue on an antitrust violation by the treble damage remedy.<sup>30</sup> A private suit is initiated and

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<sup>24</sup> 1980, c. 11, § 7.

<sup>25</sup> See text accompanying notes 120-31 *infra*.

<sup>26</sup> 1980, c. 11, § 2(2).

<sup>27</sup> *Westinghouse Elec. Corp. v. Rio Algom Ltd.*, No. 76-C3830 (N.D. Ill., filed Oct. 15, 1976). See text accompanying notes 36-39 *infra*. For an informative overview of the lengthy *Westinghouse* litigation, see Wood & Carrera, *The International Uranium Cartel: Litigation and Legal Implications*, 14 TEX. INT'L L.J. 59 (1979); Note, *Discovery in Great Britain: The Evidence (Proceedings in Other Jurisdictions) Act*, 11 CORNELL INT'L L.J. 323, 324 n.4 (1978) [hereinafter cited as *Discovery Note*]; Merhige, *The Westinghouse Uranium Case; Problems Encountered in Seeking Foreign Discovery and Evidence*, 13 INT'L LAW. 19 (1979).

<sup>28</sup> See text accompanying notes 159-264 *infra*.

<sup>29</sup> For general commentary on the Trading Interests Act, see 9 INT'L PRACTITIONER'S NOTEBOOK 1 (1980); Baker, *U.K. Using New Weapons to Attack Foreign Reach of U.S. Trust Laws*, NAT'L L. J., Jan. 14, 1980, at 24. See also Dep't of Trade of the United Kingdom, Press Notice Ref. 523 (Dec. 4, 1979) [hereinafter cited as Dec. U.K. Press Notice].

<sup>30</sup> A treble damage provision, permitting "[a]ny person who shall be injured. . . [to] recover threefold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee" was part of the original Sherman Act. Sherman Antitrust Act, ch. 647, § 7, 26 Stat. 210 (1890) (codified at 15 U.S.C. § 7 (1976)). The original § 7 was repealed in 1955 and superceded by § 4 of the Clayton Act, c. 283, § 4, 69 Stat. 283 (1955) (current version at 15 U.S.C. § 15 (1976)), which reenacted a treble damage provision. This remedy derives from the British Statute of Monopolies, 1623, 21 Jac. 1, c. 3, § 4, which was repealed by the Statute Law (Repeals) Act, 1969, c. 52. This statute evidently had fallen into disuse by the 18th century, although multiple damage provisions still appear elsewhere in English law. See, e.g., Distress for Rent Act, 1689, 2 W. & M. 77, c. 5, § 3

adjudicated without consideration of possible political repercussions or complications resulting from the involvement of a foreign defendant.<sup>31</sup> By threatening a winning plaintiff with a British action that would reclaim any compensatory portion of this treble damages award, the Trading Interests Act is designed to discourage private extraterritorial antitrust suits, at least insofar as British commerce is affected.<sup>32</sup>

Private litigants in the United States will find that the cost of litigation against foreign defendants far exceeds any benefit to be derived.<sup>33</sup> If private antitrust litigation can no longer be induced by the promise of treble damages, enforcement of these laws is certain to decline. Even if enforcement by the Department of Justice expands, it is unlikely to

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(treble damages), § 4 (double damages), *reprinted in* 9 HALSBURY'S STATUTES OF ENGLAND 511 (3d ed. 1969).

<sup>31</sup> There are risks associated with enabling private suits against foreign defendants to proceed merely because a substantial effect on American foreign or interstate commerce is shown. For example, U.S. foreign policy and international relations may be jeopardized by attendant jurisdictional controversies. One observer has advocated a statutory prohibition on private suits. Snyder, *Foreign Investment and Trade: Extraterritorial Impact of United States Antitrust Law*, 6 VA. J. INT'L L. 1, 36-37 (1965).

In *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597 (9th Cir. 1976), Judge Choy suggested instead, a judicial evaluation and balancing of the foreign interests and commercial consequences involved. *Id.* at 613. He remarked that sensitivity to foreign implications of extraterritorial enforcement of U.S. laws "is especially required in private suits, for in these cases there is no opportunity for the executive branch to weigh the foreign relations impact, nor any statement implicit in the filing of the suit that that consideration has been outweighed." *Id.* In contrast, at an early stage in its investigations of foreign parties, the Justice Department notifies those foreign governments that may have an interest in the case. *See* Antitrust Realism, *supra* note 8, at 7-8.

The United States is a party to several arrangements calling for international notification and consultation about antitrust enforcement proceedings. These include: a bilateral executive agreement with the Federal Republic of Germany, Agreement Relating to Mutual Cooperation on Restrictive Business Practices, June 23, 1976, United States-Federal Republic of Germany, 27 U.S.T. 1956, T.I.A.S. No. 8291, *reprinted in* [1978] 5 TRADE REG. REP. (CCH) ¶ 50,283; an informal understanding with Canada, *Canada-United States Joint Statement Concerning Cooperation in Antitrust Matters*, 8 INT'L LEGAL MATERIALS 1305 (1969); two Organization for Economic Cooperation and Development (OECD) Council recommendations, O.E.C.D. Recommendation on Notification and Co-operation, C(67) 53 (final), Oct. 10, 1967 and Recommendations of the Council, C(73) 99 (final), Oct. 3, 1973; and a decision by the General Agreement on Tariffs and Trade organization to cooperate in lessening the harmful effects of restrictive business practices. *See* Marks, *State Department Perspectives on Antitrust Enforcement Abroad*, 13 J. INT'L L. & ECON. 153 (1978).

<sup>32</sup> *See* British Diplomatic Note, note 11 *supra*. The British government stated that one of its major objections to the private treble damage action provided by U.S. antitrust laws, is that "the usual discretion of a public authority to enforce laws in a way which has regard to the interests of society is replaced by a motive on the part of the plaintiff to pursue defendants for private gain thus excluding considerations of a public nature." *Id.* This objection finds redress in § 6 of the Protection of Trading Interests Act, 1980, c. 11, which enables losing defendants to recover non-compensatory damages through suit against a plaintiff's British-based assets.

<sup>33</sup> For a general discussion of the protracted nature of antitrust litigation, see Wall St. J., Aug. 29, 1978, at 14, col. 4.



compensate for the predictable decrease in private suits. Thus, the Trading Interests Act constitutes a major challenge to the extraterritorial enforcement of U.S. antitrust laws.

This comment will first examine the impetus for the Trading Interests Act. A discussion of the *Westinghouse* uranium contracts litigation<sup>34</sup> and the Justice Department's prosecution of three European shipping lines<sup>35</sup> will highlight the three British objections to U.S. extraterritorial antitrust enforcement that motivated the passage of the Act: (1) U.S. intrusions on British sovereignty; (2) the availability of a treble damage remedy to private litigants; and (3) the inattention of U.S. courts to considerations of international comity. Second, this comment will describe the provisions of the Trading Interests Act and analyze their import. The Act affects the availability of discovery to foreign courts and authorities as well as the recognition and enforcement of foreign multiple damage and antitrust judgments. It empowers the Secretary of State to prohibit compliance by persons in the United Kingdom with overseas measures affecting British trade or security interests. Additionally, the Act creates a new cause of action which permits qualifying defendants who have paid noncompensatory damages on a foreign judgment to recover in Britain against the assets of the winning foreign plaintiff.

Finally, this comment will assess the Act's implications for current United States antitrust enforcement practices. The British statute may trigger the need for a re-evaluation of the viability of U.S. antitrust enforcement procedures, especially as they concern private suits. The recovery or "claw back" provision of the Act, in particular, will considerably raise the stakes for private litigants, and will thus minimize private antitrust enforcement.

### IMPETUS FOR THE BRITISH LAW

The impetus for the British Protection of Trading Interests Act is directly traceable to the protracted *Westinghouse* uranium cartel litigation which began in 1975.<sup>36</sup> This litigation provoked Britain and the

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<sup>34</sup> See text accompanying notes 36-89 *infra*.

<sup>35</sup> See text accompanying notes 90-98 *infra*.

<sup>36</sup> *In re Westinghouse Elec. Corp. Uranium Contracts Litigation*, 405 F. Supp. 316 (J.P.M.D.L. 1975). See *Westinghouse Elec. Corp. v. Rio Algom Ltd.*, 617 F.2d 1248 (7th Cir. 1980); *Discovery Note*, *supra* note 27, at 324 n.4 (summarizing the complex litigations involved); Daily Hansard, *supra* note 9, at 731; [1980] 5 TRADE REG. REP. (CCH) ¶ 50,414. A press notice issued on Oct. 31, 1979, by the British Department of Trade expressly attributes the introduction of the Protection of Trading Interests bill to the *Westinghouse* litigation and a grand jury indict-

other countries whose nationals were defendants.<sup>37</sup> The disputed issues are best understood through a brief summary of the litigation.

In 1975, twenty-seven separate suits were brought against the Westinghouse Electric Corporation for breaching contracts to supply uranium to electric utility companies.<sup>38</sup> Westinghouse responded *inter alia* with a defense of commercial impracticability arising from an international uranium producers cartel,<sup>39</sup> consisting of corporations from Canada, Britain, South Africa and Australia. This cartel allegedly denied Westinghouse access to supplies and conspired to raise the market price of uranium, which had increased eightfold.<sup>40</sup> To sustain its commercial impracticability defense, Westinghouse sought to produce thousands of documents located abroad by utilizing the letters rogatory procedure.<sup>41</sup> Both the Canadian<sup>42</sup> and Australian<sup>43</sup> courts refused to honor the letters of request, referring to the discretionary nature of this procedure and the existence of domestic laws and policies which conflicted with disclosure.<sup>44</sup>

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ment of several European shipping lines. Oct. U.K. Press Notice, note 11 *supra*. See notes 90-92 and accompanying text *infra*.

<sup>37</sup> See *Westinghouse Elec. Corp. v. Rio Algom Ltd.*, 480 F. Supp. 1138, 1155-56 (N.D. Ill. 1979); Stanford, *The Application of the Sherman Act to Conduct Outside the United States: A View from Abroad*, 11 CORNELL INT'L L.J. 195, 204-14 (1978) (discussing the alleged infringement of political and national security policies); Baker, note 10 *supra*; Oct. U.K. Press Notice, note 11 *supra* (addressing disputes over sovereignty, jurisdiction, and discovery in a foreign country).

<sup>38</sup> For detailed analysis of the issues presented and argued in *In re Westinghouse Elec. Corp. Uranium Contracts Litigation*, 405 F. Supp. 316 (J.P.M.D.L. 1975), see Wood & Carrera, note 27 *supra*; *Discovery Note*, *supra* note 27, at 324 n.4; Merhige, note 27 *supra*; Lever, note 13 *supra*.

<sup>39</sup> 436 F. Supp. at 991.

<sup>40</sup> *Id.* at 994.

<sup>41</sup> Letters rogatory are "the medium . . . whereby one country, speaking through one of its courts, requests another country, acting through its own courts and by methods of court procedure peculiar thereto and entirely within the latter's control, to assist the administration of justice in the former country." *The Signe* (Tiedmann v. The Signe), 37 F. Supp. 819, 820 (E.D. La. 1941), *case decided sub nom.* The Florida, 39 F. Supp. 810 (E.D. La. 1941), *aff'd sub nom.* The Florida, 133 F.2d 719 (5th Cir. 1943). See 28 U.S.C. §§ 1781-84 (1976); FED. R. CIV. P. 28(b); 14A BENDER'S FORMS OF DISCOVERY § 13.05[3] (1974). For further discussion of foreign reaction to the use of letters rogatory by U.S. courts, see Rahl, note 13 *supra*; *Foreign Disclosure Note*, note 10 *supra*; *Discovery Note*, note 27 *supra*.

<sup>42</sup> *In re Westinghouse Elec. Corp. Uranium Contracts Litigation*, 563 F.2d 992 (J.P.M.D.L. 1975); Wood & Carrera, *supra* note 27, at 93-96.

<sup>43</sup> Merhige, *supra* note 27, at 20.

<sup>44</sup> *In re Westinghouse Elec. Corp. and Duquesne Light Co.*, 78 D.L.R.3d 3 (Ont. 1977), *cited in* Wood & Carrera, *supra* note 27, at 93. Westinghouse applied to the High Court of Justice for the Province of Ontario for enforcement of the letters rogatory against individuals connected with four Canadian corporations, but the High Court refused. Australia also refused to grant the letters of request. Wood & Carrera, *supra* note 27, at 94 n.168. See *In re Uranium Antitrust Litigation*, 480 F. Supp. 1138, 1155 (N.D. Ill. 1979); Stanford, *supra* note 37, at 204-06.

The Attorney General of Canada intervened in the judicial proceedings and filed an affidavit that indicated that the "informal marketing arrangement of non-United States producers" of ura-

Unlike its Australian and Canadian counterparts, however, the High Court of England gave effect to the letters rogatory,<sup>45</sup> pursuant to the Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters,<sup>46</sup> to which both Britain and the United States are signatories.<sup>47</sup> The parties and corporations named in the letters refused to testify, claiming privilege under the fifth amendment to the U.S. Constitution and comparable E.E.C. and British safeguards.<sup>48</sup> In an unusual step,<sup>49</sup> the U.S. Department of Justice assured the presiding

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nium was intended to stabilize the uranium market. Wood & Carrera, *supra* note 27, at 93. Furthermore, the affidavit claimed Crown privilege with respect to the documents sought, and explained that disclosure was not in the public interest. *Id.* In refusing to enforce the letters, the Canadian court stressed that granting them was a matter of international comity which will not be exercised in violation of the public policy of the state to which the request is made. *Id.* at 93-94. Furthermore, the court doubted that the letters sought evidence that was properly within the limited scope of the letters rogatory procedure. The court decided that letters rogatory could only be used to acquire evidence that was either absolutely necessary for the requesting court to render justice or that was directly admissible at trial. It concluded that Westinghouse was not requesting either sort of evidence. *Id.* Moreover, the court found itself precluded from granting the application by the Uranium Information Security Regulations which made it an offense to disclose documents or materials relating to the uranium pricing arrangements. STAT. O. & R. 76-644, § 3 (1976), revised by STAT. O. & R. 77-836 (1977).

In response to the letters rogatory directed to the court in New South Wales, the Australian government hastily enacted legislation which made the disclosure of information on subjects thereafter designated by the Attorney General, including uranium, a criminal offense. See the Foreign Procedures (Prohibition of Certain Evidence) Act, 1976, No. 121 (Austl.). For an account of the haste with which the legislation was enacted, see Daily Hansard, *supra* note 9, at 731.

<sup>45</sup> *In re Westinghouse Elec. Corp. Uranium Contracts Litigation*, [1977] 3 W.L.R. 430, [1977] 3 All E.R. 703 (C.A. 1977), *rev'd*, [1978] 2 W.L.R. 81 (H.L. 1977). See Wood & Carrera, *supra* note 27, at 97-100.

<sup>46</sup> The Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters of 1968, opened for signature Mar. 18, 1970, 658 U.N.T.S., established procedures for complying with foreign discovery requests in the form of letters rogatory. The Convention was executed in the United Kingdom by the Evidence (Proceedings in Other Jurisdictions) Act, 1975, c. 34. See Carter, *Obtaining Foreign Discovery and Evidence for Use in Litigation in the United States: Existing Rules and Procedures*, 13 INT'L LAW. 3, 10 n.10 (1979).

<sup>47</sup> The other parties to the Hague Convention are Czechoslovakia, Denmark, Finland, France, Luxembourg, Norway, Portugal, and Sweden. Carter, *supra* note 46, at 10 n.10.

<sup>48</sup> U.S. CONST. amend. V. Appellants argued that the Evidence Act should permit them the same privileges against compelled evidence that a person would typically have in the forum jurisdiction, that is, in the U.S. The British appellants also contended that by complying they would be exposed to prosecution under European Economic Community Law by virtue of article 85 of the Treaty of Rome, which prohibits cartels, and article 15(2) of the EEC Council Regulations, Rio Tinto Zinc v. Westinghouse Elec. Corp., [1978] 2 W.L.R. 81, 89-90 (H.L. 1977). See 13 J.O. COMM. EUR. 204, 209 (1962), which authorizes the European Commission to enforce penalties under article 85; see generally Wood & Carrera, *supra* note 27, at 97.

<sup>49</sup> The Department of Justice has a policy against offering immunity to secure testimony in private litigation "except in the most extraordinary circumstances." Letter from the Attorney General of the United States to the United States Attorney for the Eastern District of Virginia (July 12, 1977), reprinted in part in Rio Tinto Zinc v. Westinghouse Elec. Corp., [1978] 2 W.L.R. 81, 91 (H.L. 1977). The Justice Department's intercession in a private action was apparently so

U.S. district court judge that since the evidence requested by the letters rogatory might be indispensable to a grand jury investigation of the uranium cartel underway in Washington,<sup>50</sup> the witnesses' testimony would be immunized from use in criminal prosecution in the United States.<sup>51</sup> The British defendants appealed to the House of Lords, both as to the appellate court's order that the letters be effectuated and as to their entitlement to immunity from testifying under the fifth amendment privilege.<sup>52</sup> On several grounds, the House of Lords denied effect to the letters.<sup>53</sup> That decision discouraged any further attempts by Westinghouse to obtain documents in the breach of contract action.

The activities of the international uranium cartel also formed the basis of a separate antitrust action lodged by Westinghouse in October 1976 against twelve foreign and seventeen domestic uranium producers.<sup>54</sup> In this case, nine of the twelve foreign defendants rejected outright the personal jurisdiction of the U.S. district court by failing to appear or otherwise reply to Westinghouse's complaint.<sup>55</sup> Final default judgments were entered against these firms in January 1979<sup>56</sup> and tem-

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extraordinary that, according to Lord Wilberforce of the British High Court, it was unprecedented. *Id.* at 94. See also *Cira, Jr., Current Problems in the Extraterritorial Application of U.S. Antitrust Law*, 13 J. INT'L L. & ECON. 157, 159 (1978); Bell, *International Comity and the Extraterritorial Application of Antitrust Laws*, 51 AUST'L L.J. 801, 802 (1977).

<sup>50</sup> In 1976, the Justice Department convened a grand jury in Washington, D.C. to investigate the alleged international uranium cartel. See Burnham, *Data Show U.S. Rejected Effort to Prosecute a Uranium Cartel*, N.Y. Times, Dec. 4, 1979, § A at 1, col. 5; Bukro, *U.S. Probing Uranium Cartel*, Chicago Tribune, Sept. 2, 1976, § 3 at 1; see generally *Hearings on the International Uranium Cartel Before the Subcomm. on Oversight and Investigations of the House Comm. on Interstate and Foreign Commerce*, 95th Cong., 1st Sess. (1977).

<sup>51</sup> [1978] 2 W.L.R. at 92-94. See Wood & Carrera, *supra* note 27, at 98-99; *Discovery Note*, *supra* note 27, at 325 n.7.

<sup>52</sup> [1978] 2 W.L.R. at 93.

<sup>53</sup> *Id.* at 93-94. Most significantly, the Lords asserted that the Justice Department's intervention into the private civil proceedings changed it into a criminal matter and negated the applicability of the Evidence Act. Under section 1(b) of the Evidence Act, letters rogatory may be used before the initiation of a civil suit, but, under section 5, they may not be used before the initiation of a criminal proceeding. Since a grand jury investigation comes before any formal criminal charge, the information it might request of British residents or citizens can not be legally provided.

The High Court also acknowledged the long-term British policy in opposition to U.S. extraterritorial investigations of U.K. companies. Lord Wilberforce asserted: "The courts should in such matters speak with the same voice as the executive," thereby deferring to the government view that British sovereignty would be infringed by compliance with the letters rogatory. *Id.* at 94.

<sup>54</sup> *In re Uranium Antitrust Litigation*, 480 F. Supp. 1138 (N.D. Ill. 1979), *aff'd* 617 F.2d 1248 (7th Cir. 1980).

<sup>55</sup> 617 F.2d at 1250. In February 1977, the district court entered default judgments pursuant to Rule 55(a) of the Federal Rules of Civil Procedure against each of the nine defaulting defendants. *Id.*

<sup>56</sup> *Id.* See generally 898 ANTITRUST & TRADE REG. REP. (BNA), at A-1 (Feb. 8, 1979). The companies judged in default were four Australian companies (Conzinc Rio Tinto of Australia,

porary restraining orders were imposed on their wholly owned U.S. subsidiaries that required the firms to give notice to the court twenty days before assets exceeding \$10,000 could be transferred out of the country.<sup>57</sup> Upon appeal, the Seventh Circuit Court of Appeals upheld the default judgments and the temporary restraining orders.<sup>58</sup> The court stayed a determination of damages against the defaulters pending judgment as to the non-defaulting defendants, unless Westinghouse decided to drop claims against the answering defendants.<sup>59</sup>

Of the active defendants, ten were ordered to produce documents situated abroad.<sup>60</sup> Upon their refusal to comply, the district judge ordered the disclosure of these documents,<sup>61</sup> despite the existence of foreign statutes imposing criminal penalties for disclosing the information.<sup>62</sup> Rejecting a balancing approach advocated by several defendants,<sup>63</sup> the court maintained that "[i]t is simply impossible to ju-

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Ltd., Mary Kathleen Uranium Ltd., Pancontinental Mining Ltd., and Queensland Mines Ltd.), two British companies (Rio Tinto Zinc Corp. Ltd. and RTZ Services Ltd.), two South African companies (Nuclear Fuels Corporation of South Africa and Anglo-American Corporation of South Africa Ltd.), and one Canadian corporation (Rio Algom Ltd.). 617 F.2d at 1253 n.11.

<sup>57</sup> 617 F.2d at 1250. The temporary restraining order was effective for a period of nine days, after which a hearing was held and a preliminary injunction was entered. Within hours of receiving notice of the temporary restraining order, Rio Tinto Zinc Corp. (RTZ), the London parent of several of the defaulters, instructed employees of its subsidiaries to transfer as much money as possible from U.S. bank accounts into Canada. Without notifying the district court, approximately \$3,200,000 were transferred from one of the U.S. defaulters to another in Canada. Several other plans were devised to transfer money from the United States companies to foreign subsidiaries of RTZ. *Id.* at 1250-52. The appeal was presented for the defaulters by the active defendants, who argued that their case would be prejudiced by an immediate hearing on the defaulters' damages, such as the district court had held to be appropriate. In addition, the governments of Australia, Canada, South Africa and the United Kingdom of Great Britain and Northern Ireland filed briefs as amici curiae. *Id.* at 1253.

<sup>58</sup> *Id.* at 1256-63.

<sup>59</sup> *Id.* at 1262-63. Four additional defendants satisfied the discovery orders, either by production of documents or by summarizing the contents of the requisite material. 480 F. Supp. at 1142. The ten other defendants invoked foreign law objections based on Canadian, Australian, Swiss, and South African laws. *Id.* at 1142-43. In view of the defendants' resulting vulnerability to criminal prosecution, the main issue was whether they should be compelled to produce documents that had been withheld. *Id.* at 1144. The test applied was formulated in *Société Internationale v. Rogers*, 357 U.S. 197 (1958), 480 F. Supp. at 1145-48. For a discussion of the *Rogers* test, see COMMON MARKET AND AMERICAN ANTITRUST: OVERLAP AND CONFLICT, *supra* note 1, at 119.

<sup>60</sup> 480 F. Supp. at 1142-43.

<sup>61</sup> *Id.* at 1156.

<sup>62</sup> *Id.* at 1143-45.

<sup>63</sup> *Id.* at 1148. The balancing approach urged by several defendants derives from section 40 of the RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (1965) and calls upon the court to balance the interests of each sovereign to determine which predominates. A number of factors to consider are contained in section 40, such as (a) the vital national interests of each state, and (b) the extent and nature of the hardships that inconsistent enforcement actions would impose upon the person, and (c) the extent to which the required conduct is to take

ditionally 'balance' [the] total contradictory and mutually negating actions" of the United States and the foreign countries to determine which interest predominates.<sup>64</sup> Additionally, by demonstrating to the defendants that they were not immune from sanctions for noncompliance, the court hoped to induce the defendants to take affirmative steps towards securing the documents.<sup>65</sup>

The *Westinghouse* litigation has not yet been concluded,<sup>66</sup> but it has already provoked widespread controversy and resulted in the modification or enactment of five foreign statutes,<sup>67</sup> the most important of which is the British Protection of Trading Interests Act.<sup>68</sup> The *Westinghouse* case is not the first extraterritorial antitrust suit against multinational defendants to arouse foreign antipathy.<sup>69</sup> There are three

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place in the territory of the other state. The specific actions referred to by the Court are the United States' enforcement of its laws, and the interference created by foreign countries who perceive such enforcement to be an infringement of their sovereignty.

<sup>64</sup> Apparently, the Justice Department felt that the district court had improperly waived the comity issue. In a formal statement of interest by the United States, posted May 6, 1980, Associate Attorney General John H. Shenefield urged Judge Prentice H. Marshall to give "appropriate deference and weight [to the views and representations advanced by foreign governments] in resolving legal questions that turn, at least in part, on considerations of international comity." More significantly, the statement asserted "that it would be inappropriate, in the absence of bad faith, to inflict punishment against a defendant in the above-captioned case for inability to comply with a discovery order of the court because of a contrary foreign criminal law. . . ." [1980] 5 TRADE REG. REP. (CCH) ¶ 50,416.

<sup>65</sup> 480 F. Supp. at 1156.

<sup>66</sup> Adjudication on the merits was scheduled for September 1980. Wall St. J., May 4, 1979, at 1; N.Y. Times, July 9, 1978, § 3, at 1, col. 6.

<sup>67</sup> The first three of these statutes restrict or prohibit access by foreign parties to certain information. *Discovery* Note, *supra* note 27, at 341 n.132 (1978). Discovery in the uranium litigation prompted the passage in Canada of the Atomic Energy Control Act. CAN. REV. STAT. c. A-19 (1970), and the Uranium Information Security Regulations, STAT. O. & R., 77-836 (1977) (replacing Uranium Information Security Regulations, STAT. O. & R. 76-644) (promulgated pursuant to this Act). Additionally, following the issuance of letters rogatory in the *Westinghouse* litigation, the Australian Parliament passed criminal legislation for the production of documents concerning subjects specified by the Attorney General, among which uranium was immediately designated. Foreign Proceedings (Prohibition of Certain Evidence) Act, 1976, No. 121 (Austl.), *as amended by* Foreign Proceedings (Prohibition of Certain Evidence) Amendment Act, 1976, No. 202 (Austl.), *as implemented by* Order of the Attorney General, Austl. Gov't Gaz. No. S. 214 (Nov. 29, 1976). See Daily Hansard, *supra* note 9, at 731.

South Africa's statute predates the uranium litigation. It was modified in 1978 "for the express purpose of frustrating the jurisdiction of the United States courts over the activities of the alleged international uranium cartel." *In re Uranium Antitrust Litigation*, 480 F. Supp. 1138, 1143 (N.D. Ill. 1979). For a discussion of the South African statute, see note 9 *supra*.

The two most recently enacted statutes foreclose enforcement or registration of certain foreign judgments. They are the Australian Foreign Antitrust Judgments (Restriction of Enforcement) Act, 1979, No. 121 (Austl.), and the British Protection of Foreign Trading Interests Act, 1980, c. 11. See [1980] 5 TRADE REG. REP. (CCH) ¶ 50,414.

<sup>68</sup> 1980, c. 11.

<sup>69</sup> Beginning in 1945 with the decision in *United States v. Aluminum Co. of America*, 148

reasons, however, for *Westinghouse's* extraordinary effect.

First, Westinghouse threatens the survival of industries critical to the well-being of foreign nations.<sup>70</sup> The plaintiffs are seeking treble damages under the Clayton Act,<sup>71</sup> which could amount to six billion dollars.<sup>72</sup> This award would devastate Australia's uranium industry and injure that of Britain, Canada, and South Africa.<sup>73</sup> By providing for treble damages, Congress intended the antitrust laws to be prophylactic and sought to encourage private attorneys general to prosecute violations.<sup>74</sup> Foreign governments, however, have long protested that such damages, which are uniquely American,<sup>75</sup> are penal and hence, should not be available to private plaintiffs.<sup>76</sup>

Second, each of the foreign courts which received letters rogatory suggested that the substance of the requests and possibly the purpose for which they were intended as well, constituted an attempt to abuse this procedure.<sup>77</sup> Extensive use of pretrial discovery in the United States has no foreign counterpart.<sup>78</sup> Even in a noncontroversial case, a

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F.2d 416 (2d Cir. 1945), the Supreme Court has rejected a "strict territorial" view of jurisdiction, embracing instead an "objective territorial projection" of the antitrust laws. After *Alcoa*, the Court applied the Sherman Act to an agreement between two foreign nationals to fix quotas on sales, holding that it tended to provide the defenders with an illegal advantage by restraining imports to the United States. *United States v. National Lead*, 332 U.S. 319 (1946). For cases where foreign countries have protested U.S. litigation against their nationals for violations of antitrust law, see BREWSTER, *supra* note 15, at 45-51.

<sup>70</sup> The personal view of the Director General of the Canadian Bureau of Commercial and Commodity Relations, Department of External Affairs, was that the *Westinghouse* litigation had brought a new dimension to the issue of extraterritorial jurisdiction since the case "involve[d] the intervention of governments seeking to protect the most vital natural resources of their economies." Stanford, *supra* note 37, at 201. The Canadians, the South Africans, and the Australians protested the infringements of national security more than did the British, who took a broader stance and rejected outright any extraterritorial prosecution of U.S. laws. See *In re Westinghouse Elec. Corp. Uranium Contracts Litigation*, 563 F.2d 992 (10th Cir. 1977); 13 TEX. INT'L L.J. 477 (1978).

<sup>71</sup> 15 U.S.C. § 15 (1976).

<sup>72</sup> See Transcripts of Proceedings, Mar. 27, 1979, at 8 and June 20, 1979 at 11, *In re Uranium Antitrust Litigation*, M.D.L. No. 342, No. 76-C3830, cited in Amicus Curiae Brief of the Government of the United Kingdom, at 2 (Aug. 2, 1979).

<sup>73</sup> See Daily Hansard, *supra* note 9, at 733, 737; 946 ANTITRUST & TRADE REG. REP. (BNA), at A-25 (Jan. 10, 1980).

<sup>74</sup> *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 745-47 (1977), rehearing denied, 434 U.S. 881 (1977); *Essex Int'l, Inc. v. Industria Prod., Inc.*, 64 F.R.D. 361, 363 (N.D. Ind. 1974).

<sup>75</sup> For discussion of foreign protest against U.S. treble damage remedy, see BREWSTER, *supra* note 15, at 45-51; Carter, *supra* note 46, at 6-9; *Foreign Disclosure Note*, *supra* note 10, at 613 n.5. The uniqueness of treble damages is discussed in note 30 *supra*. See Antitrust Realism, *supra* note 8, at 13; [1979] 4 COMM. MKT. REP. (CCH) ¶ 31,130; Oct. U.K. Press Notice, *supra* note 11, at 1, 5.

<sup>76</sup> See British Diplomatic Note, note 11 *supra*.

<sup>77</sup> See note 44 *supra*.

<sup>78</sup> See Carter, *supra* note 46, at 5-9; Rahl, *Enforcement and Discovery Conflicts: A View from the United States*, in INTERNATIONAL ANTITRUST, FIFTH ANNUAL FORDHAM CORPORATE LAW

foreign court will deny the release of information that would not be similarly available to litigants in that country.<sup>79</sup> Additionally, in the *Westinghouse* suit, national security considerations have made foreign governments particularly unwilling to allow the disclosure of documents or information on uranium production and marketing arrangements.<sup>80</sup> Furthermore, the British courts, which initially were amenable to the letters of request,<sup>81</sup> ultimately refused to compel either the required testimony or production of the documents because the Justice Department's intervention to immunize the parties' testimony was deemed to have transformed the private civil proceedings into a criminal proceeding.<sup>82</sup> The House of Lords concluded its opinion by finding "that the attempt to extend the grand jury investigation extra-territorially into the activities of the [British] companies was an infringement of United Kingdom sovereignty."<sup>83</sup>

Third, the defaulting foreign defendants may be held liable for satisfying all of Westinghouse's alleged damages, since antitrust defendants are jointly and severally liable,<sup>84</sup> and their failure to contest the complaint is construed as an admission.<sup>85</sup> The appeal of the active defendants to the Seventh Circuit prevented the district court from holding an immediate hearing<sup>86</sup> to set damages, but the district court's

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INSTITUTE 346 (B. Hawk ed. 1979).

<sup>79</sup> See Carter, *supra* note 46, at 5-9.

<sup>80</sup> See *In re Uranium Antitrust Litigation*, 480 F. Supp. 1138 (N.D. Ill. 1979); Wood & Carrera, note 27 *supra*.

<sup>81</sup> *In re Westinghouse Elec. Corp. Uranium Contracts Litigation*, [1977] 3 All E.R. 703 (C.A. 1977), *rev'd*, [1978] 2 W.L.R. 81 (H. L. 1977).

<sup>82</sup> *In re Westinghouse Elec. Corp. Uranium Contracts Litigation*, [1978] 2 W.L.R. 81 (H.L. 1977).

<sup>83</sup> [1978] 2 W.L.R. at 93. Foreign hostility toward the treble damage provision is understandable when the course of the private civil suit and the criminal proceedings are compared. After four years, the private action brought by Westinghouse against the uranium cartel is still one year from being heard on the merits and the case threatens multibillion dollar liability. In contrast, the grand jury returned a one count misdemeanor within a year indicting only one of nine potential violators. The indicted corporation, Gulf Oil, pleaded no contest and was fined \$40,000. See Burham, note 50 *supra*; Bukro, note 50 *supra*.

<sup>84</sup> Under § 1 of the Sherman Act, antitrust liability is joint and several. See *Bogosian v. Gulf Oil Corp.*, 561 F.2d 434 (3d Cir. 1977). Since the defaulting defendants have confessed to the Westinghouse allegations by their refusal to appear, the defaulters may have to accept full responsibility for the damage ultimately proven by Westinghouse as a result of that default. *In re Uranium Antitrust Litigation*, 617 F.2d 1257, 1263 (7th Cir. 1980).

<sup>85</sup> 617 F.2d at 1260.

<sup>86</sup> *Id.* The Seventh Circuit held that because liability may be joint and because there is a possibility of inconsistent adjudications, a hearing on the defaulters' damages should await a judgment on the merits of the case of the non-defaulting defendants.



judgment as to the defaulters was upheld.<sup>87</sup> Thus, regardless of the outcome on the merits for the active defendants, the defaulters will remain liable.<sup>88</sup> Moreover, the temporary restraining order imposed on their American subsidiaries to impede the transfer of certain assets outside the country, ensures that execution on a future damage award will not be totally frustrated.<sup>89</sup>

Another litigation involving enforcement of U.S. antitrust laws also contributed to the impetus of the British legislation—the recent Department of Justice prosecution of European shipping lines and their executives for antitrust violations.<sup>90</sup> In June 1979, a Washington grand jury released criminal indictments against three European and four American shipping companies, plus thirteen of their executives, for price fixing violations under section 1 of the Sherman Act.<sup>91</sup> The grand jury investigation, spanning the period from 1971 to 1976, disclosed an on-going conspiracy to fix freight rates in the North Atlantic liner trades.<sup>92</sup>

Four of the defendants were British, and the reaction of the British government was immediate and hostile, warning of retaliation for the “unilateral action” of the United States and of a reappraisal of its cooperation with the United States on antitrust matters.<sup>93</sup> Several aspects of the prosecutions especially incensed the British; first, that the U.S. sought to regulate shipping which is an international activity; and sec-

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<sup>87</sup> The trial court's default determination was made after waiting two years for the defendants to appear. Such a determination would only be set aside for an abuse of discretion. 617 F.2d at 1258.

<sup>88</sup> This prospect has moved several foreign governments to protest to the United States Department of Justice and the State Department. See [1980] 5 TRADE REG. REP. (CCH) ¶ 50,416; 946 ANTITRUST & TRADE REG. REP. (BNA), at A-24 (Jan. 10, 1980).

<sup>89</sup> See note 57 and accompanying text *supra*; 953 ANTITRUST & TRADE REG. REP. (BNA) at A-5 (Feb. 28, 1980); Wall St. J., May 4, 1979, at 1, 18. Efforts by the foreign defaulters to evade the anticipated judgment against them have been encouraged and supported by several of the foreign governments. See Daily Hansard, *supra* note 9, at 733.

<sup>90</sup> United States v. Atlantic Container Line Ltd., No. 79-00271 (D.D.C., filed June 1, 1979); United States v. Bates, No. 79-00272 (D.D.C., filed June 1, 1979). See [1979] 4 COMM. MKT. REP. (CCH) ¶ 31,130; 922 ANTITRUST & TRADE REG. REP. (BNA), at A-30 (July 12, 1979).

<sup>91</sup> See Dept. of Trade of the United Kingdom, Press Notice Ref. No. 165 (June 4, 1979) [hereinafter cited as June U.K. Press Notice]; 922 ANTITRUST & TRADE REG. REP. (BNA), at A-31 (July 12, 1979). The indicted companies included three mainly-European shipping groups: Hapag-Lloyd, incorporated in the Federal Republic of Germany, Atlantic Container Line and Dart Container Line, both consortia. Four American companies—Seatrains Lines, United States Lines, Sea-Lane Services and American Export Lines—were also indicted.

<sup>92</sup> 922 ANTITRUST & TRADE REG. REP. (BNA), at A-31 (July 12, 1979).

<sup>93</sup> June U.K. Press Notice, note 91 *supra*. The Department of Justice instituted suits against both the individuals involved in managing the container lines, United States v. Bates, No. 79-00272 (D.D.C., filed June 1, 1979), and the companies, United States v. Atlantic Container Line Ltd., No. 79-00271 (D.D.C., filed June 1, 1979). See generally Antitrust Realism, note 8 *supra*.

ond, that activities of the defendants, although violative of the Sherman Act, would not have been illegal either in the United Kingdom or elsewhere in Europe.<sup>94</sup> Moreover, the expense and duration of antitrust cases, in addition to the risk of treble damage actions, induced the defendants not to contest the charges.<sup>95</sup> The resultant fines totalled \$6.1 million, the highest ever imposed under section 1 of the Sherman Act.<sup>96</sup> Despite the *nolo contendere* plea<sup>97</sup> and the out of court settlement, which were specifically intended to minimize the likelihood of additional private suits being brought, thirty-four suits had been filed by the end of 1979 which, if successful, could result in damages amounting to several billion dollars.<sup>98</sup> The British government's resentment found expression in the Protection of Trading Interests Act.

### BRITAIN'S STATUTORY RESPONSE

The Protection of Trading Interests Act, which was signed into law on March 20, 1980,<sup>99</sup> contains several significant provisions. The Act is

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<sup>94</sup> Oct. U.K. Press Notice, *supra* note 11, at Notes to Editors 6. Both the United States and Britain accept a shipping conference system, but whereas the American Shipping Act, 46 U.S.C. § 814 (1976), confers antitrust immunity only on conference arrangements regulated and approved by the U.S. Federal Maritime Commission, Britain leaves the regulation of conference activity to the participating shipping companies. Baker, *supra* note 10, at 186-87. Under the European legal system, shipping lines are able to set route rates by means of their traditional conference system. They may also discount rates to certain customers. 922 ANTITRUST TRADE REG. REP. (BNA), at A-30 (July 12, 1979); Oct. U.K. Press Notice, *supra* note 11, at Notes to Editors 6.

<sup>95</sup> Oct. U.K. Press Notice, *supra* note 11, at Notes to Editors 6. Under § 16(a) of the Clayton Act, a final judgment in a proceeding brought by the United States is *prima facie* evidence against the defendant in an action or proceeding brought by any other party against such defendant as to all matters which were decided in the prior action. Consent decrees entered before any testimony has been taken are excepted. Thus, subsequent private actions do not benefit from *res judicata* if the government's case was concluded by a consent decree. 15 U.S.C. § 16 (1976).

<sup>96</sup> Oct. U.K. Press Notice, note 11 *supra*. The thirteen individual defendants were fined \$50,000 each and convicted of misdemeanors. The maximum fine of \$1 million was imposed on each of the seven corporate defendants, although three of them eventually had their fines reduced. *Id.*

<sup>97</sup> A plea of *nolo contendere* in a criminal antitrust case does not constitute *prima facie* evidence of a violation in any subsequent private civil antitrust action for treble damages. *City of Burbank v. General Electric Co.*, 329 F.2d 825 (9th Cir. 1964); *Commonwealth Edison Co. v. Allis-Chalmers Mfg. Co.*, 323 F.2d 412 (7th Cir. 1963). See FED. R. EVID. 410.

<sup>98</sup> Oct. U.K. Press Notice, *supra* note 11, at Notes to Editors 6. The British were further incensed by the inconsistency of the U.S. government's position in the shipping conferences. Atlantic Container Line, one of the indicted British companies, asserted that the Department of Justice and the Federal Maritime Commission embraced views so disparate that the Justice Department prosecuted despite FMC's conferral of antitrust immunity on the joint actions of the shipping lines "through at least 15 duly approved agreements." 922 ANTITRUST & TRADE REG. REP. (BNA), at A-31 (July 12, 1979).

<sup>99</sup> 1980, c. 11. The legislation was introduced to the British House of Commons in 1979 "to provide better protection to companies and individuals in the United Kingdom against attempts

the first foreign statute to provide foreign defendants with the means to recover punitive damages paid on a judgment that their government regards as invalid for lack of jurisdiction.<sup>100</sup> In that sense, it is the first foreign statute to incorporate offensive tactics against U.S. prosecutions of extraterritorial acts. Additionally, the Act grants the Secretary of State the authority to employ measures with extraterritorial effect in order to regulate the compliance of parties engaged in business in the United Kingdom.<sup>101</sup> Thus, companies conducting business in both the United States and Britain are more likely to be subjected to conflicting requirements. Finally, the Act prohibits future registration and enforcement of all punitive judgments, in addition to certain foreign anti-trust judgments.<sup>102</sup>

### *Description of the Act*

The Protection of Trading Interests Act is divided into eight sections. The six substantive sections address: overseas measures affecting British trading interests (section 1),<sup>103</sup> documents and information required by foreign courts or authorities (section 2),<sup>104</sup> restrictions on enforcement of certain overseas judgments (section 5),<sup>105</sup> recovery of awards of multiple damages (section 6),<sup>106</sup> reciprocal enforcement of overseas judgments under provisions corresponding to section 6 (section 7),<sup>107</sup> and repeal of the Shipping Contracts and Commercial Documents Act of 1964 (section 8).<sup>108</sup>

The first four substantive sections of the Act only provide protection against foreign measures, proposed or effectuated, that are perceived to infringe on Britain's commercial interests. It is ironic that the latter two sections, however, enable the government to promote the objectives of the Act beyond British territory.

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by overseas countries to impose their domestic legislation and regulations outside their own territory." Oct. U.K. Press Notice, note 11 *supra*.

<sup>100</sup> The British government, along with the Canadian and Australian governments, believe that the existence of *prima facie* activity within the forum territory is necessary to establish subject matter jurisdiction. This view conflicts with the U.S. effects doctrine, particularly when economic policy is involved. See Oct. U.K. Press Notice, *supra* note 11, Notes to Editors 4; British Diplomatic Note, *supra* note 12, at 4; [1980] 4 TRADE REG. REP. (CCH) ¶ 50,414.

<sup>101</sup> See text accompanying notes 161-68 *infra*.

<sup>102</sup> 1980, c. 11, § 5.

<sup>103</sup> *Id.* § 1.

<sup>104</sup> *Id.* § 2.

<sup>105</sup> *Id.* § 5.

<sup>106</sup> *Id.* § 6.

<sup>107</sup> *Id.* § 7.

<sup>108</sup> *Id.* § 8.

*Response to Foreign Measures*

Section 1 empowers the Secretary of State to affirmatively counter-act foreign trade measures or proposals that he regards as damaging to British commerce.<sup>109</sup> This section is expressly applicable to a foreign nation that makes demands of parties who are outside of its territorial jurisdiction.<sup>110</sup> In response, the Secretary of State may order such persons to give notice of any requirement or prohibition imposed or threatened to be imposed on them by a foreign state.<sup>111</sup> All orders of the Secretary are to be issued in statutory form and are subject to annulment by resolution of either house of Parliament.<sup>112</sup>

Upon receiving notice of foreign restrictions imposed on persons engaged in commercial relations in Britain, the Secretary may direct parties not to comply with them.<sup>113</sup> Directions can be tailored to prohibit compliance, generally or specifically, absolutely or conditionally.<sup>114</sup> Unlike orders, which are voidable by act of Parliament,

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<sup>109</sup> Section 1 of the Act corresponds to the British Shipping and Commercial Documents Act, 1964, c. 87 (Shipping Act), which enabled the United Kingdom government to block compliance with foreign measures or orders concerning the carriage of goods or persons by sea. See text accompanying notes 154-58 *infra*.

<sup>110</sup> Several U.S. regulatory agencies have power to take actions with extraterritorial effect. For example, the Federal Trade Commission Act of 1914, §§ 4-5, 15 U.S.C. §§ 44-45 (1976), empowers the Federal Trade Commission to investigate "unfair methods of competition" in foreign commerce. Additionally, the Securities and Exchange Commission and the Commodities Futures Trading Commission impose disclosure requirements on companies incorporated and doing business abroad, provided they issue stock that is exchanged in the U.S. market. See Oct. U.K. Press Notice, *supra* note 11, at Notes to Editors 8; *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974 (2d Cir. 1975); *Leasco Data Processing Equipment Corp. v. Maxwell*, 468 F.2d 1326 (2d Cir. 1972).

In regulating U.S. participation in ocean-shipping conferences, the Federal Maritime Commission is empowered to order reports documenting any account, record, rate, or charge or any memorandum of any facts and transactions appertaining to the business of any common carrier subject to its jurisdiction. Shipping Act of 1916, 46 U.S.C. § 820 (1976). Orders for documents have long been issued to foreign carriers under the unusual jurisdiction established and initially complied with under the U.S. Shipping Act. See Lowenfield, "To Have One's Cake . . ."—*The Federal Maritime Commission and the Conferences*, 1 J. MAR. L. & COMM. 21, 42-49 (1969). These orders have generated much litigation and international controversy. *Id.*

Although the Trading Interests Act was originally directed at the United States, it could be applied to other countries as well, for example, the Arab states that have furthered their boycott of Israel by imposing boycott regulations on British firms. CURRENT L. STAT., 1980, c. 11(1) (general note) (This publication is an annotation of British acts).

<sup>111</sup> 1980, c. 11, § 1(2). Although § 1 of the 1980 Trading Interests Act is modeled after the 1964 Shipping Act, the Trading Interests Act does not require parties doing business in the United Kingdom to disclose demands made upon them by foreign governments unless the Secretary of State takes separate statutory action to this effect. *Id.* § 1(2).

<sup>112</sup> *Id.* § 1(4)-(5).

<sup>113</sup> *Id.* § 1(3).

<sup>114</sup> *Id.* § 1(5).

directions are completely within the discretion of the Secretary,<sup>115</sup> and must only be published in such manner as the Secretary deems appropriate to be effective.<sup>116</sup> Also, they are only to be used to prohibit compliance and not to ensure that authorities receive notification of foreign requests.<sup>117</sup>

Section 3 makes failure to comply with the orders without reasonable excuse a violation punishable by a fine which may amount to £ 1000 or more.<sup>118</sup> Only a British citizen or a corporation incorporated in the United Kingdom can be guilty of an offense under section 3 by reason of any act or omission outside the United Kingdom in contravention of an order.<sup>119</sup> Thus, the Act recognizes territorial limits to these sanctions insofar as it relates to non-British citizens. No such jurisdictional limit is acknowledged, however, for British citizens, so conceivably, a British company with its principal place of business in the United States could be found in violation of these orders for complying with certain prohibitions or requirements of U.S. law in its transactions in France.

### *Restrictions on Compliance with Foreign Information Requests*

Subsection 2 enables the Secretary to prohibit persons in Britain from complying with certain orders of a foreign court, tribunal or authority to produce or to publish commercial information which is not within the territorial jurisdiction of the mandating country.<sup>120</sup> The Secretary's authority may be exercised in anticipation of an inadmissible foreign order, as well.<sup>121</sup> A foreign order is inadmissible if the Secretary decides that the request should be refused under any of the several

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<sup>115</sup> Apparently the Secretary's authority to issue directions is limited to measures which are the subject of a notification order, issued under subsection (2). CURRENT L. STAT., 1980, c. 11(1) (general note).

<sup>116</sup> 1980, c. 11, § 1(5). Only "general directions need be published, according to subsection (5), yet no distinction is drawn in the statute between "specific" and "general" directions.

<sup>117</sup> *Id.* § 1(4).

<sup>118</sup> *Id.* § 3(1)(a). This section permits a fine of any amount to be imposed upon indictment. Upon summary conviction, the penalty is a fine, that is not to exceed the sum prescribed for England and Wales under the Criminal Law Act, 1977, c. 45, § 28, and, for Scotland, under the Criminal Procedure (Scotland) Act, 1975, c. 21, § 289(d). The sum presently set by these statutes is £1000, but it may be raised according to changes in currency valuation.

<sup>119</sup> 1980, c. 11, § 3(2).

<sup>120</sup> *Id.* § 2(1)(a)-(b). This provision is directed at the wide range of evidence that may be subpoenaed under U.S. discovery pursuant to 28 U.S.C. § 1783 (1976). Either parties or witnesses may be subjected to subpoenas from an American court to supply information held by them, or their controlled subsidiaries abroad.

<sup>121</sup> 1980, c. 11, § 2(1)(a)-(b).

grounds contained in subsections (2)(a), (2)(b), (3)(a) or (3)(b).<sup>122</sup> Under subsection (2), a request will be inadmissible:

(a) if it infringes the jurisdiction of the United Kingdom or is otherwise prejudicial to the sovereignty of the United Kingdom; or (b) if 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.<sup>123</sup>

Subsection (3) specifies that unless the information is to be used in civil or criminal proceedings which have been instituted in the overseas country, it will not be furnished if the Secretary so directs.<sup>124</sup> A foreign request is also inadmissible under subsection (3) if it orders a party to declare which documents relevant to these proceedings are or have been within that party's control, or to produce documents other than those specified in the order.<sup>125</sup> Although section 2 generally is framed in terms of requirements imposed by foreign authorities, subsection 5 explains that a request or demand will be considered to be compelled if it was made in circumstances in which a requirement could be or could have been imposed.<sup>126</sup>

If the foreign order is characterized as inadmissible under any of the above subsections, the Secretary may issue directions forbidding compliance with the request. Any person who knowingly contravenes the Secretary's directions under 2(1) not to comply will be guilty of an offense.<sup>127</sup> To be convicted of violating subsection 1(3) or 2(1), a party must have had knowledge of the direction.<sup>128</sup> Since a direction is effective upon publication,<sup>129</sup> unless knowledge were a pre-requisite for conviction, parties in Britain would be unfairly exposed to liability. Proceedings to enforce the provisions of section 3 are to be instituted by the Secretary of State or with the consent of the Attorney General.<sup>130</sup>

Section 4 announces that section 2 of the Evidence (Proceedings in

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<sup>122</sup> *Id.* §§ 2-3.

<sup>123</sup> *Id.* § 2(2)(a)-(b).

<sup>124</sup> The statute does not define when proceedings will be deemed to be "instituted," although any foreign procedure for pre-action discovery would be inapplicable to persons under British jurisdiction based on § 2(3)(b).

<sup>125</sup> *Id.* § 2(3)(b).

<sup>126</sup> Thus, the Secretary of State may prohibit a person from voluntarily complying with an unenforceable request from a foreign court. Even a request to supply evidence is considered to be an order to produce that evidence. This subsection prohibits compliance with foreign orders to disclose evidence to persons other than the ordering authority, for example, to another party to the foreign proceedings. CURRENT L. STAT., 1980, c. 11(2) (general note, subs. (5)).

<sup>127</sup> 1980, c. 11, § 3(1).

<sup>128</sup> *Id.* § 3.

<sup>129</sup> *Id.* § 2(4).

<sup>130</sup> *Id.* § 3(3).

Other Jurisdictions) Act is to be read consistently with the Protection of Trading Interests Act to bar compliance with a foreign court's requests for information that the Secretary of State has certified as prejudicial to British sovereignty.<sup>131</sup> This ensures that litigants invoking either act will be accorded the same treatment.

### *Non-Registrability of Foreign Judgments*

Section 5 blocks registration of any foreign judgment for multiple damages or any foreign judgment based on a provision or rule of law which appears to the Secretary of State to be concerned with the prohibition or regulation of restraints on competition.<sup>132</sup> Similarly, the section bars registration of any judgment on a claim for contribution to a multiple damage award or any antitrust judgment.<sup>133</sup> Registration is a prerequisite to enforcement. Therefore, this section effectively inhibits recovery in the United Kingdom on any foreign judgment within its ambit.<sup>134</sup> Discretion rests with the Secretary of State as to what constitutes an anti-competition law. Subsection (4) indicates, however, that laws concerned with the regulation of agreements, arrangements or practices designed to restrain or distort competition in business, qualify.<sup>135</sup> Since the Secretary's decision may provoke serious political repercussions, an order issued pursuant to this subsection is subject to annulment by resolution of either House of Parliament.<sup>136</sup>

### *Recovery of Multiple Damages*

The last two substantive sections of the Act are unprecedented and

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<sup>131</sup> See text accompanying notes 211-23 *infra*.

<sup>132</sup> 1980, c. 11, § 5(1). A foreign judgment for multiple damages, "arrived at by doubling, trebling or otherwise multiplying a sum assessed as compensation," is automatically barred from registration. *Id.* § 5(3). A judgment based on a provision or rule of law regulating competition in business will only be unregistrable if the Secretary of State considers the law supporting the judgment to fall within the category of anticompetition laws. *Id.* § 5(4). Additionally, the Secretary's designation of such a law must be approved by Parliament. *Id.* § 5(5).

<sup>133</sup> *Id.* § 5(2). This section recognizes that United States courts acknowledge a right of contribution between joint defendants to an antitrust action. See *Professional Beauty Supply, Inc. v. National Beauty Supply, Inc.*, 594 F.2d 1179 (8th Cir. 1979).

<sup>134</sup> Even the compensatory part of a damage award is unrecoverable in the United Kingdom if the judgment was premised on a foreign competition law. The statute, thus, supercedes the common law right to sue on final judgments. No action need be taken by the Secretary of State for the specified judgments to be prohibited from recognition or enforcement since the bar in this section is absolute. 1980, c. 11, § 5(1).

<sup>135</sup> The general description of antitrust laws in subsection (4) is based on article 85 of the Treaty of Rome, which defines anticompetition law for the European Economic Community. Treaty of Rome, *done* Mar. 25, 1957, art. 85, 298 U.N.T.S. 11.

<sup>136</sup> 1980, c. 11, § 5(5).

extremely provocative. Their aim is to undercut multiple damage awards.<sup>137</sup> Section 6, dubbed the "claw back" provision,<sup>138</sup> entitles certain qualifying defendants to recover any noncompensatory damages paid to a victorious plaintiff in a foreign court.<sup>139</sup> If full payment has not yet been made by the defendant, he is entitled to recover that proportion of the amount paid that is equivalent to the proportion of the judgment that exceeded actual damages.<sup>140</sup> Thus, if a defendant is adjudged liable for treble damages but pays only one-half of the total award, recovery under section 6 would be for two-thirds of the one-half sum paid or one-third of the total award.<sup>141</sup>

Citizens of the United Kingdom, British corporations, and persons carrying on business in Britain are all entitled to recover under this section.<sup>142</sup> Section 6 excepts from its coverage, "an individual who was ordinarily resident in the overseas country at the time when the proceedings in which the judgment was given were instituted or a body corporate which had its principal place of business there at that time."<sup>143</sup> Additionally, recovery is not available "where the qualifying defendant carried on business in the overseas country and the proceedings in which the judgment was given were concerned with activities carried on *exclusively* in that country."<sup>144</sup> Proceedings under this section may be heard by a British court notwithstanding that the person against whom the proceedings are brought is outside the court's jurisdiction.<sup>145</sup> Judgments entered before the passage of this Act are not eligible for the provisions of section 6.<sup>146</sup>

In the final stage of amendment to the Bill, the House of Lords added a subsection (7), which applied the recovery provisions to any order made by a tribunal or authority of an overseas country that would, if that tribunal were a court, be a judgment for multiple damages within the broad definition in section 5.<sup>147</sup> This modification permits recovery from decisions rendered by the European Economic

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<sup>137</sup> See Dec. U.K. Press Notice, note 29 *supra*; CURRENT L. STAT., 1980, c. 11(5)-(6) (general notes).

<sup>138</sup> See 302 U.S. EXPORT WEEKLY (BNA), at C-4 (Apr. 8, 1980).

<sup>139</sup> 1980, c. 11, § 6(2). See 9 INT'L PRACTITIONER'S NOTEBOOK 1 (1980); Baker, *supra* note 29, at 24.

<sup>140</sup> 1980, c. 11, § 6(2).

<sup>141</sup> Any execution obtained by the plaintiff against the assets of a qualifying defendant is included within the amount the defendant is deemed to have paid. 1980, c. 11, § 6(6).

<sup>142</sup> *Id.* § 6(1).

<sup>143</sup> *Id.* § 6(3).

<sup>144</sup> *Id.* § 6(4) (emphasis added).

<sup>145</sup> *Id.* § 6(5).

<sup>146</sup> *Id.* § 6(8).

<sup>147</sup> *Id.* § 6(7). See CURRENT L. STAT., 1980, c. 11(6) (general note).



Community (EEC) under the Rome Treaty.<sup>148</sup> More importantly, this subsection ensures that the Act will not be circumvented by a U.S. administrative agency, such as the Securities and Exchange Commission or the Federal Maritime Commission, that renders a decision within the ambit of the statute.<sup>149</sup>

### *Reciprocal Enforcement of Foreign Recovery Provisions*

As an incentive for other countries to adopt legislation permitting the recovery of noncompensatory foreign judgments, Parliament provided in section 7 for the enforcement in Britain of recovery orders issued under any corresponding foreign law.<sup>150</sup> This provision is premised on Parliament's perception that the comparable foreign law will permit judgments rendered under section 6 to be enforced in the foreign country.<sup>151</sup> Although recovery is obviously dependent upon whether any assets of the winning plaintiff are within the jurisdiction of the court, reciprocal enforcement of these judgments makes recovery more likely for the qualifying defendant who brings an action under section 6 or a foreign facsimile. Thus, the more countries with similar legislation, the more effective will be a judgment in any one of them. Section 7 requires a separate parliamentary decree to implement the reciprocity clause with respect to each country.<sup>152</sup>

### *Repeal of the Shipping Contracts and Commercial Documents Act*

Section 8 defines some terms used within the Trading Interests Act,<sup>153</sup> in addition to repealing the Shipping Contracts and Commer-

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<sup>148</sup> Art. 15 of Council Regulation No. 17, Reglement No. 17: Premier reglement d'application des articles 85 et 86 du traite, 5 J.O. COMM. EUR. 204 (1962), enables the Commission of the EEC to impose fines for infringement of articles 85(1) or 86, the anticompetition rules of the EEC. Treaty of Rome, *done* Mar. 25, 1957, arts. 85, 86, 298 U.N.T.S. 11. These fines can amount to up to 10% of the revenues of the preceding year for each of the parties participating in the infringement. *Id.* A qualifying British defendant seeking to take advantage of § 6 of the 1980 Act will encounter a conflict between Britain's obligations as an EEC member, and the literal provisions of the 1980 statute. Community law is binding on Britain yet § 6 does not explicitly except anticompetition fines enacted by the EEC from the bases for recovery.

<sup>149</sup> See CURRENT L. STAT., 1980, c. 11 (introductory general note).

<sup>150</sup> 1980, c. 11, § 7. This section was amended to the bill during the Report stage in the House of Lords. The Parliamentary record reveals that other countries are considering a provision similar to § 6. See 405 PARL. DEB., H.L. (5th ser.) 949 (1979); 980 PARL. DEB., H.C. (5th ser.) 649 (1979); [1980] 5 TRADE REG. REP. (CCH) ¶ 50,414.

<sup>151</sup> [1980] 5 TRADE REG. REP. (CCH) ¶ 50,414.

<sup>152</sup> 1980, c. 11, § 7(1).

<sup>153</sup> For example, the term "overseas country" means, according to section 8(2), "any country or territory outside the United Kingdom other than one for whose international relations Her Majesty's Government in the United Kingdom are responsible." According to section 8(3), "[r]eferences. . . to the law or a court, tribunal or authority of an overseas country includes, in the

cial Documents Act of 1964 (Shipping Act).<sup>154</sup> In several respects, that statute was the precursor to the Trading Interests Act. The Shipping Act constituted an early attempt to inhibit U.S. efforts to regulate, through the Federal Maritime Commission, the international carriage of goods.<sup>155</sup> The Shipping Act also restricted the production of documents sought by foreign authorities or courts.<sup>156</sup> Authority similar to that presently delegated to the Secretary of State by the Trading Interests Act was delegated under the Shipping Act to "any Minister of the Crown."<sup>157</sup> Moreover, a fine of up to £1000 was provided for willful failure to comply with statutory orders or for contravention of any directions issued under the Shipping Act.<sup>158</sup>

### EFFECTS AND IMPLICATIONS

The Trading Interests Act reflects the government's frustration with both the undaunted continuation of U.S. extraterritorial enforcement practices and its own past inability to protect British citizens or parties conducting business in Britain from prosecution under U.S. laws.<sup>159</sup> The provisions of the statute have two objectives. First, they offer shelter from certain past vulnerabilities. One example is section 6, which entitles defendants to recover in Britain for punitive damages paid on a foreign judgment under an anticompetition law.<sup>160</sup> Second, the provisions anticipate potential disputes and equip the Secretary of State to respond. For example, the first section of the Act confers broad power on the Secretary to decide when parties in Britain should be ordered not to comply with foreign laws that exceed their territorial jurisdiction.<sup>161</sup> Overall, the Act will motivate the U.S. government to

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case of a federal state, references to the law or a court, tribunal, or authority of any constituent part of that country." Thus, the Act will apply to U.S. state court decisions as well as those of the U.S. federal courts.

<sup>154</sup> 1980, c. 11, § 7(5)-(6). Although the Shipping Act, 1964, c. 87, is repealed, subsection (6) preserves the effect of any directions given under that Act prior to the passage of the Trading Interests Act. Only one direction was issued pursuant to the 1964 Act: the Shipping Contracts (Foreign Measures) Order, 1968, STAT. INST. No. 1382, regarding the U.S. Federal Maritime Commission's order against the North Atlantic Westbound Freight Association. CURRENT L. STAT., 1980, c. 11(8) (general note).

<sup>155</sup> See Baker, *supra* note 29, at 24.

<sup>156</sup> 1964, c. 87, § 1(2).

<sup>157</sup> *Id.* § 2(1). Under this subsection, any Minister may give directions prohibiting any person in the United Kingdom from complying with any foreign court order to produce extraterritorially located commercial documents.

<sup>158</sup> *Id.* § 3(1).

<sup>159</sup> See CURRENT L. STAT., 1980, c. 11 (introductory general note); [1979] 5 TRADE REG. REP. (CCH) ¶ 50,416; Dec. U.K. Press Notice, note 29 *supra*.

<sup>160</sup> See text accompanying notes 244-64 *infra*.

<sup>161</sup> See text accompanying notes 109-19 *supra*.

negotiate its differences, and will encourage U.S. courts to pay heed to considerations of comity.

The combined effect of the reactive and prospective provisions on efforts to prosecute British defendants is likely to be substantial. Private litigants are especially vulnerable to the statute's provisions since, even if they win their case, any noncompensatory damages they receive are subject to a set-off against any assets they may have in the United Kingdom or other countries subscribing to the reciprocity notion of section 7.<sup>162</sup> Both private and government cases will find discovery of foreign documents greatly impeded. An official in the Justice Department expressed concern that future cases will be adjudicated without the advantage of comprehensive discovery, which will presumably impair justice.<sup>163</sup>

A number of U.S. statutes besides the antitrust laws may be frustrated by the new British Act. The United States has embraced a non-territorial conception of jurisdiction and many important laws reflect this view.<sup>164</sup> As an example, the Foreign Corrupt Practices Act,<sup>165</sup> which prohibits bribery of foreign officials for the purpose of inducing a preference for the goods or services of the bribing company, would cover a foreign subsidiary acting as an agent of its U.S. parent.<sup>166</sup> Although British and American interests would seem to correspond where a U.S. subsidiary in Britain was suspected of bribing a British official to influence government procurement, Britain may resent U.S. efforts to stem corruption when it involves actions within Britain by British citizens. Thus, section 1 might be invoked to block compliance with documentary requests by the United States. That section is sufficiently open-ended to make its application conjectural.<sup>167</sup> Regardless of the

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<sup>162</sup> Britain is more concerned with private antitrust suits than with government suits for two reasons. First, only private litigants are eligible for multiple damage awards under the Clayton Act. 15 U.S.C. § 15 (1976). Second, in private suits, foreign governments do not receive notice prior to commencement of the suit, as they do before government initiated litigation. See note 31 *supra*; Stanford, note 37 *supra*.

<sup>163</sup> Baker, *supra* note 10, at 187.

<sup>164</sup> For discussion of the expansive jurisdictional view held by the United States, as compared to other countries' restrictive views, see Stanford, *supra* note 37, at 203.

<sup>165</sup> 15 U.S.C. §§ 78a, 78dd(a)-(b) (Supp. III 1979) (amending 15 U.S.C. §§ 78m, 78ff (1976)).

<sup>166</sup> To fall within the parameters of the Act, a foreign subsidiary must act in behalf of a domestic company and make corrupt use of interstate commerce in furtherance of a bribe. The Act requires more than merely the *Alcoa* proof of "substantial effects" to justify the extraterritorial extension of its provisions. *Id.*

<sup>167</sup> The Secretary of State may act under § 1 if the foreign measure, insofar as it applies to the extraterritorial activities of persons conducting business in the United Kingdom, damages or threatens to damage the trading interests of the United Kingdom. The foreign measure need not infringe upon the jurisdiction of the United Kingdom before § 1 applies. The Secretary of State

section's actual use, it clearly informs the United States that the British intend to assert their jurisdictional authority more aggressively than in the past.<sup>168</sup>

*Section 1: Protection Against Overseas Measures*

*Problems of Concurrent Jurisdiction.* As Britain acts under section 1 to block compliance with U.S. requests or prohibitions, companies doing business in Britain are more likely to find themselves violating the law of either one sovereign or the other. One could hypothesize an alleged infraction of the anti-boycott provisions of the U.S. Export Administration Act of 1979 (EAA)<sup>169</sup> by a wholly owned British subsidiary of a U.S. corporation which agrees to a letter of credit containing a requirement prohibited by that Act. The Export Administration Act applies to United States persons, a category which may encompass controlled foreign subsidiaries.<sup>170</sup> Although an exception to the EAA's coverage permits a United States resident in a foreign country to comply with the laws of that foreign country when importing certain goods into that country alone,<sup>171</sup> deference to the foreign sovereign is very limited and depends upon the existence of a countermanding foreign law.<sup>172</sup> Conceivably, if a country has a public policy supporting certain business practices, but this policy is not enacted into law, the exception to the EAA would not inure. Thus, if the U.S. subsidiary complies with the EAA by disclosing to Treasury Department officials an unlawful foreign request, it may be in violation of British law, if the British Secretary of State has directed noncompliance with foreign document disclosure requirements.

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has broad discretion as to how to implement the Act. *See* CURRENT L. STAT., 1980, c. 11(1) (general note).

<sup>168</sup> *Id.*, at c. 11 (introductory general note); Baker, *supra* note 29, at 24.

<sup>169</sup> Export Administration Act of 1979, § 8, 50 U.S.C. app. § 2407 (Supp. I 1979). The anti-boycott provisions of the Export Administration Act prohibit any United States person from complying with any boycott imposed by a foreign country against a country that is not the object of a U.S. boycott. *Id.* Moreover, the President is directed to issue regulations requiring any U.S. person who receives a request for information which would aid a foreign boycott to report that fact to the Secretary of State. *Id.* The British Secretary of Trade may find any such restriction or reporting requirement imposed upon a company conducting business in Britain to be an invasion of British sovereignty.

<sup>170</sup> Section 16, 50 U.S.C. app. § 2415 (Supp. I 1979). *See* Hacking, *The Increasing Extraterritorial Impact of U.S. Laws: A Cause For Concern Amongst Friends of America*, 1 NW. J. INT'L L. & BUS. 1, 6-7 (1978).

<sup>171</sup> Section 8(a)(2)(F), 50 U.S.C. app. § 2407 (Supp. I 1979).

<sup>172</sup> *Id.* The exception applies only to imports of trademarked, trade named, or similarly specifically identifiable products, or components of products manufactured for the use of U.S. persons abroad.

*Foreign Governmental Compulsion Defense.* Another ramification of a section 1 order is that it could serve as the basis for a foreign governmental compulsion defense in a United States court. Foreign governmental compulsion is one of several affirmative defenses frequently raised against subject matter jurisdiction.<sup>173</sup> To sustain this defense, a party must show that the conduct in question was compelled under the foreign law as it existed at the time of the alleged offense, and not merely permitted or encouraged.<sup>174</sup> Moreover, the conduct must have occurred within the territory of the foreign sovereign.<sup>175</sup> In the past, defendants have had difficulty prevailing with this defense.<sup>176</sup> The Justice Department has urged that the sovereign compulsion doctrine be strictly construed so that the Department may "carry out its essential function of protecting the competitiveness of U.S. markets and export opportunities."<sup>177</sup> Yet in certain situations, the fact of a government compelled action, attested to by the British Secretary of State's statutory order, may suffice to insulate defendants from prosecution under U.S. law.<sup>178</sup>

*International Comity.* Even if a court is not persuaded by a defense of foreign governmental compulsion, an order under section 1 would bear on considerations of international comity.<sup>179</sup> Until the Ninth Circuit's decision in *Timberlane Lumber Co. v. Bank of America*,<sup>180</sup> defendants were only infrequently able to persuade the courts to balance the competing interests of the implicated foreign nation with those of the

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<sup>173</sup> Antitrust litigation on foreign activities often involves a foreign compulsion defense. See ANTITRUST GUIDE FOR INTERNATIONAL OPERATIONS, *supra* note 8, at 7-8; see, e.g., *In re Uranium Antitrust Litigation*, Westinghouse Elec. Corp. v. Rio Algom, Ltd., 480 F. Supp. 1138 (N.D. Ill. 1979); *Interamerican Ref. Corp. v. Texaco Maracaibo, Inc.*, 307 F. Supp. 1291 (D. Del. 1970).

<sup>174</sup> ANTITRUST GUIDE FOR INTERNATIONAL OPERATIONS, *supra* note 8, at 54-55. See *Bates v. State Bar of Ariz.*, 433 U.S. 350 (1977); *Interamerican Ref. Corp. v. Texaco Maracaibo, Inc.*, 307 F. Supp. 1291, 1296-99 (D. Del. 1970).

<sup>175</sup> ANTITRUST GUIDE FOR INTERNATIONAL OPERATIONS, *supra* note 8, at 54-55. See Stanford, *supra* note 37, at 203.

<sup>176</sup> See Stanford, *supra* note 37, at 203.

<sup>177</sup> ANTITRUST GUIDE FOR INTERNATIONAL OPERATIONS, *supra* note 8, at 8.

<sup>178</sup> See CURRENT L. STAT., 1980, c. 11 (introductory general note). Cf. *Restatement Note*, note 21 *supra* (This author argues that a U.S. court should not defer to foreign interests merely because the foreign country has made compliance with an American law a criminal offense.).

<sup>179</sup> United States laws that have an extraterritorial effect make international clashes over concurrent jurisdiction more likely. Comity, the concept of one sovereign's modification of its own interests to accommodate those of another sovereign, has been increasingly endorsed by U.S. officials. See Bell, note 49 *supra*; Antitrust Realism, *supra* note 8, at 8. Recently, the Justice Department's sensitivity toward U.S. court decisions that fail to take sufficient account of foreign governmental concerns was reflected in a formal statement to the district court judge in the *Westinghouse uranium litigation*. See note 64 *supra*. But see Shiffrin, note 18 *supra*.

<sup>180</sup> 549 F.2d 597 (9th Cir. 1976).

United States.<sup>181</sup> In *Timberlane*, the court concluded that the effects test alone was inadequate to resolve whether extraterritorial jurisdiction should be asserted since it ignores the interests of foreign nations.<sup>182</sup> The court instead proposed a tripartite analysis, including the usual "effect doctrine" inquiry, an inquiry as to the extent of the alleged violation, and an inquiry as to the magnitude of the effect on American foreign commerce.<sup>183</sup> In utilizing this approach, the courts have paid greater heed to statutes than to judge-made rules of law or to governmental policy statements.<sup>184</sup> One incidental result has been to encourage foreign countries to pass legislation in anticipation of or reaction to U.S. litigation.<sup>185</sup> By passing the Trading Interests Act, Britain has attempted to influence a U.S. court's evaluation of the comity interests involved.<sup>186</sup> Even with the existence of a countermanding foreign law, however, at least some American courts will not hesitate to reach decisions that place the foreign defendant in a position of criminal liability.<sup>187</sup> Most recently, in the *Westinghouse* litigation, the District Court of the Northern District of Illinois rejected the need to balance the national interests of the United States and the foreign countries involved to determine which interests predominated before it ordered production of documents, disclosure of which would violate certain foreign laws.<sup>188</sup> Judge Marshall asserted:

Aside from the fact that the judiciary has little expertise, or perhaps even authority, to evaluate the economic and social policies of a foreign country, such a balancing test is inherently unworkable in this case. The com-

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<sup>181</sup> See *id.* at 612 & nn.24-25.

<sup>182</sup> *Id.* at 611-12; see Note, *Mannington Mills, Inc. v. Congoleum Corp.: A Further Step Toward a Complete Subject Matter Jurisdiction Test*, 2 NW. J. INT'L L. & BUS. 241, 243 (1980) [hereinafter cited as *Mannington Note*].

<sup>183</sup> 549 F.2d at 613.

<sup>184</sup> See, e.g., *United States v. First Nat'l City Bank*, 396 F.2d 897 (2d Cir. 1968); *American Indus. Contracting, Inc. v. Johns-Mansville Corp.*, 326 F. Supp. 879 (W.D. Pa. 1971) (holding that the strong public policy behind U.S. antitrust laws demanded certain information be produced despite foreign blocking laws, and without considering countermanding foreign policy interests). Part of the reason why U.S. courts take a narrow view of foreign laws is that they have responsibility for inquiring into the legislative intent of and other non-statutory influences on U.S. laws but are not concomitantly empowered, nor best suited, to probe the motives underlying a foreign country's laws. For comment on the dissent in *In re Westinghouse Elec. Corp. Uranium Contracts Litigation*, 563 F.2d 992 (10th Cir. 1977) which criticized the majority for not looking behind the relevant Canadian statute, see TEX. INT'L L.J., *supra* note 70, at 479-80.

<sup>185</sup> See Stanford, *supra* note 37, at 204-06.

<sup>186</sup> See [1980] 4 TRADE REG. REP. (CCH) ¶ 50,414.

<sup>187</sup> See, e.g., *Westinghouse v. Rio Algom*, 617 F.2d 1248 (7th Cir. 1980); *In re Uranium Anti-trust Litigation*, 480 F. Supp. 1138 (N.D. Ill. 1979). Cf. *In re Westinghouse Elec. Corp. Uranium Contracts Litigation*, 563 F.2d 992 (10th Cir. 1977) (attempting to weigh competing national interests using the *Rogers* rule).

<sup>188</sup> 480 F. Supp. at 1148.

peting interests here display an irreconcilable conflict on precisely the same plane of national policy. . . . It is simply impossible to judicially 'balance' these totally contradictory and mutually negating actions.<sup>189</sup>

Although the doctrine of comity was revitalized in *Timberlane*, it remains ambiguous and difficult to apply.<sup>190</sup> Furthermore, its use has been largely limited to the stage at which sanctions are imposed, and the doctrine has not been widely accepted as a determinative or substantial factor when the court decides whether or not to exercise its jurisdiction.<sup>191</sup> Thus, even if parties who are subject to section 1 of the Trading Interests Act buttress their comity arguments by pointing to the British Secretary of State's order, this argument may not be heard until the defendants have been held in default for refusing compliance and sanctions are considered.<sup>192</sup> Some courts have refrained, however, from ordering sanctions against parties who did not comply with U.S. law since compliance would have made them liable under a foreign law.<sup>193</sup>

Thus, section 1 permits the British government to do more than merely command parties subject to its jurisdiction not to comply with extraterritorial requirements imposed on them by foreign authorities. If these parties are sued for noncompliance or related actions, a section 1 order will contribute to the persuasiveness of a foreign governmental compulsion defense as well as an argument that, because vital foreign policy is implicated, considerations of comity should stay a U.S. court's assertion of jurisdiction, or failing that, any imposition of sanctions.

#### *Sections 2, 3 and 4: Restrictions on Compliance with Foreign Information Requests*

Together, sections 2, 3 and 4 modify prior law governing cooperation with foreign courts and authorities on documents and information needed for civil or criminal proceedings. First, these new provisions make clear that the nature of foreign documentary requests as well as their stated purpose will come under stricter scrutiny than heretofore

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<sup>189</sup> *Id.*

<sup>190</sup> *Id.* See generally *Foreign Disclosure* Note, note 10 *supra*; *Discovery* Note, note 27 *supra*.

<sup>191</sup> See *Société Internationale v. Rogers*, 357 U.S. 197 (1958); *In re Uranium Antitrust Litigation*, 480 F. Supp. 1138, 1144-47 (N.D. Ill. 1979).

<sup>192</sup> *Id.* See *Westinghouse v. Rio Algom*, 617 F.2d 1248 (7th Cir. 1980).

<sup>193</sup> See *In re Westinghouse Elec. Corp. Uranium Contracts Litigation*, 563 F.2d 992, 998-99 (10th Cir. 1977); *United States v. First Nat'l City Bank*, 396 F.2d 897 (2d Cir. 1968). In *First Nat'l City Bank*, the Second Circuit stated that on the basis of comity, U.S. courts should not take action that could force a party to violate the laws of other sovereign states. *Id.* at 901. See generally *Bell*, note 49 *supra*; *Mannington* Note, note 182 *supra*.

both by British courts and by the Secretary of State.<sup>194</sup> Access to materials sought other than as evidence in criminal or civil proceedings that have already been instituted will be denied.<sup>195</sup> Second, the determination not to permit the foreign request is no longer primarily made by the courts since the Secretary is empowered under section 2 to direct parties not to comply with requirements deemed "inadmissible."<sup>196</sup> Third, the criteria of inadmissibility are expanded to encompass possible injury to British trade relations with other countries,<sup>197</sup> while maintaining the previous concerns with security and infringement on sovereignty.<sup>198</sup> Fourth, unlike the Evidence Act, which applies only to discovery pursuant to letters rogatory,<sup>199</sup> section 2 of the new Act applies to "any request or a demand for the supply of a document or information which, pursuant to the requirement of any court, tribunal or authority of an overseas country, is *addressed to a person* in the United Kingdom. . . ."<sup>200</sup> Thus, personal service of requests is within the scope of the Act, implicating the provisions of 28 U.S.C. § 1783,<sup>201</sup> which address the service of subpoenas on an American citizen or resident located in a foreign country, and Rule 28(b) of the Federal Rules of Civil Procedure,<sup>202</sup> addressing the taking of depositions in foreign countries.

Finally, these sections exempt certain parties from the offenses they formulate. "A person who is neither a citizen of the United Kingdom and Colonies nor a body corporate incorporated in the United Kingdom" cannot be compelled to ignore trade measures imposed by foreign countries or information requested by foreign authorities, if that compliance occurs outside the United Kingdom.<sup>203</sup> The express exemption from liability under the Act for non-British citizens who comply with foreign policies implies that British citizens are not similarly exempted for their actions outside British territory.<sup>204</sup> In this

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<sup>194</sup> See text accompanying notes 218-23 *infra*.

<sup>195</sup> 1980, c. 11, § 2(3)(a).

<sup>196</sup> *Id.* § 2.

<sup>197</sup> *Id.* § 2(2).

<sup>198</sup> See Evidence (Proceedings in Other Jurisdictions) Act, 1975, c. 34, § 3(3); Shipping Contracts and Commercial Documents Act, 1964, c. 87, § 2(1)(b).

<sup>199</sup> Evidence (Proceedings in Other Jurisdictions) Act, 1975, c. 34, § 1.

<sup>200</sup> 1980, c. 11, § 2(5). This section amends the provisions of the Shipping Act, which did not cover documents or evidence sought through letters rogatory.

<sup>201</sup> 28 U.S.C. § 1783 (1976). See CURRENT L. STAT., 1980, c. 11(2) (general note). Under § 1783, a U.S. court is not permitted to subpoena the attendance or response of foreign citizens or residents. See *Gillars v. United States*, 182 F.2d 962 (D.C. Cir. 1950).

<sup>202</sup> FED. R. CIV. P. 28(b).

<sup>203</sup> 1980, c. 11, § 3(2).

<sup>204</sup> See CURRENT L. STAT., 1980, c. 11(3) (general note).



event, the Act claims personal jurisdiction based on both territorial and national factors, the latter being one characteristic of many United States laws that the British deplore.<sup>205</sup>

Despite the innovations and modifications of sections 2 and 3, these sections merely transfer the authority and expand the coverage of the 1964 Shipping Contracts and Commercial Documents Act.<sup>206</sup> Under the Shipping Act, which is superceded by section 8(5) of the Protection of Trading Interests Act,<sup>207</sup> any Minister could issue directions prohibiting compliance with foreign documentary requirements.<sup>208</sup> The Shipping Act focused on preventing release of information to foreign authorities that could or would constitute an infringement of the jurisdiction of the United Kingdom.<sup>209</sup> The Act offered no specific protection of Britain's international commercial interests as does the Trading Interests Act.<sup>210</sup> Where documentary requests were made by overseas courts or authorities, using letters rogatory in pursuance of instituted civil or criminal proceedings, or contemplated civil proceedings, the 1975 Evidence Act prevailed.<sup>211</sup> The new Act combines provisions relevant to both of these older Acts and consolidates authority for its effectuation under the Secretary of State. This consolidation ensures that Britain's foreign policy is considered before information is released to foreign courts or authorities.

The combined effect of sections 2, 3 and 4 is likely to alter the perspective of courts in the United Kingdom toward the release of commercial information to foreign courts. Section 2 essentially codifies the House of Lords' holding on the Evidence Act in *Rio Tinto Zinc v. Westinghouse*,<sup>212</sup> however, so that a change in court attitude probably would have occurred even without that section. In *Rio Tinto Zinc*, a case of first impression under the Evidence Act, the English Court of Appeal rejected the old case law as inapposite and declared that pre-trial discovery would be freely allowed.<sup>213</sup> The House of Lords, however, reinvoked the historical bar against the release of information

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<sup>205</sup> See Sept. U.K. Press Notice, note 12 *supra* (speech of John Nott).

<sup>206</sup> Subsections 2 and 3 of section 1 of the Shipping Act are reenacted in the Trading Interests Act, although with several changes.

<sup>207</sup> 1980, c. 11, § 8(5).

<sup>208</sup> 1964, c. 87, § 2.

<sup>209</sup> *Id.* See Baker, *supra* note 29, at 24.

<sup>210</sup> 1964, c. 87, § 2. See CURRENT L. STAT., 1980, c. 11(2) (general note).

<sup>211</sup> See *Discovery Note*, note 27 *supra*.

<sup>212</sup> *In re Westinghouse Elec. Corp. Uranium Contract Litigation*, [1978] 2 W.L.R. 81, 87-90, [1978] 1 All E.R. 434, 441-43 (H.L. 1977).

<sup>213</sup> *In re Westinghouse Elec. Corp. Uranium Contract Litigation*, [1978] 2 W.L.R. 81 (H.L. 1977) (opinion of Lord Wilberforce).

sought merely because it might lead to the discovery of other information that would be relevant at trial.<sup>214</sup>

The literal wording of the Evidence Act allowed a British court to secure information for a requesting foreign court even before proceedings were instituted.<sup>215</sup> As long as civil proceedings were "contemplated," a court could grant letters rogatory.<sup>216</sup> In the past, British courts had summarily refused requests by U.S. courts for assistance in the production of pretrial discovery.<sup>217</sup>

Once it was decided that the Evidence Act would be read to limit discovery to material evidence,<sup>218</sup> the Lords then concluded, by a three to two vote, that they should look beyond the phrasing of the letters rogatory to the substance of the request and the circumstances in which they were issued.<sup>219</sup> The courts are directed, thus, to predict the ultimate purpose of the request. This inquiry may further impede access by foreign litigants to information in Britain. Moreover, the Lords stated that in matters of longtime government policy, the courts should speak "with the same voice as the executive."<sup>220</sup> Lord Wilberforce commented in reference to the U.S. Justice Department's intervention:

[I]f public interest enters into this matter on one side, so it must be taken account of on the other; and as the views of the executive in the United States of America impel the making of the [letters rogatory] order, so must the views of the executive in the United Kingdom be considered when it is a question of implementing the order here. It is axiomatic that in anti-trust matters the policy of one state may be to defend what it is the policy of another state to attack.<sup>221</sup>

With that comment, Lord Wilberforce signalled that the courts would and, in fact, should further the policies of the British government. Apparently, Parliament wanted an additional safeguard for its

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<sup>214</sup> *Id.*

<sup>215</sup> Evidence (Proceedings in Other Jurisdictions) Act, 1975, c. 34 § 1(b).

<sup>216</sup> *Id.*

<sup>217</sup> See [1978] 2 W.L.R. at 86-87. *Radio Corp. of America v. Rauland Corp.*, [1956] 1 Q.B. 618 (1955) is the leading case on point. In this case, the court refused to comply with a request from a U.S. court for documents from parties not involved in the suit. The request was rejected on the basis that the Foreign Tribunals Evidence Act, 1856, 19 & 20 Vict. 619, c. 113, § 1, allowed production only of evidence to be used at trial, and did not allow production for the purpose of pre-trial discovery.

<sup>218</sup> *Id.* at 101.

<sup>219</sup> *Id.* at 118-19. The U.S. Department of Justice had offered the British appellants immunity from government prosecution based on their requested testimony. Text accompanying notes 49-52 *supra*. The House of Lords viewed the Justice Department's intercession in a case initiated by private parties as an indication that the requested testimony might be used for more than the evidentiary purpose expressed in the Westinghouse letters rogatory. [1978] 2 W.L.R. at 115.

<sup>220</sup> [1978] 2 W.L.R. at 94.

<sup>221</sup> *Id.*

policies since it empowered the Secretary of State, under the Trading Interests Act, to prohibit compliance with foreign requests that are prejudicial to British sovereignty, security, or international relations.<sup>222</sup> Not only are the lower courts to follow the British High Court's admonition to scrutinize foreign requests for their underlying purpose, but they are directed to employ expanded standards of inadmissibility. In the future, foreign parties can anticipate a cautious approach by courts to letters rogatory and other demands for information.<sup>223</sup>

*Sections 5, 6 and 7: Prohibitions Against Registration and Recovery of Judgments for Punitive Damages*

Sections 5,<sup>224</sup> 6,<sup>225</sup> and 7<sup>226</sup> form Britain's new offensive against United States extraterritorial jurisdiction. Whereas the preceding sections of the Act resemble nondisclosure statutes previously adopted in many foreign countries, sections 5, 6, and 7 are unprecedented.<sup>227</sup> These sections affect the judgment and post-judgment phases of litigation rather than the discovery or evidence-gathering phase, which was the focus of most previous blocking statutes.<sup>228</sup> Britain's enactment of major restrictions on recognition and enforcement of certain kinds of foreign judgments serves as a sound political rebuke to the United States, coming at a time when the United States-United Kingdom Convention on the Reciprocal Recognition and Enforcement of Judgments in Civil Matters is in draft form and under negotiation.<sup>229</sup> Moreover,

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<sup>222</sup> 1980, c. 11, § 2(2).

<sup>223</sup> For a discussion of the different concepts of jurisdiction recognized by Britain and the United States, see text accompanying notes 1-12, *supra*.

<sup>224</sup> 1980, c. 11, § 5.

<sup>225</sup> *Id.* § 6.

<sup>226</sup> *Id.* § 7.

<sup>227</sup> See CURRENT L. STAT., 1980, c. 11(5)-(7) (general notes).

<sup>228</sup> Only the Australian Foreign Antitrust Judgments (Restriction of Enforcement) Act, 1979, No. 13 (Austl.), antedated the Trading Interests Act's prohibitions on registration and enforcement of multiple damage judgments. The Australian Act is, however, much less ambitious than the British Act in attempting to thwart U.S. extraterritorial jurisdiction. The Australian Attorney General is only authorized to proscribe the registration of antitrust judgments that he deems detrimental or likely to be detrimental to Australia's trade interests.

Additionally, the Australian Act permits the Attorney General merely to limit the enforceability of any foreign antitrust judgment so that a treble damage award might be ordered enforceable in Australia for a sum substantially less than was decided by the foreign court. 1979, No. 13, § 3 (Austl.).

<sup>229</sup> Convention on the Reciprocal Recognition and Enforcement of Judgments in Civil Matters, draft initialed Oct. 26, 1976, United States-United Kingdom, reprinted in 16 INT'L LEGAL MATERIALS 71 (1977) [hereinafter cited as Reciprocal Convention]. See generally Smit, *The Proposed United States-United Kingdom Convention on Recognition and Enforcement of Judgments: A Prototype for the Future*, 17 VA. J. INT'L L. 443 (1977). This Convention followed the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, opened for sig-

the letter, although perhaps not the spirit, of sections 5 and 6 extends beyond punitive judgments in antitrust suits: any judgment for multiple damages is potentially recoverable.<sup>230</sup> Section 5 expressly prohibits the registration and enforcement of any foreign judgment for multiple damages.<sup>231</sup> This could encompass a judgment in which the underlying action was in tort or trademark infringement. Furthermore, section 6, by allowing any "person carrying on business in the United Kingdom" to recover,<sup>232</sup> entitles individuals with potentially limited ties to Britain to recover under this provision. Thus, this landmark statute is not only broad in its coverage and unprecedented in its likely effect on certain foreign judgments rendered against British defendants, but it is also of substantial advantage to non-British parties who are merely carrying on business in the United Kingdom.

Finally, and most significantly, sections 6 and 7 directly challenge the system of U.S. private antitrust prosecutions. Specifically, by entitling a British national, a British corporation, or a person conducting business in the United Kingdom to recover the noncompensatory portion of a judgment for multiple damages paid in the United States, the British Act undermines the treble damages incentive to private attorneys general provided by the Clayton Act. Generally, this new approach is a result of frustration with the limited effectiveness of other defensive statutes legislated in the United Kingdom and elsewhere.<sup>233</sup> For example, by merely restricting access to documents required by U.S. plaintiffs, Britain has not significantly deterred private or public suits against parties under British sovereignty.<sup>234</sup> Therefore, sections 5, 6, and 7 take broad aim and contain some powerful incentives for the United States government to re-evaluate its extraterritorial enforcement policies and statutes.

*U.S.-U.K. Convention on the Reciprocal Recognition and Enforcement of*

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*nature* Sept. 27, 1968, 15 J.O. COMM. EUR. (No. L 299) 32 (1972), translated in [1973] 2 COMM. MKT. REP. (CCH) ¶ 6003 (entered into force Feb. 1, 1973). The 1973 Convention is an agreement among the members of the European Economic Community to honor judgments rendered in any member state against a non-member defendant. Thus, a civil or commercial decision of a British court against a U.S. defendant would be recognizable in Germany. The EEC Convention makes the enforcement of judgments possible in a greater number of jurisdictions than previously.

<sup>230</sup> 1980, c.11, § 5(2)(a). See CURRENT L. STAT., 1980, c.11(5) (general note).

<sup>231</sup> CURRENT L. STAT., 1980, c.11(5) (general note).

<sup>232</sup> 1980, c.11, § 6(1)(c).

<sup>233</sup> For a list of the past foreign enactments that employed defensive measures, see note 13 *supra*.

<sup>234</sup> In fact, the number of both private and public antitrust suits brought against foreign defendants has increased in the past few years. See Rahl, *Antitrust and International Transactions—Recent Developments*, 46 ANTITRUST L.J. 965, 965 (1978); Shifrin, note 17 *supra*.

*Judgments in Civil Matters.* That the United Kingdom would prohibit the registration and enforcement of multiple damages is no surprise. What is surprising, however, is that in the midst of bilateral negotiations with the United States, Britain has taken unilateral action especially targeted at U.S. judgments. In October 1976, the United States and the United Kingdom initialed the draft of the Convention on the Reciprocal Recognition and Enforcement of Judgments in Civil Matters.<sup>235</sup> Both nations agreed that judgments for punitive or multiple damages would be excluded from coverage.<sup>236</sup> This provision is in addition to article 7(a), which permits nonrecognition when recognition would be manifestly repugnant to local public policy.<sup>237</sup> Because the United States abandoned consideration of the registration of multiple damage judgments in order to advance the negotiation of a complete Convention package, Britain's unilateral enactment of this provision appears to be in bad faith. Additionally, the United States is disconcerted by the substance of section 5 of the Act, which bars registration of certain judgments, since it does not correspond to what was agreed upon in the Convention.<sup>238</sup>

*Inclusion of Non-Antitrust Laws.* The real sting of section 5 is not so much that the registration of multiple damage judgments is prohibited, but that the registration or enforcement of any antitrust decision or other judgment arising out of the regulation of competition may also be barred.<sup>239</sup> A final order rendered under one of the restraint of trade laws need not award punitive damages to be ineligible for registra-

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<sup>235</sup> See note 229 *supra*.

<sup>236</sup> Reciprocal Convention, *supra* note 229, Art. 2(2)(b); see Smit, *supra* note 229, at 448.

<sup>237</sup> Reciprocal Convention, *supra* note 229, Art. 7(a).

<sup>238</sup> See Dec. U.K. Press Notice, *supra* note 29, at 4. In a diplomatic note dated November 9, 1979, and addressed to the British Secretary of State for Trade, the United States Ambassador to Great Britain strongly criticized the provisions of clause 5 which were ultimately enacted in § 5. In particular, the U.S. Ambassador remarked that unlike the negotiated draft of the Convention on Reciprocal Recognition of Judgments, clause 5 did not contemplate enforcement of the compensatory portion of a multiple damage award. This inconsistency was partially rectified in amendments to the Protection of Trading Interests Bill, but § 6 enables pro rata recovery. Assuming that treble damages are awarded in the United States, if the defendant does not pay the full judgment, but is entitled to recover two-thirds of whatever is paid, the winning plaintiff would be left with less than full compensation. Of course, this hypothetical assures that the plaintiff has sufficient recoverable assets that are available to the qualifying defendant in Britain. Furthermore, § 5 bars recognition and hence, enforcement of judgments that presumably would have been honored under the Convention on Reciprocal Recognition of Judgments. For example, a judgment based on a rule of law specified by the Secretary of State is unenforceable under § 5(2)(b). See CURRENT L. STAT., 1980, c. 11(5) (general note).

<sup>239</sup> 1980, c. 11, § 5(4). Judgments rendered by many of the U.S. regulatory agencies, such as the Federal Trade Commission or the Federal Maritime Commission, are now subject to the § 5 prohibition on registration and enforcement.

tion.<sup>240</sup> Since the legislation was precipitated by British antipathy toward extraterritorial enforcement of laws under which treble damages were awarded, the prohibitionary authority accorded the Secretary of State is more expansive than may have been anticipated. Depending on the Secretary's use of the provisions of section 5, United States plaintiffs in antitrust suits may not be able to recover unfulfilled judgments against defendant's assets in Britain.

In effect, however, section 5 does not take from a winning litigant in a U.S. court a privilege that was previously available. Nonrecognition of U.S. judgments abroad is the norm, not the exception.<sup>241</sup> In contrast, judgments rendered in foreign countries have generally been recognized and enforced in the United States only upon the proper exercise of jurisdiction by the rendering court and due process for the defendant.<sup>242</sup> In many instances, section 5 will impose no burden on the successful plaintiff since there will be sufficient attachable assets in the United States to fulfill the judgment. Long before final adjudication of a case the plaintiff may have obtained a temporary restraining order restricting the defendant's ability to transfer assets out of the United States.<sup>243</sup> Thus, a private plaintiff may not after all be deterred from bringing a cause of action by the nonregistrability or nonenforcement provisions in the United Kingdom.

*Undermining Private Antitrust Litigation.* Britain's perception of the inadequacy of its past blocking legislation prompted more innovative and stringent measures. Accordingly, the recovery and reciprocity provisions of sections 6 and 7, respectively, raise the legal and financial stakes for a plaintiff in the United States bringing suit against British or British-based defendants. Unlike the other substantive sections of the Act, section 6 is framed as an entitlement of a qualifying defendant, not

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<sup>240</sup> *Id.*

<sup>241</sup> Among Common Market members,

United States judgments are not enforceable in the Netherlands because its law requires the existence of a treaty; they are reexamined on the merits in Belgium; they are subject to a statutory reciprocity requirement in Germany that is often difficult to establish to the satisfaction of the German courts, which are accustomed to look to statutes rather than to court decisions; and they are by statute subject to reexamination on the merits in Italy if rendered by default. In the Scandinavian countries, a treaty is needed for enforcement. In the rest of Western Europe, as well as in Latin America, the situation does not differ substantially.

NEW YORK STATE BAR ASSOCIATION, REPORT AND PROPOSED RESOLUTION OF COMMITTEE ON INTERNATIONAL LAW (1972), *quoted in* Von Mehren, *Enforcement of Foreign Judgments in the United States*, 17 VA. J. INT'L L. 401, 406 n.25 (1977).

<sup>242</sup> *Id.*

<sup>243</sup> In the Westinghouse litigation, Westinghouse followed this course and successfully obtained an injunction. *See* note 57 *supra*; Getschow, *Westinghouse Finds It Has Its Hands Full in Uranium Cartel Suit*, Wall St. J., May 4, 1979, at 1.

as a discretionary provision.<sup>244</sup> As such, it is enforceable in court without an intervening opinion or any official action by the Secretary of State. By entitling citizens, domestic corporations and parties conducting business in the United Kingdom to recover noncompensatory damages paid in a foreign judgment,<sup>245</sup> Britain is embarking upon legal warfare. Clearly, the expected result is to thwart the treble damage incentive to private plaintiffs under American antitrust laws. The immediately foreseeable impact is that private parties will be compelled to do a cost-benefit analysis that anticipates the potential frustration of the noncompensatory portion of a judgment.<sup>246</sup>

The British Act sought to circumscribe U.S. extraterritorial jurisdiction or, at least, to limit its application to cases in which no countervailing foreign policies were infringed. A major incentive to the British for enacting the Protection of Trading Interests Act was that it would induce more consideration of British policies by U.S. courts.<sup>247</sup> Therefore, it is somewhat ironic that the United States government objected to the format of section 6 because "it does not leave any room for the Secretary of State or the court to examine the facts of the case and determine either that there is no significant United Kingdom interest in the transaction or that United States interests outweigh United Kingdom interests."<sup>248</sup> Section 6 does not require a case-by-case review of facts, nor does it include a procedure by which views of the foreign country whose jurisdiction is being overturned can be taken into account.<sup>249</sup> Furthermore, a court in the United Kingdom may entertain proceedings on a claim for recovery without having the defendant in the court's jurisdiction.<sup>250</sup> Thus, recovery seems to be a foregone conclusion once the action is initiated.

In effect, Britain has neutralized the disadvantage previously experienced by foreign defendants raising foreign law objections in U.S. courts. In doing so, it has adopted an outlook similar to the pre-*Timberlane* judicial attitude in the United States, which tended to bypass comity arguments. Britain has gone even further to recruit opposition to U.S. practices. In section 7, other countries are encouraged to adopt a "claw back" provision paralleling section 6.<sup>251</sup> Thus, a qualify-

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<sup>244</sup> 1980, c. 11, § 6(2).

<sup>245</sup> *Id.* § 6(1). See CURRENT L. STAT., 1980, c. 11(6) (general note).

<sup>246</sup> See 302 U.S. EXPORT WEEKLY (BNA), at C-4 (Apr. 8, 1980).

<sup>247</sup> CURRENT L. STAT., 1980, c. 11 (introductory general note).

<sup>248</sup> Dec. U.K. Press Notice, note 29 *supra*.

<sup>249</sup> See *id.* at 8.

<sup>250</sup> 1980, c. 11, § 6(5).

<sup>251</sup> 1980, c. 11, § 7.

ing defendant whose right of recovery is recognized in the United Kingdom, but who finds insufficient assets there, conceivably could recover against the plaintiff in any other country where such a provision existed and the British judgment was enforceable.<sup>252</sup>

What emerges from the diplomatic exchange between the United States and Britain over section 6 in particular is a clear picture of intractable jurisprudential differences.<sup>253</sup> Legal channels alone are unable to ameliorate the dilemma. Whereas the United States claims the need and lawfulness of executing its antitrust laws against parties who do not have a territorial or personal connection with the United States, but whose actions do have a substantial and direct effect on the United States,<sup>254</sup> the United Kingdom considers these laws to be appendages of national economic policy, and hence, properly confined to a nation's own territory or citizens.<sup>255</sup> The obvious rebuttal to the British view is that intentionally unlawful acts against one country should not be immunized by virtue of the act having been committed in a foreign location. On the other hand, since each country enacts its own statutes, it becomes circular to rationalize extraterritorial jurisdiction because a party outside of the jurisdiction violates a given law. Once a sovereign seeks to enforce its laws in the territory of another state, controversy is likely. There is an underlying dichotomy between the way the United States, along with several other countries, and the Commonwealth nations define their jurisdictions.

Despite these doctrinal differences, it is curious to note that, in essence, section 6 operates extraterritorially. An example presented in the diplomatic exchange between the United States Ambassador and the British government is illustrative.<sup>256</sup> It hypothesizes a French company with modest branch operations in both the United Kingdom and France conspiring with its United States competitors to fix United States prices of their product.<sup>257</sup> One significant price-fixing meeting among the conspirators was held abroad.<sup>258</sup> A United States purchaser uncovers the conspiracy and successfully collects treble damages under U.S. antitrust laws.<sup>259</sup> If the French company's U.S. branch office was

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<sup>252</sup> CURRENT L. STAT., 1980, c. 11(7) (general note). See [1980] 4 TRADE REG. REP. (CCH) ¶ 50,414.

<sup>253</sup> See Dec. U.K. Press Notice, note 29 *supra*; [1980] 4 TRADE REG. REP. (CCH) ¶ 50,414.

<sup>254</sup> See discussion of the *Alcoa* doctrine, note 8 *supra*.

<sup>255</sup> See Dec. U.K. Press Notice, note 29 *supra*.

<sup>256</sup> See Antitrust Realism, *supra* note 8, at 12.

<sup>257</sup> Dec. U.K. Press Notice, note 29 *supra*.

<sup>258</sup> *Id.*

<sup>259</sup> *Id.*



not its principal place of business at the time of the violation and the violative activities were not exclusively carried on in the United States, the defendant could recover in a British court for any noncompensatory damages it paid.<sup>260</sup> The "cause" upon which this action arose would not even meet the "substantial and direct effect" test which forms the basis of United States extraterritorial jurisdiction in antitrust law.<sup>261</sup>

Even if no other country immediately accepts Britain's challenge, the threat of future recovery legislation in foreign countries may discourage private litigants from seeking the treble damage remedy. Antitrust litigation is notoriously expensive and time consuming.<sup>262</sup> It would be naive to suggest that private plaintiffs are motivated entirely or even principally by a commitment to uphold a competitive free enterprise system. The treble damage remedy is alluring and in many cases, perhaps necessary to compensate parties for time, and monetary and emotional expense.<sup>263</sup> In the past, United States lawmakers have considered the treble damages remedy to be the sine qua non of effective antitrust enforcement inasmuch as the federal and state enforcement agencies combined cannot fully monitor or prosecute all violations and, therefore, depend on private attorneys general.<sup>264</sup> Escalating tensions with foreign countries and their concomitant expression in new restrictive statutes raise anew the need for the United States to reconsider not merely the method of enforcing private rights of action under the antitrust laws, but also the mitigating factors that a court should assess when extraterritorial jurisdiction is asserted.

## CONCLUSION

The extraterritorial scope of U.S. antitrust laws has created friction

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<sup>260</sup> *Id.* See 1980, c. 11, § 6(3).

<sup>261</sup> See note 8 *supra*.

<sup>262</sup> See H.R. REP. NO. 422, 84th Cong., 1st Sess. (1955), reprinted in [1955] U.S. CODE CONG. & AD. NEWS 2328. At the time of the 1955 amendment to the Clayton Act, Congress reviewed the rationale behind the treble damages provision. "It was originally hoped that this would encourage private litigants to bear a considerable amount of the burden and expense of enforcement and thus save the Government time and money." [1955] U.S. CODE CONG. & AD. NEWS, at 2329. The enactment of section 5 of the Clayton Act, "was in part a recognition by the Congress that section 7 of the Sherman Act had not successfully stimulated private litigation for enforcement of the Sherman Act." *Id.* Section 5 provides that final judgments and decrees in federal antitrust proceedings would be acceptable as prima facie evidence against defendants in private damage suits. In fact, since the enactment of section 5, "the bulk of private antitrust litigation has followed successful Government action, so that the judgments and decrees in the Federal proceedings could be used to establish a case." *Id.*

<sup>263</sup> *Id.* at 2330.

<sup>264</sup> See note 74 and accompanying text *supra*.

between the United States and its main trading partners. Many countries have reacted to this invasion of their territorial sovereignty by enacting nondisclosure statutes prohibiting the availability of specific information of foreign litigants. Generally, the impact of these foreign statutes has been minimal since litigation can proceed without certain documents. By failing to inhibit American lawsuits based on extraterritorial jurisdiction, foreign governments have exposed their nationals and their domestic business to treble damages.

The huge potential judgment in the *Westinghouse* uranium contracts litigation induced the United Kingdom to legislate safeguards and countermeasures. The resultant British Protection of Trading Interests Act of 1980 empowers the Secretary of State to prohibit compliance by persons in Britain with foreign statutes and regulations that operate extraterritorially. Also, requests for commercial documents by foreign courts and litigants will be treated more circumspectly under the new Act. The Act's most dramatic effect, however, will derive from the provisions that entitle recovery of noncompensatory damages against the winning plaintiff's assets located in Britain and that encourage other nations to enact comparable legislation. These provisions aim at inhibiting private antitrust suits but, failing that, they equip qualifying British defendants to strike back.

Without the economic or political control it once exercised in international trade, the United States is under increasing foreign pressure to pay greater heed to the doctrine of comity. Political measures by foreign countries have not induced the United States to rethink its antitrust enforcement policies. Thus, for the first time, a foreign nation has enacted legislation that allows it to deal aggressively with U.S. extraterritorial enforcement. The British Act undermines the treble damage remedy which motivates private attorneys general. Private parties in the United States are left with the choice of either not litigating, or litigating, but perhaps losing the noncompensatory damages. Consequently, the United States must reassess the importance of conflicting foreign laws and policies in the context of private extraterritorial antitrust enforcement. Unless the United States recognizes the vital interests of other countries, it can anticipate further frustration of its own laws by aggressive foreign statutes.

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