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The Protection of Trading Interests Act of 1980— Britain's Latest Weapon in the Fight Against United States Antitrust Laws

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Arlene Daffada

Abstract

This Note will review the doctrines and principles which now guide the enforcement of United States antitrust laws in foreign commerce. It will then argue that the United States must choose between two alternative courses of action when responding to the passage of the PTIA. On the one hand, the United States could choose to maintain the status quo by endorsing existing antitrust laws and doctrines applicable to foreign commerce. On the other hand, the United States could respond by reexamining existing laws and considering changes in their scope, function, and application in the field of foreign commerce. Whichever option is selected, it will have far-reaching political, economic, and legal ramifications.

NOTES

THE PROTECTION OF TRADING INTERESTS ACT OF 1980—BRITAIN'S LATEST WEAPON IN THE FIGHT AGAINST UNITED STATES ANTITRUST LAWS

INTRODUCTION

During the past two decades there has been an "astonishing growth"¹ in the number of antitrust suits filed by private parties² and the number of antitrust suits instituted involving foreign commerce.³ In 1980, these two phenomena combined to cause an unprecedented backlash against the extraterritorial application of United States antitrust laws. In Great Britain this reaction was embodied in retaliatory legislation enacted by Parliament.⁴

1. Remarks by Mr. John H. Shenefield, Associate Attorney General of the United States, before the International Law Section of the American Bar Association, in Washington, D.C. (Dec. 10, 1980) at 6 [hereinafter cited as Shenefield Remarks]. Mr. Shenefield noted that "[i]n 1960, less than three hundred private antitrust suits were filed. In the year ending June 30, 1980, 1457 suits were filed—a five-fold increase." *Id.*

2. Private causes of action for violation of antitrust laws are authorized under section 4 of the Clayton Act. 15 U.S.C. § 15 (1976). *See* *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 745-46 (1977); *Mechanical Contractors Bid Depository v. Christiansen*, 352 F.2d 817, 821 (10th Cir.), *cert. denied*, 384 U.S. 918 (1965).

3. *See* Joelson, *Challenges to United States Foreign Trade and Investment: Antitrust Law Perspectives*, 14 INT'L LAW. 103, 103-04 (1980). "Foreign commerce" as used in this Note encompasses (1) acts of United States citizens or foreigners performed in whole or in part in the United States which directly affect commerce between the United States and foreign nations, and (2) conduct performed abroad which affects commerce within the United States or United States trade with other nations. "Extraterritorial jurisdiction" as used in this Note includes the assertion of jurisdiction under United States law over the conduct of foreigners which takes place in whole or in part outside the United States. Increased activity by the Department of Justice in the foreign commerce field, and the reaction it has caused, have been the subject of commentary by Justice Department officials. They have noted that "in the last few years, we've hit them [foreigners, and the British in particular] pretty hard," and that as a result "foreign governments have become more forceful in expressing their concern over the reach of U.S. antitrust laws." Remarks of Douglas Rosenthal, Chief of the Justice Department Antitrust Division, Foreign Commerce Section, *quoted in* [1979] 917 ANTITRUST & TRADE REG. REP. (BNA), June 7, 1979, at A-26. *See also* Shenefield Remarks, *supra* note 1, at 6.

4. *See* pt. III B *infra*. The terms Great Britain and United Kingdom will be used interchangeably throughout this Note.

The passage of the Protection of Trading Interests Act⁵ (PTIA) by the British Parliament merits careful study for several reasons. First, and most importantly, the act challenges the propriety and efficacy of extraterritorial enforcement of United States antitrust laws.⁶ Second, the PTIA represents a unique attempt to minimize

5. The Protection of Trading Interests Act, 1980, c. 11 [hereinafter cited as PTIA]. Royal assent to the Act was given on March 20, 1980. 407 PARL. DEB., H.L. (5th ser.) 432 (1980). The official title of the Act is: "An Act to provide protection from requirements, prohibitions and judgments imposed or given under the laws of countries outside the United Kingdom and affecting the trading or other interests of persons in the United Kingdom." The PTIA is reproduced in its entirety in the Appendix to this Note. See generally B. HAWK, UNITED STATES, COMMON MARKET AND INTERNATIONAL ANTITRUST: A COMPARATIVE GUIDE 62-64 supp. (1979 & Supp. 1980); Gordon, *Extraterritorial Application of United States Economic Laws: Britain Draws the Line*, 14 INT'L LAW. 151 (1980).

6. Birenbaum & Johnson, *U.S. Law Under Fire*, N.Y. Times, Nov. 26, 1980, at A19, col. 1; Lewis, *Export of U.S. Laws Disputed—Other Nations are Retaliating*, N.Y. Times, Dec. 27, 1980, at 29, col. 4. The policies underlying the antitrust laws and the Sherman Act, in particular, were summarized by the Supreme Court in *Northern Pac. Ry. Co. v. U.S.*, 356 U.S. 1 (1958). The Court stated:

[The antitrust laws were] designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. [They] rest on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions.

Id. at 4. For a statement regarding the application of this policy in foreign commerce cases, see ANTITRUST DIV., U.S. DEP'T OF JUSTICE, ANTITRUST GUIDE FOR INTERNATIONAL OPERATIONS (rev. Mar. 1, 1977) at 4-6. The Justice Department describes two fundamental goals which motivate enforcement of antitrust laws in the foreign commerce field. They are (1) "to protect the American consuming public by assuring it the benefit of competitive products and ideas produced by foreign . . . as well as domestic competitors," and (2) "to protect American export and investment opportunities against privately imposed restrictions." *Id.* at 4-5. Opposition to the application of these laws to the conduct of foreign corporations is a fundamental concept embodied in the PTIA.

For a discussion of the economic theory underlying the antitrust laws, see, e.g., ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS, DEP'T OF JUSTICE, REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS ch. I (1955); M. MASSELL, COMPETITION AND MONOPOLY: LEGAL AND ECONOMIC ISSUES 16-40 (1962); SECTION OF ANTITRUST LAW, AMERICAN BAR ASS'N, ANTITRUST DEVELOPMENTS 1955-1968: A SUPPLEMENT TO THE REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS MARCH 31, 1955 ch. 1 (1968); G. STOCKING & M. WATKINS, CARTELS OR COMPETITION? THE ECONOMICS OF INTERNATIONAL CONTROLS BY BUSINESS AND GOVERNMENT ch. 4 (1948) [hereinafter cited as STOCKING & WATKINS]; H. ZWARENSTEYN, SOME ASPECTS OF THE EXTRATERRITORIAL REACH OF THE AMERICAN ANTITRUST LAWS ch. III (1970).

the impact abroad of judgments by United States courts.⁷ Third, the PTIA demonstrates an effort to deter private parties from instituting antitrust suits in United States courts against British corporations.⁸ Whether or not it is successful, the deterrent aspect of the act is significant because it represents a novel approach to fighting the effects of United States antitrust laws.

In the past, the jurisdiction of United States courts has been challenged,⁹ and nondisclosure laws have been used¹⁰ in the fight against the extraterritorial application of United States antitrust statutes. Adoption of the PTIA indicates that the locus of the fight against United States antitrust laws is being shifted abroad to permit the use of foreign laws and foreign courts to frustrate the enforcement of judgments rendered in United States courts.¹¹

Enactment of the Protection of Trading Interests Act demon-

7. Prior to the enactment of the PTIA the strongest legislation enacted by a foreign nation designed to neutralize the effect of United States antitrust judgments was the Foreign Antitrust Judgments (Restriction of Enforcement) Act, passed by the Australian Federal Parliament in March 1979. No. 13, Austl. Acts (1979). Unlike the British act, the Australian act does not contain a clawback provision; that is, a provision permitting recovery of the punitive portion of a multiple damage award paid pursuant to a judgment by a foreign court. See 20 HARV. INT'L L.J. 663 (1979).

8. See note 188 *infra* and accompanying text.

9. See, e.g., *United States v. Pacific & Arctic Ry. & Navig. Co.*, 228 U.S. 87, 99, 105-06 (1913); *United States v. American Tobacco*, 221 U.S. 106, 134 (1911); *United States v. Imperial Chem. Indus.*, 100 F. Supp. 504, 511 (S.D.N.Y. 1951), *enforced*, 105 F. Supp. 215 (S.D.N.Y. 1952).

10. For example, in 1977 the Canadian government invoked its nondisclosure law or "blocking statute," the Atomic Energy Control Act, CAN. REV. STAT. c. A-19 (1970), Uranium Information Security Regulation, STAT. O. & R. 76-644, amended by CAN. STAT. O. & R. 77-836, consolidated at Can. Consol. R. c. 366 in response to subpoenas issued by a district court. The blocking statute was implemented through a regulation promulgated under the Atomic Energy Control Act which prevented the dissemination of information outside Canada relating to uranium market activities. See *In re Westinghouse Elec. Corp. Uranium Contracts*, 563 F.2d 992 (10th Cir. 1977). In 1979, the British government invoked its then applicable blocking statute, the Shipping Contracts and Commercial Documents Act, 1964, c. 87, in response to subpoenas issued during the course of a grand jury investigation of the transatlantic shipping industry. See [1979] 917 ANTITRUST & TRADE REG. REP. (BNA), June 7, 1979, at A-26. Other nondisclosure statutes include: (Australia) Foreign Proceedings (Prohibition of Certain Evidence) Act, 1976, No. 121, 202; (Netherlands) Law of June 28, 1956, Concerning Economic Competition, [1956] Staatsblad 1061, amended by Law of July 16, 1958, § 39, [1958] Staatsblad 413; (Ontario) Ontario Business Records Protection Act, 1 ONT. REV. STAT. c. 54 (1970); (Quebec) Business Concerns Records Act, QUE. REV. STAT. c. 278 (1964); (South Africa) Atomic Energy Act, 1967, No. 90, § 30, Stat. Repub. So. Afr. 1045 (1977); (West Germany) Law of May 24, 1965, § 11, [1965] Bundesgesetzblatt [BGBl] II 835.

11. See notes 151-83 *infra* and accompanying text.

strates that a watershed has been reached in the application of United States antitrust laws to foreign commerce. Furthermore, passage of the act represents an unambiguous message to the United States by one of its closest allies¹² and exemplifies legislation that may soon be passed by other nations.¹³

This Note will review the doctrines and principles which now guide the enforcement of United States antitrust laws in foreign commerce. It will then argue that the United States must choose

12. If there existed any doubt as to the motivation for enactment of the PTIA, it was dispelled by the remarks made regarding the act by the British Secretary of State for Trade, Mr. John Nott, before the House of Commons. Mr. Nott stated:

My objective in introducing this Bill is to reassert and reinforce the defenses of the United Kingdom against attempts by other countries to enforce their economic and commercial policies unilaterally on us. From our point of view the most objectionable method by which this is done is by the extra-territorial application of domestic law.

....

[T]he practices to which successive United Kingdom Governments have taken exception have arisen in the case of the United States of America. We have not suddenly become belligerent or confrontational in regard to this most powerful and valued friend. This Bill is a response to a situation of a very particular nature which has been developing over several decades, and which in the past few years had become much more acute. It also emphasizes that, insofar as the application or enforcement of any foreign law requires the active assistance or passive acquiescence of the United Kingdom; the overseas country in question must have regard to the trading interests of the United Kingdom.

973 *PARL. DEB., H.C. (5th ser.) 1533-34 (1979)*. Portions of Mr. Nott's statement quoted above were incorporated into a diplomatic note sent by the British government to the United States government. The British note was a reply to questions and criticisms of the PTIA, as proposed, which had been expressed by the United States government in a diplomatic note to Her Majesty's government soon after the PTIA was introduced in the House of Commons. United States Diplomatic Note No. 56 from Secretary of State Vance to Her Majesty's Government (Nov. 9, 1980), and British Diplomatic Note No. 225 from Her Majesty's Government to Secretary of State Vance (Nov. 27, 1980). Copies of the United States Note No. 56 and another United States Note which reproduces the substance of the British Note No. 225 are on file at the office of the *Fordham International Law Journal*.

13. As of this writing, Canada and Australia are considering similar legislation. In Canada, a bill was introduced in the House of Commons proposing enactment of the Foreign Proceedings and Judgments Act, a law strikingly similar to the PTIA. Foreign Proceedings and Judgments Act, H.C. Bill C-41, 32d Parl., 1st Sess. 1980 (First Reading, July 11, 1980). Debate on the bill has not yet taken place. Debate was tabled soon after the bill's introduction in the House of Commons. Telephone conversation with G. Woolcombe, Economic Counsellor at the Canadian Embassy, Washington, D.C. (Jan. 28, 1981). The Australian government has also considered enacting legislation that would permit the government to seize the assets of a party which receives payment of a multiple damage award from an Australian citizen. [1980] 980 *ANTITRUST & TRADE REG. REP. (BNA)*, Sept. 11, 1980, at A-13.

between two alternative courses of action when responding to the passage of the PTIA.¹⁴ On the one hand, the United States could choose to maintain the status quo by endorsing existing antitrust laws and doctrines applicable to foreign commerce. On the other hand, the United States could respond by re-examining existing laws and considering changes in their scope, function, and application in the field of foreign commerce. Whichever option is selected, it will have far-reaching political, economic, and legal ramifications.

I. EXTRATERRITORIAL APPLICATION OF UNITED STATES ANTITRUST LAWS: SOURCES OF JURISDICTION

There exists no single, comprehensive antitrust statute applicable to foreign commerce cases. Rather, such cases are subject to the provisions of a number of antitrust and related statutes enacted by Congress.¹⁵ While a comprehensive analysis of jurisdiction under all such statutes is beyond the scope of this Note, a review of the statutes which have the greatest impact on foreign commerce is in order.¹⁶

14. Because the extraterritorial application of United States antitrust laws has both political and economic implications, the Department of Justice and the State Department, as well as the Congress, should have input into decision-making regarding this complex issue. For a brief discussion of the many factors which influence international antitrust policy and enforcement, see generally B. HAWK, *supra* note 5, at 1-6; Church, *The Search for a Viable Foreign Economic Policy*, 1 NW. J. INT'L L. & BUS. 46 (1979); Strauss, *United States Foreign Trade Policy: A Delicate Balancing Act*, 1 NW. J. INT'L L. & BUS. 40 (1979).

15. The Constitution provides: "The Congress shall have the Power . . . To regulate Commerce with foreign Nations, and among the several States . . ." U.S. CONST. art. I, § 8, cl. 3.

16. Of course, in order for a court to properly hear a case it must have jurisdiction over both the subject matter of the suit and the parties involved. This Note will discuss briefly the exercise of subject matter jurisdiction in antitrust cases. For a more thorough discussion of subject matter jurisdiction of United States courts over foreign commerce under the antitrust laws, see, e.g., K. BREWSTER, *ANTITRUST AND AMERICAN BUSINESS ABROAD* (1958); *COMMON MARKET AND AMERICAN ANTITRUST: OVERLAP AND CONFLICT* 50-86, 372-407 (J. Rahl ed. 1970); W. FUGATE, *FOREIGN COMMERCE AND THE ANTITRUST LAWS* chs. 2, 5, 6, 7 & 13 (rev. ed. 1973); B. HAWK, *supra* note 5, at 19-59, 366-69; E. KINTER & M. JOELSON, *AN INTERNATIONAL ANTITRUST PRIMER* 21-33 (1974); A. NEALE, *THE ANTITRUST LAWS OF THE UNITED STATES OF AMERICA* (2d ed. 1970); J. TOWNSEND, *EXTRATERRITORIAL ANTITRUST: THE SHERMAN ANTITRUST ACT AND U.S. BUSINESS ABROAD* 26-81 (1980); Baker, *Antitrust and World Trade: Tempest in a Teapot?*, 8 CORNELL INT'L L.J. 16 (1974); Davidow, *Extraterritorial Application of U.S. Antitrust Law In A Changing World*, 8 LAW & POL'Y INT'L BUS. 895 (1976); Fortenberry, *Jurisdiction Over Extraterritorial Antitrust Violations—Paths Through the Great Grimpen Mire*, 32 OHIO ST. L.J. 519

A. *The Sherman Anti-Trust Act*

The Sherman Anti-Trust Act¹⁷ (Sherman Act), passed in 1890, is the cornerstone of United States antitrust legislation.¹⁸ In broad and sweeping language, the statute makes illegal "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations"¹⁹ Section 2 of the Sherman Act provides that "[e]very person who shall 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, shall be deemed guilty [of a violation of the act]."²⁰

Under the Sherman Act, a single violation may lead to both civil and criminal liability.²¹ Treble damage awards are specifically authorized for successful private suits brought under the act.²² This

(1971); Hacking, *The Increasing Extraterritorial Impact of U.S. Laws: A Cause for Concern Amongst Friends of America*, 1 NW. J. INT'L & BUS. 1 (1979); Jacobs, *Extraterritorial Application of Competition Laws: An English View*, 13 INT'L LAW. 645 (1979); Jones, *Extraterritoriality in U.S. Antitrust: An International "Hot Potato,"* 11 INT'L LAW. 415 (1977); Rahl, *Foreign Commerce Jurisdiction of the American Antitrust Laws*, 43 ANTITRUST L.J. 521 (1974); Schwechter & Schepard, *The Effects of United States Antitrust Laws on the International Operations of American Firms*, 1 NW. J. INT'L L. & BUS. 492 (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 (1978); Triggs, *Extraterritorial Reach of the United States Anti-Trust Legislation: The International Implications of the Westinghouse Allegations of a Uranium Producers' Cartel*, 12 MELB. U. L. REV. 250 (1979); Comment, *Defenses to Actions Against Foreign States Under the Antitrust Laws*, 20 HARV. INT'L L.J. 583, 609-26 (1979) [hereinafter cited as *Defenses to Actions*]. For a discussion of the exercise of personal jurisdiction in antitrust cases involving foreign commerce, see, e.g., W. FUGATE, *supra*, §§ 3.1-3.20; B. HAWK, *supra* note 5, at 659-61; Triggs, *supra*, at 270-71.

17. 15 U.S.C. §§ 1-7 (1976).

18. For a thorough discussion of jurisdiction under the Sherman Act, see J. TOWNSEND, *supra* note 16; Kintner & Griffin, *Jurisdiction Over Foreign Commerce Under the Sherman Antitrust Act*, 18 B.C. INDUS. & COM. L. REV. 199 (1977).

19. 15 U.S.C. § 1 (1976).

20. *Id.* § 2.

21. *Id.* § 3 (criminal liability), § 15 (civil liability). Under § 5 of the Clayton Antitrust Act, 15 U.S.C. § 16 (1976), a final decree or judgment against a defendant in an antitrust suit brought by the government under any of the antitrust laws may be used as prima facie evidence against the same defendant in a subsequent action brought by any other party under the antitrust laws based on the same facts. See, e.g., *Windham v. American Brands, Inc.*, 539 F.2d 1016, 1021 (4th Cir. 1976), *aff'd on rehearing*, 565 F.2d 59 (4th Cir.), *cert. denied*, 435 U.S. 968 (1977); *Eagle Lion Studios, Inc. v. Loew's, Inc.*, 248 F.2d 438 (2d Cir. 1955), *aff'd per curiam*, 358 U.S. 100 (1958).

22. 15 U.S.C. § 15 (1976).

enforcement provision relating to private actions has proved to be a source of great irritation to many foreign corporations and governments.²³

Both domestic and extraterritorial applications of the statute have been limited by two restraints imposed by the courts. The acts in question must fall either within the category of offenses known as *per se* violations,²⁴ or be found to violate the "rule of reason." This rule, adopted by the United States Supreme Court in 1911,²⁵ holds that only unreasonable or undue restraints of trade will be held to violate the Sherman Act.²⁶ Furthermore, to violate the act, the restraint or monopolization must be found to have occurred in domestic commerce, or in the course of domestic commerce, or had an effect on United States domestic or foreign commerce.²⁷

B. *The Clayton Anti-Trust Act*

The Clayton Anti-Trust Act²⁸ (Clayton Act) also has a number of provisions which are applicable to foreign commerce.²⁹ Section 2

23. *See, e.g.*, remarks of Secretary of State for Trade John Nott, 973 PARL. DEB., H.C. (5th ser.) 1536-37 (1979); remarks of Lord Mackay, 404 PARL. DEB., H.L. (5th ser.) 556-57 (1980).

24. *Per se* violations include price fixing and horizontal territorial allocation of markets and customers. *See* W. FUGATE, *supra* note 16, §§ 5.3-5.5; B. HAWK, *supra* note 5, at 7.

25. *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1 (1911).

26. *Id.* at 60. The broad language of the statute, if not limited by such a construction, would be applicable to virtually every contract, since the scope of the act has been found to be coextensive with congressional regulatory power over commerce. *See* W. FUGATE, *supra* note 16, §§ 1.4, 5.1-5.4.

27. Kintner & Griffin, *supra* note 18, at 205. These two commentators have offered the following explanation of what constitutes foreign commerce under the Sherman Act:

The Sherman Act . . . applies to import and export transactions, other commercial transactions, and transportation and communications between the United States and a foreign country. Moreover, even where none of these activities are present, 'foreign commerce' may nevertheless exist if there is a sufficient nexus between the activity in question and the United States.

Id. at 203 (footnotes omitted). Exactly what kind of effect on foreign commerce is sufficient to support jurisdiction has been the subject of considerable judicial and academic scrutiny. *See* note 66 *infra* and accompanying text. *See also* W. FUGATE, *supra* note 16, § 2.20; B. HAWK, *supra* note 5, at 44-45.

28. 15 U.S.C. §§ 12, 13, 14-21, 22-27 (1976). *See generally* W. FUGATE, *supra* note 16, §§ 10.8-10.13, 13.4-13.7; B. HAWK, *supra* note 5, at 52-54; E. KINTER & M. JOELSON, *supra* note 16, at 16-17.

29. Under section 1 of the Clayton Act, 15 U.S.C. § 12 (1976), "commerce" is defined to include "trade or commerce among the several States and with foreign nations . . ." Professor Hawk has noted:

of the Clayton Act³⁰ prohibits any person engaged in commerce from discriminating in price between different purchasers of similar commodities where such discrimination would substantially lessen competition or tend to create a monopoly in any line of commerce. Section 3 prohibits sellers and lessors engaged in commerce from making sales or leases on the condition that the purchaser or lessee refrain from using or dealing in the goods of competing sellers or lessors, where the effect of such a lease, sale or contract for sale may be to substantially lessen competition or tend to create a monopoly in any line of commerce.³¹ Section 4 authorizes treble damage awards to private plaintiffs who successfully sue under the Clayton Act or any of the antitrust laws which provide for a private cause of action.³² Finally, section 7 forbids the acquisition by one corporation of the stock or assets of another corporation in any line of commerce where the effect of such an acquisition may be to substantially lessen competition or create a monopoly.³³

C. *Other Relevant Statutes*

Another statute which is frequently associated with the extra-territorial application of United States antitrust laws is the Federal Trade Commission Act.³⁴ This act declares "unfair methods of com-

The jurisdictional reach of the Clayton Act with respect to foreign transactions is significantly narrower than the Sherman Act for two reasons, both based on statutory language. The *first* reason relates to both interstate and foreign commerce; that is, the Clayton Act requires that the challenged acts . . . be 'in' commerce. This is unlike the Sherman Act where the acts can be either 'in' commerce or 'affecting' interstate or foreign commerce The *second* reason for narrower Clayton Act jurisdiction rests upon other statutory language peculiar to the foreign commerce area

Section 3 . . . applies . . . only to sales or leases of goods for use, consumption or resale within the United States.

Section 7 [has] . . . [s]everal jurisdictional conditions [which] limit its scope in the foreign commerce area. This is true particularly with respect to overseas acquisitions and joint ventures

B. HAWK, *supra* note 5, at 52-54 (footnotes omitted).

30. 15 U.S.C. §§ 13-13b (1976). Section 2 of the Clayton Act was amended in 1936 and is frequently referred to as the Robinson-Patman Antidiscrimination Act.

31. 15 U.S.C. § 14 (1976).

32. *Id.* § 15. See W. FUGATE, *supra* note 16, § 1.7.

33. 15 U.S.C. § 18 (1976). This section of the Clayton Act was "not an effective law prior to its amendment by the Celler-Kefauver Antimerger Act in 1950, when its terms were broadened to include asset acquisitions and competition generally rather than merely between the acquiring and acquired corporations." W. FUGATE, *supra* note 16, § 1.9 (footnotes omitted). See also E. KINTER & M. JOELSON, *supra* note 16, at 121.

34. 15 U.S.C. §§ 41-58 (1976).

petition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce"³⁵ are unlawful. The Federal Trade Commission is granted the power to apply the provisions of the Federal Trade Commission Act to persons, partnerships, and corporations.³⁶

The Wilson Tariff Act³⁷ has often been employed in foreign commerce antitrust cases. Although this Act does not provide for a private right of action, it has been particularly valuable to the United States government in prosecuting international cartel cases.³⁸

Finally, a few words must be said about the following industries involved in foreign commerce which have been exempted, in whole or in part, from the application of antitrust laws: international air transport, export cartels, and international ocean shipping. The activities of international air transport carriers are currently regulated by the Civil Aeronautics Board.³⁹ Export cartels of United States corporations are exempt from antitrust laws if they

35. *Id.* § 45 (a)(2).

36. *Id.* § 46(a). The act does not provide for private causes of action. *See, e.g.*, *Frederick Chusid & Co. v. Marshall Leeman & Co.*, 326 F. Supp. 1043 (S.D.N.Y. 1971); *La Salle St. Press, Inc. v. McCormick & Henderson, Inc.*, 293 F. Supp. 1004 (N.D. Ill. 1968), *modified*, 445 F.2d 84 (7th Cir. 1971).

37. 15 U.S.C. §§ 8-11 (1976). The prohibitions of the Wilson Tariff Act are similar to those found in the Sherman Act; however, the Wilson Tariff Act focuses solely on imports into the United States. The act states:

Every combination, conspiracy, trust, agreement, or contract is declared to be contrary to public policy, illegal, and void when . . . made by . . . persons or corporations, either of whom . . . is engaged in importing any article from any foreign country into the United States, and when such combination, conspiracy [etc.] . . . is intended to operate in restraint of lawful trade, or free competition in lawful trade or commerce

Id. § 8. Suits in which violation of the Wilson Tariff Act is alleged frequently involve allegations of the Sherman Act as well. *See, e.g.*, *Timberlane Lumber Co. v. Bank of America, N.T. & S.A.*, 549 F.2d 597 (9th Cir. 1976); *United States v. R.P. Oldham Co.*, 152 F. Supp. 818 (N.D. Cal. 1957).

38. *W. FUGATE*, *supra* note 16, §§ 13.1-13.4. *See, e.g.*, *United States v. Concentrated Phosphate Ass'n, Inc.*, 393 U.S. 199 (1968).

39. Federal Aviation Act of 1958, 72 Stat. 731 (codified in scattered sections of 49 U.S.C.), *as amended by* Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705. Foreign air transportation remains largely subject to Board regulation. For example, the Board retains the authority to exempt from application of the antitrust law mergers, acquisitions, and interlocking relationships among air carriers relating to foreign and interstate transportation. 49 U.S.C. § 1384 (1976 & Supp. III 1979). This power is scheduled to be transferred, in stages, to the Department of Justice by 1985. 49 U.S.C. § 1551 (Supp. III 1979). *See B. HAWK*, *supra* note 5, at 11-14.

come within the scope of the Webb-Pomerene Export Trade Act.⁴⁰ Recent activity within these two industries has been relatively tranquil compared to the activity within the international shipping industry, which has been the source of considerable controversy.

Under the Shipping Act of 1916,⁴¹ international ocean shipping is subject to regulation by the Federal Maritime Commission.⁴² The Shipping Act gives the Federal Maritime Commission the power to authorize certain agreements which otherwise might violate antitrust laws. The statute requires carriers to file with the Federal Maritime Commission all agreements affecting competition, including: (1) those fixing or regulating transportation rates or fares, (2) giving or receiving special rates, pooling earnings, losses, or traffic, (3) controlling, regulating, preventing, or destroying competition, and (4) providing for exclusive, preferential, or cooperative working agreements.⁴³

Agreements entered into in violation of Federal Maritime Commission regulations, or without Commission approval, may and frequently do involve violation of antitrust laws. Where violation of the Sherman or Clayton Acts and resulting injury are alleged, private parties may bring treble damage suits against the parties involved in the illegal agreement.⁴⁴ Indictments, based on agreements made without Commission approval, which were filed by

40. 15 U.S.C. §§ 61-66 (1976). The Webb-Pomerene Act provides an exemption from antitrust laws for groups of United States firms which combine solely for the purpose of export trade. Export trade is defined as "trade or commerce in goods, wares, or merchandise exported, or in the course of being exported from the United States or any Territory thereof to any foreign nation . . ." *Id.* § 61. In addition, the export associations are only exempt if they do not act to artificially or intentionally enhance or depress prices within the United States of the commodity exported, or substantially lessen competition within the United States. *Id.* § 62. For a more thorough discussion of export cartels and the provisions of the Webb-Pomerene Act, see W. FUGATE, *supra* note 16, §§ 7.1-7.15; B. HAWK, *supra* note 5, at 96-111; E. KINTNER & M. JOELSON, *supra* note 16, at 177-83.

41. 46 U.S.C. § 801 *et seq.* (1976).

42. See generally W. FUGATE, *supra* note 16, §§ 13.8-13.9; B. HAWK, *supra* note 5, at 9-11; E. KINTNER & M. JOELSON, *supra* note 16, at 169-77.

43. B. HAWK, *supra* note 5, at 9. The Shipping Act expressly prohibits carriers from making agreements relating to deferred rebates, fighting ships, predatory pricing, discriminatory contracts with shippers and boycotts or shippers using non-conference lines. 46 U.S.C. § 812 (1976). See generally Fawcett & Nolan, *United States Ocean Shipping: The History, Development, and Decline of the Conference Antitrust Exemption*, 1 *N.W. J. INT'L L. & BUS.* 537 (1979); Note, *Antitrust and the Shipping Industry: Interpretation of the Shipping Act of 1916*, 12 *N.Y.U. J. INT'L L. & POL.* 115 (1979).

44. See notes 2, 16-36 *supra* and accompanying text.

the Justice Department against several prominent international shipping firms in 1979⁴⁵ have been cited as a primary motive for enactment of the Protection of Trading Interests Act.⁴⁶

II. INTERNATIONAL ANTITRUST: AREAS OF CONFLICT

Although the United States antitrust laws use sweeping language to condemn action which restricts competition, a myriad of problems have been encountered in the course of their application to foreign commerce. The courts have struggled since the early part of this century to find a well-reasoned policy to guide the extraterritorial application of United States antitrust laws. The three areas which have proved to be the source of the greatest controversy are jurisdiction, discovery, and enforcement of judgments. These problems, and the policies which currently guide their resolution, are discussed below.

A. Jurisdiction

1. Judicial Construction of the Antitrust Laws: The Early Years

The scope of a United States court's jurisdiction over foreign commerce under the antitrust laws has been the focus of judicial and academic scrutiny since the Supreme Court first faced the question in *American Banana Co. v. United Fruit Co.*⁴⁷ in 1909. In that case the plaintiff, a United States corporation, claimed that

45. *United States v. Atlantic Container Line, Ltd.*, Crim. No. 79-00271 (D.D.C. June 1, 1979); *United States v. Bates*, Crim. No. 79-00272 (D.D.C. June 1, 1979). The indictments alleged violations of United States antitrust laws by seven ocean carriers and thirteen individuals. Two British firms, Cunard and Bibby Lines, and two British executives were allegedly involved in the unauthorized rate-fixing agreements which were the subject of the indictments. [1979] 917 ANTITRUST & TRADE REG. REP. (BNA), June 7, 1979, at A-25-26.

46. *See, e.g.*, *ECONOMIST*, Sept. 15, 1979, at 79-80; [1979] 922 ANTITRUST & TRADE REG. REP. (BNA), July 12, 1979, at A-30-32; 973 *PARL. DEB.*, H.C. (5th ser.) 1538 (1979). Speaking before the House of Commons, Mr. Nott commented:

The [shipping] indictments alleged that the consortia had violated United States antitrust legislation by establishing rates without the approval of the relevant United States regulatory authority, the Federal Maritime Commission. The Government reacted strongly against the . . . indictments, as did the previous Administration to the institution of the grand jury investigation itself. The policy of the British Government, along with that of all European Governments, has been to avoid detailed regulatory intervention in the commercial aspects of international shipping.

Id.

47. 213 U.S. 347 (1909).

the defendant, also a domestic corporation, had acted to monopolize the trade in bananas between the United States and Central America.⁴⁸ Specifically, the plaintiff alleged that the defendant had convinced the Costa Rican government to seize some of the plaintiff's land and produce located in an area of Panama where the boundary was unmarked,⁴⁹ thereby frustrating the plaintiff's plans to export bananas to the United States. The defendant interposed a defense based on the Act of State Doctrine⁵⁰ and challenged the jurisdiction of the court to hear the case.⁵¹ Justice Holmes, writing for the majority of the Supreme Court,⁵² concluded that United States courts did not have jurisdiction over the case based on the "general and almost universal rule . . . that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done."⁵³ The Court also noted in its opin-

48. *Id.* at 354.

49. *Id.* at 354-55.

50. *Id.* at 352-53. The Act of State Doctrine is a principle of United States municipal and international law which holds:

Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.

Underhill v. Hernandez, 168 U.S. 250, 252 (1897). The Doctrine has undergone careful scrutiny and has been refined since the *Underhill* decision. *See, e.g.*, *Alfred Dunhill of London v. Republic of Cuba*, 425 U.S. 682 (1976); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964); *Industrial Inv. Dev. Corp. v. Mitsui & Co.*, 594 F.2d 48 (5th Cir. 1979), *cert. denied*, 445 U.S. 903 (1980). *See generally* Henkin, *Act of State Today: Recollections in Tranquility*, 6 COLUM. J. TRANSNAT'L L. 175 (1967); Kirgis, *Act of State Exceptions and Choice of Law*, 44 COLO. L. REV. (1972); *Defenses to Actions*, *supra* note 15, at 627-53; Comment, *Rationalizing the Federal Act of State Doctrine and Evolving Judicial Exceptions*, 46 FORDHAM L. REV. 295 (1977); Comment, *The Act of State Doctrine: A History of Judicial Limitations and Exceptions*, 18 HARV. INT'L L.J. 677 (1977).

51. 213 U.S. at 352-53. For a discussion of defenses frequently asserted in foreign commerce antitrust cases, *see, e.g.*, W. FUGATE, *supra* note 16, at §§ 5.6-5.8; B. HAWK, *supra* note 5, at 118-85; Joelson, *supra* note 3, at 107-09; *Defenses to Actions*, *supra* note 16.

52. Justice Harlan concurred in the result reached by the majority, but did not write a separate opinion. 213 U.S. at 359.

53. 213 U.S. at 356 (citing *Slater v. Mexican Nat'l, R.R. Co.*, 194 U.S. 120, 126 (1904)). While the Supreme Court has never overruled *American Banana*, it has held it to mean that jurisdiction will not be exercised where no effect on United States commerce is perceived. *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 705 (1962). Since *American Banana* the courts have had little difficulty in finding an effect on United States commerce in antitrust cases. If *American Banana* were retried today the Court might find an effect on United States commerce suffi-

ion that "not only were the acts of the defendant . . . not within the Sherman Act, but they were not torts by the law of the place and therefore were not torts at all"54

American Banana was soon followed by *United States v. American Tobacco Co.*⁵⁵ *American Tobacco* involved reciprocal agreements between certain United States and British companies to divide the Anglo-American market for tobacco and tobacco products.⁵⁶ In that case, the Supreme Court held that jurisdiction over the acts of the United States and British corporations under contracts executed in Great Britain and the United States was properly exercised under the Sherman Act.⁵⁷

Two years later, in *United States v. Pacific & Arctic Railway & Navigation Co.*,⁵⁸ the Supreme Court spoke again on the jurisdiction question.⁵⁹ Upholding the exercise of extraterritorial juris-

cient to support jurisdiction. See, e.g., *United States v. Sisal Sales Corp.*, 274 U.S. 268 (1927) (monopoly of Mexican sisal market caused a sufficient effect on United States commerce to support jurisdiction under the Sherman Act and the Wilson Tariff Act); *Pacific Seafarers, Inc. v. Pacific Far East Line, Inc.*, 404 F.2d 804 (D.C. Cir. 1968), cert. denied, 393 U.S. 1093 (1969) (antitrust law applicable to shipments between Taiwan and Vietnam). See also W. FUGATE, *supra* note 16, §§ 2.2-2.9; R. LEFLAR, *AMERICAN CONFLICTS LAW* § 115 (1977); Comment, *Extraterritorial Application of United States Laws: A Conflict of Laws Approach*, 28 STAN. L. REV. 1005 (1976).

54. 213 U.S. at 357.

55. 221 U.S. 106 (1911).

56. *Id.* at 148-50.

57. *Id.* at 183-84. The court paid little attention to the argument made by the defendants that their actions were not prohibited under the Sherman Act. The court stated:

We do not, for the sake of brevity . . . stop to examine and discuss the various propositions urged in the argument at bar for the purpose of demonstrating that the subject matter of the combination which we find to exist and the combination itself are not within the scope of the Anti-trust Act because when rightly considered they are merely matters of intrastate commerce and therefore subject alone to state control. We have done this because the want of merit in all the arguments advanced on such subjects is so completely established by the prior decisions of this court . . . as not to require restatement.

Id.

58. 228 U.S. 87 (1913).

59. *Id.* at 105-08. The defendants, companies organized under the laws of the United States, Canada, and British Columbia, were indicted for conspiring and combining to eliminate competition in transportation between the United States, Canada, and Alaska; to monopolize that business; and to discriminate against other companies operating in the Pacific Northwest. *Id.* at 102. The defendants asserted a number of defenses, including lack of jurisdiction. The defendants contended "that as part of the transportation route was outside of the United States the Anti-Trust Law does not apply." *Id.* at 105.

diction over Canadian and United States defendants in an antitrust suit, the court ruled that the United States courts had the power to control the acts of domestic and foreign corporations which violated the laws of United States, even though the illegal acts occurred only in part in the United States.⁶⁰ The Court also expressed a belief that jurisdiction was proper in this case because failure to assert jurisdiction might leave the agreement, which restricted competition, ungoverned by the law of any nation.⁶¹

2. The Middle Years: *Alcoa* and the Effects Test

After *American Tobacco* and *Pacific Railway* the United States courts upheld the exercise of extraterritorial jurisdiction in a number of antitrust cases.⁶² Little more than thirty years after the decision in *American Banana*, Judge Learned Hand confidently stated in *United States v. Aluminum Co. of America*⁶³ (*Alcoa*) that "it is settled law . . . that any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders . . . which the state reprehends . . ." ⁶⁴ To determine if the exercise of jurisdiction was proper, the court formulated the now fa-

60. *Id.* at 106. The court stated:

[The] control to be exercised [by the defendants was] over transportation in the United States, and, so far, is within the jurisdiction of the laws of the United States, criminal and civil. If we may not control foreign citizens or corporations operating in foreign territory, we certainly may control such [foreign] citizens and corporations operating in our territory, as we undoubtedly may control our own citizens and our own corporations.

Id.

61. *Id.*

62. It was not until the late 1970's that the courts began to distinguish between cases where jurisdiction could be exercised and where it should be exercised. See notes 71-93 *infra* and accompanying text. For cases in which the exercise of jurisdiction was upheld, see, *e.g.*, *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962); *United States v. Timken Roller Bearing Co.*, 341 U.S. 593 (1951); *United States v. National Lead Co.*, 332 U.S. 319 (1947); *United States v. Sisal Sales Corp.*, 274 U.S. 268 (1927); *Thomsen v. Cayser*, 243 U.S. 66 (1917); *Fleischmann Distilling Corp. v. Distillers Co.*, 395 F. Supp. 221 (S.D.N.Y. 1975); *United States v. Watchmakers of Switz. Information Center, Inc.*, [1963] TRADE REG. REP. (CCH) ¶70,600 (S.D.N.Y. 1962), *modified*, [1965] TRADE REG. REP. (CCH) ¶71,352 (S.D.N.Y. 1965); *United States v. Imperial Chem. Indus., Ltd.*, 100 F. Supp. 504 (S.D.N.Y. 1951), *enforced*, 105 F. Supp. 215 (S.D.N.Y. 1952).

63. 148 F.2d 416 (2d Cir. 1945). The case was heard by three judges from the Court of Appeals for the Second Circuit based on a certificate issued by the Supreme Court, under the 1944 amendment to 15 U.S.C. § 29, declaring that a quorum of six justices was unavailable to hear the case. *Id.* at 421.

64. *Id.* at 443.

mous "effects test," stating simply "we shall assume that the [Sherman] Act does not cover agreements . . . intended to affect imports or exports, unless its performance is shown actually to have had some effect upon them."⁶⁵ The effects test, in some form, is still employed by courts to determine if a sufficient effect on United States commerce is demonstrated to support the exercise of jurisdiction in cases involving anticompetitive activity which occurred outside the flow of domestic commerce.⁶⁶

Since *Alcoa*, the United States has frequently come under fire for extending its jurisdiction beyond the limits generally recognized by other nations.⁶⁷ The British courts have, on several occasions, voiced their disapproval of the exercise of extraterritorial jurisdiction by the United States courts.⁶⁸ For example, in a case brought before the British courts, *British Nylon Spinners, Ltd. v. Imperial Chemical Industries, Ltd.*,⁶⁹ one of the judges remarked that if the effects doctrine "were conversely applied to directions designed to remove harmful effects on the trade, say, of the Great Britain . . . I should . . . be surprised to find that it was accepted as not being

65. *Id.* at 444. The effects test has also been referred to as the intent-effects test and the objective territoriality doctrine. Professor Hawk has thoroughly analyzed the test and the commentary which it has spawned. See B. HAWK, *supra* note 5, at 26-44.

66. Kinter & Griffin note:

A number of different formulas have been utilized by courts to describe the . . . effect necessary to support jurisdiction in cases involving restraints imposed outside the flow of [domestic] commerce. These formulas focus upon the question of whether the alleged restraint 'affects,' 'directly affects,' 'substantially affects,' 'directly and substantially (or materially) affects,' or, had an 'impact upon' United States commerce.

Kintner & Griffin, *supra* note 18, at 206 (footnotes omitted).

67. See Haight, *Extra-territorial Application of Restrictive Trade Legislation, Extracts From Some Published Material on Official Protests, Directives, Prohibitions, Comments Etc.*, INTERNATIONAL LAW ASSN., REPORT OF THE FIFTY-FIRST CONFERENCE, TOKYO 565-92 (1965). Official government protests were prompted by the following cases: *United States v. Watchmakers of Switz. Information Center, Inc.*, [1963] TRADE REG. REP. (CCH) ¶70,600 (S.D.N.Y. 1962), *modified*, [1965] TRADE REG. REP. (CCH) ¶71,352 (S.D.N.Y. 1965); *In re* Grand Jury Investigation of the Shipping Industry, 186 F. Supp 298 (D.D.C. 1960); *In re* Investigation of World Arrangements, 13 F.R.D. 280 (D.D.C. 1952); *United States v. General Electric Co.*, 82 F. Supp. 753 (D.N.J. 1949), *enforced*, 115 F. Supp. 835 (D.N.J. 1953). See also W. FUGATE, *supra* note 16, § 2.10.

68. See, e.g., *British Nylon Spinners, Ltd. v. Imperial Chem. Indus. Ltd.* [1953] 1 Ch. 19 (C.A.) (order granting interlocutory injunction), [1955] 1 Ch. 37 (final judgment); *Rio Tinto Zinc Corp. v. Westinghouse Elec. Corp.* (*In re* Westinghouse Uranium Contract), [1978] 1 A.C. 547 (C.A.).

69. [1953] Ch. 19 (C.A.), [1955] 1 Ch. 37.

an intrusion on the rights and sovereign authority of the United States."⁷⁰

3. Recent Developments: *Timberlane* and Its Progeny

In the past five years it has become apparent that the protests⁷¹ and retaliatory action⁷² of our trading partners, which came in response to the extraterritorial application of United States antitrust laws, did not fall on deaf ears.⁷³ This was implicit in the unanimous decision of the United States Court of Appeals for the Ninth Circuit in *Timberlane Lumber Co. v. Bank of America, N.T. & S.A.*⁷⁴ The court in that landmark case employed what it termed

70. [1953] 1 Ch. at 25.

71. In a diplomatic note sent to the United States government in July 1978 the British government stated: "H[er] M[ajesty's] Government considers that in the present state of international law there is no basis for the extension of one country's antitrust jurisdiction to activities outside of that country . . . [to] foreign nationals." NATIONAL COMMISSION FOR THE REVIEW OF ANTITRUST LAWS AND PROCEDURES, REPORT TO THE PRESIDENT AND THE ATTORNEY GENERAL, reprinted in [1979] 897 ANTITRUST & TRADE REG. REP. (BNA), Jan. 22, 1979, supp., quoted in Jacobs, *supra* note 16, at 648. See also Haight, *supra* note 67.

72. See Gordon, *supra* note 5. The British Undersecretary of Trade termed the PTIA a "reaction" by the British government rather than a retaliatory action. See Speech by Undersecretary of Trade, Mr. G. R. Sunderland, at the Federal Bar Association Conference on International Antitrust and International Mergers and Acquisition, in Washington, D.C. (Aug. 28, 1980) [hereinafter cited as Sunderland Speech]. The United States Associate Attorney General termed the foreign government response to United States laws "an overreaction." See Shenefield Remarks, *supra* note 1, at 7.

73. "The response of the Justice Department to foreign critics of the extraterritorial jurisdiction has been one of trying to preserve the interests of both antitrust enforcement and good foreign relations." Joelson, *supra* note 3, at 112. See also ANTITRUST DIV., U.S. DEP'T OF JUSTICE, ANTITRUST GUIDE FOR INTERNATIONAL OPERATIONS 6-7 (rev. Mar. 1, 1977); Shenefield Remarks, *supra* note 1. Recently, the Justice Department relayed the sentiments of foreign governments on the subject of antitrust laws to a federal district court judge hearing a private antitrust suit involving foreign commerce. In a letter to Judge Prentice H. Marshall, Associate Attorney General Shenefield wrote: "The views and representations advanced by these foreign governments are entitled to appropriate deference and weight in resolving legal questions that turn, at least in part, on considerations of international comity." Quoted in [1980] 963 ANTITRUST & TRADE REG. REP. (BNA), May 8, 1980, at A-23. Mr. Shenefield's letter was the object of criticism by at least one member of Congress. See [1980] 964 ANTITRUST & TRADE REG. REP. (BNA), May 15, 1980, at A-3. For a review of action taken a year earlier, in relation to government prosecution in the alleged uranium cartel, see Gordon, *supra* note 5, at 159-60.

74. 549 F.2d 597 (9th Cir. 1976). In *Timberlane*, four actions were consolidated on appeal. They included three tort suits and one antitrust suit brought under §§ 1 & 2 of the Sherman Act, and the Wilson Tariff Act. The facts of the antitrust action may

a "jurisdictional rule of reason"⁷⁵ when deciding whether jurisdiction should be exercised.⁷⁶ In *Timberlane*, the court noted that "[d]espite its description as 'settled law,' *Alcoa's* assertion [that the United States has jurisdiction over acts which affect United States commerce] has been roundly disputed by many foreign commentators as being in conflict with international law, comity, and good judgment."⁷⁷ The court went on to say that while "American courts have, in fact, often displayed a regard for comity and the prerogatives of other nations and considered their interests as well as . . . the factual circumstances . . . [t]he failure to articulate these other elements in addition to the standard effects analysis test is [and has been] costly"⁷⁸

Demonstrating sensitivity to the concerns of other nations and an awareness that the *Alcoa* effects test did not explicitly include considerations of international comity, the *Timberlane* court explored the proper exercise of jurisdiction.⁷⁹ The court stated:

An effect on United States commerce, although necessary to the exercise of jurisdiction under the antitrust laws, is alone not a sufficient basis on which to determine whether American authority *should* be asserted in a given case as a matter of international comity and fairness. In some cases, the application of the direct

be summarized as follows: *Timberlane* alleged that officials of the Bank of America, along with others located in the United States and Honduras, conspired to prevent *Timberlane's* Honduras subsidiaries from milling lumber in Honduras and exporting it to the United States. *Timberlane* alleged that this was done so that control of the Honduran lumber export business would remain in the hands of a few individuals financed and controlled by the bank. *Timberlane* contended that the conspiracy interfered with the export of Honduran lumber to the United States, thereby directly and substantially affecting the foreign commerce of the United States. *Id.* at 601. See generally B. HAWK, *supra* note 5, at 39-41; Joelson, *supra* note 3, at 11-12; 4 BROOKLYN J. INT'L L. 97 (1977); 46 FORDHAM L. REV. 354 (1977); 13 U. RICH. L. REV. 149 (1978); Shenefield Remarks, *supra* note 1, at 7-15.

75. 549 F.2d at 613, citing K. BREWSTER, ANTITRUST AND AMERICAN BUSINESS ABROAD 446 (1958).

76. The *Timberlane* court was the first court to focus on whether jurisdiction should be exercised rather than whether it could be exercised. The court held that it was unclear whether the district court had considered principles of international comity and fairness when deciding whether to exercise jurisdiction, and remanded the case to the district court for consideration *de novo*. *Id.* at 615-16.

77. *Id.* at 610 (footnote omitted). The principle of international comity is discussed in note 101 *infra* and accompanying text.

78. *Id.* at 612.

79. *Id.* at 612-13.

and substantial test in the international context might open the door too widely by sanctioning jurisdiction over an action when . . . [other] considerations would indicate dismissal.⁸⁰

The court cited with approval the Restatement (Second) of Foreign Relations Law⁸¹ approach for defining the limits of extraterritorial jurisdiction and went on to propose the use of a tripartite analysis in similar cases. The court urged that the problem be approached by responding to three questions: (1) Does the act alleged have a restraining affect, or was it intended to affect the foreign commerce of the United States? (2) Is it of such a type and magnitude so as to be cognizable as a violation of the Sherman Act? and (3) As a matter of international comity and fairness, should the extraterritorial jurisdiction of the United States be asserted to cover it?⁸²

The Ninth Circuit in *Timberlane* took great pains to refine the effects test and to distinguish its application in the foreign and do-

80. *Id.* at 613 (emphasis in original).

81. *Id.* RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 40 (1965). Section 40, Limitation on Exercise of Enforcement Jurisdiction reads:

Where two states have jurisdiction to prescribe and enforce rules of law and the rules they may prescribe require inconsistent conduct upon the part of a person, each state is required by international law to consider, in good faith, moderating the exercise of its enforcement jurisdiction, in the light of such factors as (a) vital national interests of each of the states, (b) the extent and the nature of the hardship that inconsistent enforcement actions would impose upon the person, (c) the extent to which the required conduct is to take place in the territory of the other state, (d) the nationality of the person, and (e) the extent to which enforcement by action of either state can reasonably be expected to achieve compliance with the rule prescribed by that state.

82. 549 F.2d at 614-15. In balancing the interests of foreign nations under question 3, the *Timberlane* court articulated a number of factors to be considered. They included:

[T]he degree of conflict with foreign law or policy, the nationality or allegiance of the parties and the locations or principal places of business of corporations, the extent to which enforcement by either state can be expected to achieve compliance, the relative significance of effects on the United States as compared with those elsewhere, the extent to which there is explicit purpose to harm or affect American commerce, the foreseeability of such effect, and the relative importance to the violations charged of conduct within the United States as compared with conduct within the United States as compared with conduct abroad Having assessed the conflict [in the law or policy of the United States and the foreign nation(s)] the court should then determine whether in the face of it the contacts and interests of the United States are sufficient to support the exercise of extraterritorial jurisdiction.

Id. (footnotes omitted).

mestic commerce arenas. To date, the efforts of that court have, in general, been well received.⁸³ Other courts and the Department of Justice have endorsed the court's reasoning.⁸⁴

The endorsement by other courts was first evidenced in *Mannington Mills, Inc. v. Congoleum Corp.*⁸⁵ *Mannington* was an antitrust action brought by a United States manufacturer of floor covering against a competing United States manufacturer. The plaintiff alleged that the defendant had acted to monopolize the industry and that it had blocked competition abroad by fraudulently obtaining patents in foreign nations. In deciding whether jurisdiction should be exercised the Third Circuit voiced substantial agreement with the *Timberlane* court's tripartite analysis.⁸⁶ In lieu of an-

83. See Shenefield Remarks, *supra* note 1, at 7; note 89 *infra*. One commentator perceived several weaknesses in the *Timberlane* court's analysis:

First, it remains to be seen whether the various elements to be weighed are sufficiently identifiable and measurable in an antitrust action. Second, not all commentators agree with the proposition articulated in section 40 [of the Restatement (Second) of Foreign Relations Law] that international law requires an enforcing state which otherwise has jurisdiction 'to consider, in good faith, moderating the exercise of enforcement jurisdiction' [Third], [t]he second part of the *Timberlane* test . . . unfortunately mixes together the issue of jurisdiction with the merits [Fourth], the opinion offers little or no guidelines as to future application of the second part of the test [T]he *Timberlane* test for jurisdiction might be favorably refined by excision of the second part of the test.

B. HAWK, *supra* note 5, at 42-44 (footnotes omitted). These criticisms of the test are well-founded. The court's reliance on an analysis which distinguishes the degree of restraint necessary for establishing subject matter jurisdiction in domestic suits as opposed to that required to state a claim in foreign commerce cases leads to confusion. Furthermore, the second question proposed in *Timberlane* is inconsistent with the purpose of the test as a whole. It requires the court to determine if a violation has been perpetrated before it even acknowledges that it has jurisdiction over the case. Rather than omitting the second question from the test, as Professor Hawk suggests, it might be retained and rephrased. For example, it might be reworded to ask "Has the plaintiff alleged facts sufficient to state a cause of action under the antitrust law designated in the complaint?" Rephrasing the question eliminates the confusion inherent in the court's test wherein the questions of jurisdiction and the merits of the case are mixed.

84. See *In re Uranium Antitrust Litigation*, 617 F.2d 1248 (7th Cir. 1980), *aff'g* 473 F. Supp. 393 (N.D. Ill. 1979); *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287 (3d Cir. 1979); *Dominicus Americana Bohio v. Gulf & Western Indus., Inc.*, 473 F. Supp. 680 (S.D.N.Y. 1979); Shenefield Remarks, *supra* note 1, at 7-15. See also *Industrial Inv. Dev. Corp. v. Mitsui & Co.*, 594 F.2d 48 (5th Cir. 1979), *cert. denied*, 445 U.S. 903 (1980).

85. 595 F.2d 1287 (3d Cir. 1979). See generally B. HAWK, *supra* note 5, at 12-13 (Supp. 1980); 20 HARV. INT'L L.J. 663 (1979); 2 NW. J. INT'L L. & BUS. 241 (1980); Shenefield Remarks, *supra* note 1, at 7-15.

86. 595 F.2d at 1297.

swering *Timberlane's* three questions, however, the *Mannington* court substituted a balancing approach employing ten factors which it considered crucial to determining whether jurisdiction should be exercised.⁸⁷ The *Mannington* court's approach has been called "an abstention analysis"⁸⁸ because of its emphasis on the international implications of exercising jurisdiction.⁸⁹

Since *Timberlane* and *Mannington*, the balancing approach has been cited with approval by two courts called upon to decide whether the exercise of jurisdiction over parties to an antitrust suit involving foreign commerce was appropriate.⁹⁰ The Justice Department has also applauded the decisions in *Timberlane* and *Mannington*. One official termed those decisions "'an enormously useful contribution' by mandating consideration of the conflicting interests of foreign sovereigns [in foreign commerce cases]."⁹¹

87. The court enumerated the following factors to be considered when deciding whether to exercise jurisdiction:

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

Id. at 1297-98.

88. Shenefield Remarks, *supra* note 1, at 8.

89. The *Mannington* court's approach is also different from that of the *Timberlane* court in that it does not advocate any change in the operation of the effects test. See 595 F.2d at 1291-92. In essence, *Mannington* adds a second test to be used in deciding whether jurisdiction should be exercised in foreign commerce cases. *Timberlane*, on the other hand, seems to advocate a less stringent effects test for exercising jurisdiction. See 549 F.2d at 613, 615 n.35. This may be due to the court's bifurcated analysis of jurisdiction under the Sherman Act. See note 183 *supra*.

90. *In re Uranium Antitrust Litigation*, 617 F.2d 1248 (7th Cir. 1980), *aff'g* 473 F. Supp. 393 (N.D. Ill. 1979); *Dominicus Americana Bohio v. Gulf & Western Indus., Inc.*, 473 F. Supp. 680 (S.D.N.Y. 1979).

91. [1979] 916 ANTITRUST & TRADE REG. REP. (BNA), May 31, 1979, at A-26. See also Shenefield Remarks, *supra* note 1, at 7. It has been noted that the Justice Department regularly uses a similar balancing approach in deciding whether to prosecute a case. Mr. Shenefield commented: "The Department carefully balances the U.S. interest in prosecuting a particular anticompetitive restraint against the sometimes conflicting interests resulting from foreign elements of the transaction We have long regarded this as an important element of our prosecutorial discretion in international cases" *Id.* at 4.

The shift in focus evidenced by the *Timberlane* and *Mannington* courts from whether subject matter jurisdiction exists to whether jurisdiction should be exercised represents a significant departure from prior decisions. It should be emphasized that while the actual scope of United States jurisdiction under the antitrust laws has not been diminished since Learned Hand decided *Alcoa*,⁹² the situations in which it should be exercised are now being carefully considered by the courts. Furthermore, it should be noted that while the decisions discussed above indicate a broadening of the perspective of United States courts, they have not had the effect of neutralizing the ire of our trading partners who continue to feel the force of United States antitrust laws.⁹³ Recent events have, if anything, caused them to focus their attention on two other facets of the application of United States law, discovery and enforcement.

B. Discovery

It has been said that "[f]oreign governments are often just as sensitive about U.S. discovery as they are about the case being heard by U.S. courts at all."⁹⁴ Discovery in antitrust suits is, of course, governed by the Federal Rules of Civil Procedure.⁹⁵ The

92. In fact, it has been suggested that jurisdiction under the antitrust laws may have been broadened. A Justice Department official noted, "*Timberlane* appears to lower the magnitude of effect necessary for the threshold test" of whether subject matter jurisdiction is present. Shenefield Remarks, *supra* note 1, at 9.

93. Commenting on the passage of the PTIA and the decisions in *Timberlane* and *Mannington*, the British Undersecretary of Trade stated:

There are welcome signs in recent judgments . . . that the concerns of foreign States are being appreciated and understood. We are keenly interested to see whether guidelines that have recently been laid down . . . will find general acceptance in the judicial system of the US; and if so whether they will serve as an adequate guide also to our companies in trying to square their every day business behaviour with US anti-trust law.

Sunderland Speech, *supra* note 72, at 20-21.

94. Shenefield Remarks, *supra* note 1, at 17.

95. The rules governing discovery are FED. R. CIV. P. 26-37. See generally W. FUGATE, *supra* note 16, at §§ 3.11-3.14; B. HAWK, *supra* note 5, ch. 4; MOORE'S FEDERAL PRACTICE ¶ 26, 61 [8] (2d ed. 1979); Carter, *Obtaining Foreign Discovery and Evidence for Use in Litigation in the United States, Existing Rules and Procedures*, 13 INT'L LAW. 5 (1979); Jacobs, *supra* note 16, at 654-59; Triggs, *supra* note 16, at 266-70; Note, *Taking Evidence Outside the United States*, 55 B. U. L. REV. 368 (1975); Note, *Ordering Production of Documents from Abroad in Violation of Foreign Law*, 31 U. CHI. L. REV. 791 (1964); 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);

liberal nature of these rules and the importance of discovery in antitrust suits have resulted in the enactment of nondisclosure laws, sometimes referred to as "blocking statutes," by a number of the United States' closest trading partners,⁹⁶ and has become the focus of a bitter international controversy.⁹⁷

The conflict between the enforcement of United States discovery rules and foreign blocking statutes is rooted in the competing interests of the forum nation and international comity.⁹⁸ The principle of *lex fori* holds that the forum state controls the procedures employed in its courts.⁹⁹ Under this principle, a United States court has the power to order the production of documents located in a foreign country where it exercises in personam jurisdiction over the party who has control of the documents.¹⁰⁰ In contrast, principles of "international comity hold that the forum court should not take action that may cause violation of another nation's laws."¹⁰¹

The Department of Justice has attempted to reconcile these principles and has implemented a number of procedures to reduce friction during its investigations and during the discovery stage of litigation.¹⁰² Antitrust officials now notify a foreign government

Note, *Foreign Nondisclosure Laws and Domestic Discovery Orders in Antitrust Litigation*, 88 YALE L.J. 612 (1979) [hereinafter cited as *Foreign Discovery*].

96. See note 10 *supra* and statutes collected therein.

97. Passage of the PTIA, which is considerably broader in scope than the statute which it replaced, the Shipping Contracts and Commercial Documents Act, 1964, c. 87, is one indication that this conflict has been exacerbated rather abated in recent years. See Gordon, *supra* note 5, at 161.

98. See, e.g., *In re Westinghouse Elec. Corp. Uranium Contracts Litigation*, 563 F.2d 992 (10th Cir. 1977); *In re Chase Manhattan Bank*, 297 F.2d 611 (2d Cir. 1962); *Foreign Discovery*, *supra* note 95.

99. B. HAWK, *supra* note 5, at 319.

100. *Id.* at 316.

101. *Id.* at 319 (footnote omitted). Mr. Shenefield noted that "[c]omity . . . also includes factors such as U.S. and foreign government interests, and deference to judicial or administrative action abroad that may solve or moot difficult issues." Shenefield Remarks, *supra* note 1, at 14.

102. The Associate Attorney General underscored the Justice Department's exercise of prosecutorial discretion in this regard in a speech made in December 1980. He stated:

In the exercise of our prosecutorial discretion, we will sometimes modify our choice of defendants, the violations to be charged, or the relief to be sought in an effort to reconcile American and foreign interests During our investigations, we engage in a similar process of discretion in deciding the extent and nature of discovery when the documents are located abroad.

Shenefield Remarks, *supra* note 1, at 4.

when they begin an investigation in that nation, and proceed with requests for voluntary submission of information rather than using court orders whenever possible.¹⁰³

Many courts have also demonstrated great sensitivity to the principle of international comity during investigations and the discovery phase of litigation, particularly when dealing with situations involving non-disclosure laws.¹⁰⁴ Attempts by the courts to reduce conflict at this stage have had mixed results. Two recent cases involving discovery requests are illustrative.

*In re Westinghouse Electric Corp. Uranium Contracts*¹⁰⁵ is a good example of how the balancing approach used to decide whether jurisdiction should be exercised may also be applied to reduce tension during the discovery phase of litigation.¹⁰⁶ In that case, the appellant, Rio Algom Corp., a Delaware corporation which maintained its corporate office in Canada, sought to overturn a contempt citation based on its failure to comply with a district court discovery order. Rio Algom had not complied with the order because it wished to avoid violating a Canadian non-disclosure law.¹⁰⁷ The Tenth Circuit overturned the district court ruling, finding that Rio Algom had "made diligent effort[s] to produce materials not subject to the Canadian regulation [and] . . . ha[d] sought a waiver from the Canadian authorities."¹⁰⁸ Furthermore, the court found that "Canada ha[d] a legitimate 'national interest' in this matter [in addition to] the United States . . . interest [in the litiga-

103. B. HAWK, *supra* note 5, at 320-21. The Justice Department's use of notification procedures has been favorably received by the British. Mr. Sunderland, commented, "the procedures for notification of intended enforcement activity in the public enforcement of anti-trust laws have worked better between the US and UK Governments and previous causes for misunderstanding have been reduced if not altogether eliminated. This is to us a welcome tendency which we encourage." Sunderland Speech, *supra* note 72, at 8.

104. See, e.g., *In re Westinghouse Elec. Corp. Uranium Contracts Litigation*, 563 F.2d 992 (10th Cir. 1977); *In re Chase Manhattan Bank*, 297 F.2d 611 (2d Cir. 1962); *Ings v. Ferguson*, 282 F.2d 149 (2d Cir. 1960); *First Nat'l City Bank v. Internal Revenue Service*, 271 F.2d 616 (2d Cir. 1959), *cert. denied*, 361 U.S. 948 (1960).

105. 563 F.2d 992 (10th Cir. 1977).

106. The call for use of a balancing approach on a case-by-case basis where nondisclosure laws are involved was first made in *Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers*, 357 U.S. 197 (1958). See also Merhige, *Obtaining Foreign Discovery and Evidence for Use in Litigation in United States, The Westinghouse Uranium Case: Problems Encountered in Seeking Foreign Discovery and Evidence*, 13 INT'L LAW. 19 (1979); Triggs, *supra* note 16.

107. 563 F.2d at 994-95.

108. *Id.* at 998.

tion]."¹⁰⁹ In conclusion, the court stated that "a 'balancing' of all these various factors leads us to conclude that the trial court's order of contempt and the sanctions imposed . . . are, on the basis of the present record, not justified."¹¹⁰

In another recent case, a district court took a distinctly different view of which factors deserve consideration when issuing discovery orders. In *In re Uranium Antitrust Litigation*,¹¹¹ the United States District Court for the Northern District of Illinois rejected the balancing approach used in the cases noted above.¹¹² The court spurned reliance on the Restatement (Second) of Foreign Relations Law section 40, and ordered the production of certain documents despite the defendants' protests that it would cause violation of the blocking statutes of four nations.¹¹³

The court, basing its opinion on *Société Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers*,¹¹⁴ outlined a two-step analysis whereby a court first decides if it will order production of the requested documents. In deciding this first issue the court suggested that the following three factors be considered: (1) the importance of the policies underlying the United States statute sought to be enforced, (2) the relationship between the documents and claims asserted, and (3) the degree of flexibility in the enforcement of the foreign nondisclosure law.¹¹⁵ In the court's view, it is only after an order is issued, and after compli-

109. *Id.* at 998-99. Violation of the applicable Canadian statute was punishable by fines of up to 10,000 Canadian dollars or five years imprisonment or both. *Id.* at 996.

110. *Id.* at 999. The court relied heavily on the RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW §§ 39, 40 (1965) in deciding what factors to use in reaching its conclusion. Section 39, Inconsistent Requirements Do Not Affect Jurisdiction, reads:

(1) A state having jurisdiction to prescribe or to enforce a rule of law is not precluded from exercising its jurisdiction solely because such exercise requires a person to engage in conduct subjecting him to liability under the law of another state having jurisdiction with respect to that conduct. (2) Factors to be considered in minimizing conflicts arising from the application of the rule stated in Subsection (1) with respect to enforcement jurisdiction are stated in § 40.

Section 40 is reproduced in note 81 *supra*.

111. [1980-1] TRADE REG. REP. (CCH) ¶ 63,124 (N.D. Ill. 1979). *See also* Arthur Andersen & Co. v. Finesilver, 546 F.2d 338 (10th Cir. 1976), *cert. denied*, 429 U.S. 1096 (1977).

112. *See* note 104 *supra*.

113. [1980-1] TRADE REG. REP. ¶ 63,124, at 77,613.

114. 357 U.S. 197 (1958).

115. [1980-1] Trade Reg. Rep. ¶ 63,124, at 77,606.

ance has been denied, that a court should go on to the second part of the test and consider whether sanctions should be imposed on the defaulting party.¹¹⁶

In sharp contrast to the Tenth Circuit's endorsement of the balancing approach, the district court stated that "in . . . this case we find that [consideration of] . . . other factors [is] of limited or no utility."¹¹⁷ Furthermore, the court commented:

[T]he judiciary has little expertise, or perhaps even authority, to evaluate the economic and social policies of a foreign country [and thus] . . . a balancing test is inherently unworkable in this case. The competing interests here display an irreconcilable conflict on precisely the same plane of national policy . . . and it is simply impossible to judicially 'balance' [the] totally contradictory and mutually negating actions [of the United States and foreign governments].¹¹⁸

Despite the efforts of the Department of Justice and many courts to reduce friction between domestic and foreign law wherever possible, resistance to requests for documents made before or during the course of a trial has hardened in recent years.¹¹⁹ The strengthening of British non-disclosure laws by the Protection of Trading Interests Act and the consideration of similar legislation by other United States trading partners are evidence of this trend.¹²⁰

C. Enforcement of Antitrust Judgments

The third area of antitrust law which has been the focus of international attention and dispute concerns the enforcement of United States court judgments abroad.¹²¹ There have been several

116. *Id.* at 77,606, 12, 13.

117. *Id.* at 77,606.

118. *Id.* Although the opinion of the district court seems to represent the minority view, it is significant because it represents a different approach which can be taken when resolving conflicts involving nondisclosure laws. Furthermore, the opinion is significant in that it indicates that judicial attitudes towards foreign nondisclosure laws may be changing.

119. *See, e.g.,* Rio Tinto Zinc Corp. v. Westinghouse Elec. Corp., [1978] A.C. 547, 606-17 (C.A.).

120. *See* note 13 *supra* & pt. III D *infra*.

121. *See, e.g.,* United States v. Watchmakers of Switz. Information Center, [1963] TRADE REG. REP. (CCH) ¶ 70,600 (S.D.N.Y. 1962), *modified*, [1965] TRADE REG. REP. (CCH) ¶ 71,352 (S.D.N.Y. 1965); United States v. Holophane Co., 119 F. Supp. 114 (S.D. Ohio 1954), *enforced*, [1954] TRADE REG. REP. (CCH) ¶ 67,679 (S.D. Ohio 1954), *aff'd per curiam*, 352 U.S. 903 (1956); United States v. Imperial Chem. Indus., Ltd., 100 F. Supp. 504 (S.D.N.Y. 1951), *enforced*, 105 F. Supp. 215

cases dealing specifically with this issue. The majority of the cases have stemmed from affirmative relief orders issued by United States courts as a means of redressing antitrust law violations.¹²²

Much of the litigation involving enforcement of judgments has coincidentally involved action required in Great Britain or action required by British citizens. For example, in *United States v. Holophane Co.*¹²³ a federal district court found that the defendant, a United States corporation, and the co-conspirators, among them a British corporation, had continuously engaged in a combination and conspiracy in restraint of trade and commerce in violation of section 1 of the Sherman Act.¹²⁴ The court ordered Holophane to promote the sale and distribution of the products involved in foreign markets and to take specific steps to promote and develop export sales for the products in question.¹²⁵ Holophane, on appeal, argued that the portion of the decision requiring the development of export sales was an abuse of discretion. Holophane contended that such development would require substantial changes in the company's plant and personnel, as well as expose Holophane to liability in foreign countries for violating the territorial agreements which formed the basis of the antitrust suit.¹²⁶ The Supreme Court was not swayed by this argument and affirmed the judgment and decree of the district court.¹²⁷

(S.D.N.Y. 1952). See generally *W. FUGATE*, *supra* note 16, §§ 3.15-3.20; *B. HAWK*, *supra* note 5, ch. 5; *Jones*, *supra* note 16, at 429-30.

122. See *B. HAWK*, *supra* note 5, at 344-46. Professor Hawk notes that "United States courts have been quite willing to grant affirmative remedies which either are effectuated abroad or have a substantial effect in a foreign country . . ." *Id.* at 344. Affirmative relief is a broad category which includes:

- (1) divestiture of stockholdings in foreign corporations or joint ventures
- (2) reasonable or good faith efforts to sell abroad
- (3) reasonable or good faith efforts by [a] foreign competitor to sell in the United States
- (4) transfer of foreign patent and trademark rights, including compulsory royalty-free licensing of foreign patents and knowhow
- (5) enjoining the exercise of foreign patents, knowhow and trademark rights.

Id. at 345-46 (footnotes omitted).

123. 119 F. Supp. 114 (S.D. Ohio 1954), *enforced*, [1954] TRADE REG. REP. (CCH) ¶ 67,679 (S.D. Ohio 1954), *aff'd per curiam*, 352 U.S. 814 (1955). The case centered on a monopoly in certain lighting fixtures and glassware involving Holophane Co. and its British and French affiliates.

124. 119 F. Supp. at 119; see 15 U.S.C. § 1 (1976).

125. [1954] TRADE REG. REP. (CCH) ¶ 67,679, at 69,183-84.

126. *B. HAWK*, *supra* note 5, at 347-48.

127. 352 U.S. at 814. For similar cases where remedial action was required in Britain, see *Timken Roller Bearing Co. v. United States*, 341 U.S. 593 (1951); *United States v. Diebold, Inc.* [1977-2] TRADE REG. REP. (CCH) ¶ 61,735 (N.D. Ohio 1977)

In *United States v. Imperial Chemical Industries, Ltd.*¹²⁸ it was adjudged that DuPont, a United States corporation, and Imperial Chemical, registered in Great Britain, had entered into a number of patent licensing agreements which also provided for the division of world markets of nylon and other fibers in violation of the Sherman Act.¹²⁹ The court summarized its objectives in fashioning a remedy by stating that it wished to terminate the restrictive covenants entered into by the parties and to re-establish competitive conditions insofar as they pertained to United States imports and exports.¹³⁰ Part of the court's decree required Imperial Chemical to reassign to DuPont all the foreign patents it had received in the illegal agreement and to grant immunity to DuPont (for what would otherwise be an illegal infringement of patent rights) if DuPont were to ship the fibers in question to Great Britain.¹³¹

After the remedial decree was ordered, a suit was commenced in Great Britain to prevent its execution.¹³² The plaintiff in that case, British Nylon Spinners, had acquired by contract with Impe-

(consent decree); *United States v. Diebold*, [1977-2] TRADE REG. REP. (CCH) ¶ 61,736 (N.D. Ohio 1977) (consent decree).

128. 100 F. Supp. 504 (S.D.N.Y. 1951), *enforced*, 105 F. Supp. 215 (S.D.N.Y. 1952). *Imperial* is "the only litigated decision in which the antitrust relief . . . was directly questioned by a foreign court." B. HAWK, *supra* note 5, at 352. See *British Nylon Spinners, Ltd. v. Imperial Chem. Indus.*, [1955] 1 Ch. 37. In a subsequent case, *United States v. Watchmakers of Switz. Information Center, Inc.*, [1963] TRADE REG. REP. (CCH) ¶ 70,600 (S.D.N.Y. 1962), *modified*, [1965] TRADE REG. REP. (CCH) ¶ 71,352 (S.D.N.Y. 1965), concern over possible conflict with the sovereignty of foreign nations led the United States government to request certain modifications in the final judgment. See [1965] TRADE REG. REP. ¶ 71,352.

129. 100 F. Supp. at 513-18.

130. 105 F. Supp. at 220.

131. The final decree is quoted in part in *British Nylon Spinners Ltd. v. Imperial Chem. Indus.*, [1955] 1 Ch. 37, 50. The district court judge who issued the decree on remedies anticipated that there might be difficulty in enforcing portions of the decree in Britain. He therefore inserted the following explanation and contingency clause in his opinion:

What credit may be given to such an injunctive provision by the courts of Great Britain . . . we do not venture to predict. We feel that the possibility that the English courts in an equity suit will not give effect to such a provision . . . should not deter us from including it [in our decree] No provision of this judgment shall operate against I.C.I. for action taken in compliance with any law . . . of any foreign government . . . to which I.C.I. is at the time being subject, and concerning matters over which, under the law of the United States, . . . such government . . . has jurisdiction.

Id. at 48-49.

132. *British Nylon Spinners Ltd. v. Imperial Chem. Indus.* [1953] 1 Ch. 19 (interlocutory decree) [1955] 1 Ch. 37 (final decree).

rial Chemical the exclusive right to use the DuPont patents which had been assigned to Imperial Chemical. British Nylon Spinners initially obtained an interlocutory injunction forbidding compliance with the United States court order by Imperial Chemical. At the trial on the merits, the court held that "notwithstanding the judgment of the United States court . . . the defendants, [Imperial Chemical] are bound by English law to carry out their agreement [with British Nylon Spinners]"133

Although the precedential value of the *British Nylon Spinners, Ltd. v. Imperial Chemical Industries* case has been disputed,¹³⁴ it represents a milestone in Anglo-American relations.¹³⁵ The case enunciated many concepts and beliefs which were later embodied in the Protection of Trading Interests Act.¹³⁶

III. THE PROTECTION OF TRADING INTERESTS ACT

A. Events Which Precipitated Passage of the Act

The Protection of Trading Interests Act can only be properly examined against the background of prior disagreements regarding the jurisdiction, discovery, and enforcement aspects of United States antitrust laws and recent events. The passage of the PTIA was directly preceded, perhaps even provoked, by two events; first, the indictment of British executives and corporations for participating in an alleged shipping cartel without the approval of the Federal Maritime Commission, and possibly in violation of antitrust laws,¹³⁷ and second, the antitrust suit brought by West-

133. [1955] 1 Ch. 37, 54-55. After *British Nylon Spinners* was decided, DuPont refused to grant to Imperial immunity for importing fibers into the United States as required by the court's decree. Imperial then moved to compel DuPont's compliance with the court's decree. Because DuPont had been denied a similar right by the *British Nylon Spinners* decision, the court denied Imperial's motion. B. HAWK, *supra* note 5, at 358.

134. B. HAWK, *supra* note 5, at 357.

135. Gordon, *supra* note 5.

136. Compare the power exercised by the British court in *British Nylon Spinners* with the power delegated to the Secretary of State under §§ 4, 5 of the PTIA discussed in notes 165-67 *infra* and accompanying text.

137. [1979] 922 ANTITRUST & TRADE REG. REP. (BNA), July 12, 1979, at A-30-32; [1979] 917 ANTITRUST & TRADE REG. REP. (BNA), June 7, 1979, at A-25. Commenting on the indictments, Mr. Nott stated: "The Government reacted strongly against the handing down of these indictments The policy of the British Government . . . has been to avoid detailed regulatory intervention in commercial aspects of international shipping. We believe that to be the best way of achieving effi-

inghouse Electric Company against a number of foreign uranium producers, including Britain's Rio Tinto Zinc.¹³⁸

The shipping cartel indictments alleged violations of antitrust laws through price fixing for ocean freight between the United States and Western Europe.¹³⁹ The British government responded to the indictments by invoking its non-disclosure law, the 1964 Shipping Contracts and Commercial Documents Act, so that the British firms would not have to comply with discovery orders during the grand jury proceedings.¹⁴⁰ The Justice Department suits were concluded quickly when the defendants pleaded *nolo contendere* to the indictments and were ordered to pay 6.1 million dollars in fines.¹⁴¹ The fines brought strong criticism from the British government.¹⁴² The British Undersecretary of State for Trade commented:

Shipping is an international activity, affecting the interests of both countries. Any questions that arise should therefore be dealt with jointly, and we consider it wrong in principle for the U.S. to exercise unilateral control over shipping between the two countries, in disregard both of [British] economic interests and shipping policies.¹⁴³

Following the settlement with the Justice Department, the Federal Maritime Commission began an investigation of the alleged cartel, and a number of treble damage suits were instituted under United States antitrust laws by private parties seeking recovery for damages allegedly sustained as a result of the operation of

cient and effective shipping services and protecting the interest of the consumer." 973 PARL. DEB., H.C. (5th ser.) 1538 (1979).

138. See note 148 *infra*.

139. United States v. Atlantic Container Line, Ltd., Crim. No. 79-00271 (D.D.C. June 1, 1979); United States v. Bates, Crim. No. 79-00272 (D.D.C. June 1, 1979). See [1979] 917 ANTITRUST & TRADE REG. REP. (BNA), June 7, 1979, at A-25. The indictments were brought under the Sherman Act rather than the Shipping Act because the alleged agreements fell outside the scope of the rate-fixing agreements subject to Federal Maritime Commission regulation. See notes 41-46 *supra* and accompanying text.

140. [1979] 917 ANTITRUST & TRADE REG. REP. (BNA), June 7, 1979, at A-26.

141. [1979] 922 ANTITRUST & TRADE REG. REP. (BNA), July 12, 1979, at A-30-31; [1979] 917 ANTITRUST & TRADE REG. REP. (BNA), June 7, 1979, at A-25.

142. *Id.* See also Press Notice Issued by the British Department of Trade, Ref. 445, Oct 31, 1979. Copy on file at the office of the *Fordham International Law Journal*.

143. [1979] 922 ANTITRUST & TRADE REG. REP. (BNA), July 12, 1979, at A-31.

the cartel.¹⁴⁴ In one such case,¹⁴⁵ the United States District Court for the Southern District of New York recently refused to dismiss a suit brought by shipping companies allegedly injured by the cartel.¹⁴⁶ Should the plaintiff shipping companies win their case, the final judgments will certainly be subject to careful scrutiny by the British government, and will be likely targets for the initial application of the PTIA.¹⁴⁷

If it is likely that judgments in the shipping cases may be subject to the provisions of the PTIA, it is almost certain that the same will be true when the final judgment is handed down in the Westinghouse Electric Company uranium cartel litigation.¹⁴⁸ In

144. In the suits the plaintiffs' claims may total over \$1.5 billion in damages. 973 PARL. DEB., H.C. (5th ser.) 1539 (1979).

145. *In re Ocean Shipping Antitrust Litigation*, MDL 395, M21-26 (CES), (S.D.N.Y. Oct. 15, 1980). Copy on file at the office of the *Fordham International Law Journal*.

146. *Id.* The defendants sought dismissal of the suit on the ground of implied immunity, or failing that, a stay under the doctrine of primary jurisdiction to enable the Federal Maritime Commission to consider the case. *Id.* at 2. The court rejected these arguments, and found *Carnation v. Pacific Westbound Conference*, 383 U.S. 213 (1965), controlling. The court denied the defendant's motions finding that the Federal Maritime Commission did not have exclusive jurisdiction over ocean shipping, and that rate-fixing activities by ocean carriers were not impliedly immune from antitrust laws. *Id.* at 7-12.

147. See remarks of Mr. Nott, 973 PARL. DEB., H.C. (5th ser.) 1539 (1979) wherein he commented on the ongoing private suits involving the shipping industry. He stated: "The consequences for the shipping companies are potentially financially crippling. No Government can stand by and allow a vital industry to be threatened in that way when we contest the very basis of the United States action." *Id.*

148. See *In re Uranium Antitrust Litigation*, 617 F.2d 1248 (7th Cir. 1980), *aff'g* 473 F. Supp. 382 (N.D. Ill. 1979); *In re Uranium Antitrust Litigation*, 473 F. Supp. 393 (N.D. Ill. 1979). The litigation involving the cartel is one of many stemming from a common series of events. The events which precipitated the litigation are summarized below. This summary is based on the writings of an Australian commentator, Gillian Triggs, and the remarks of John Nott. These sources reflect certain beliefs and opinions of foreigners whose governments have reacted strongly to the Westinghouse suit.

In 1964, when the United States uranium mining industry was threatened by foreign imports, it was afforded long-term protection by means of a United States government ban on the import of uranium for use in United States reactors. That protection denied to non-United States producers approximately three-quarters of the world market for uranium. During the late 1960's and early 1970's Westinghouse concluded a number of contracts relating to the construction of nuclear power stations in which it agreed to supply future quantities of uranium. In the meantime, the uranium producers outside the United States had, with the encouragement of the governments involved, taken some action to protect their markets outside the United States in the light of the United States ban and the generally depressed market conditions which it aggravated. Following a large and unexpected increase in the price

that suit, Westinghouse is asking for total damages of approximately \$6 billion, roughly four times the amount at stake in the private shipping cases.¹⁴⁹

The enormous strain on Anglo-American trade relations precipitated by the shipping indictments and continuing uranium litigation came to a head in October 1979, when the PTIA was introduced in the British House of Commons.¹⁵⁰ Without question, passage of the act increased rather than decreased the potential for conflict between the British and the United States and their respective courts.

of uranium after 1973, Westinghouse found itself in serious difficulties. The litigation which ensued involved three related proceedings. The first arose from contracts between several United States utility companies and Westinghouse for the supply of uranium by Westinghouse. Westinghouse failed to deliver the uranium as contracted and the utility companies sued, alleging breach of contract and claiming close to \$2 billion in damages. Westinghouse relied upon the defense of commercial impracticability under § 2-615 of the U.C.C. Westinghouse alleged that the impracticability arose from a uranium producers' cartel which forced the price of uranium to commercially prohibitive levels. In turn, Westinghouse commenced a treble damage action under the antitrust laws in which it requested an award of approximately \$6.1 billion against 29 United States and foreign defendants including companies from Australia, France, United Kingdom, and South Africa. Nine of the defendants in the Westinghouse suit, including Britain's Rio Tinto Zinc. Corp., Ltd., refused to answer the complaints or appear in court. Default judgments were issued against the nine defendants but damages will not be fixed until after the case against the remaining defendants is concluded.

The Justice Department also began its own investigations into the cartel allegations with the intention of instituting criminal proceedings which might be warranted. The investigation culminated in limited prosecution of the corporations involved in the international cartel. The limited scope of the Justice Department action caused a good deal of controversy in the United States Congress. See Triggs, *supra* note 16, at 268-69; 973 PARL. DEB., H.C. (5th ser.) at 1539-41 (1979). See also Comment, *The International Uranium Cartel: Litigation and Legal Implications*, 14 TEX. INT'L L.J. 59 (1979); [1979] 943 ANTITRUST & TRADE REG. REP. (BNA), Dec. 13, 1979, at A-1-4.

Westinghouse recently reached an out-of-court settlement with Gulf Oil Corp., one of the domestic corporations which allegedly participated in the international uranium cartel. See Martin, *Suit Ended In Supplies of Uranium—Gulf Pact Settles Westinghouse Price-Fix Charge*, N.Y. Times, Jan. 30, 1981, at D1, col. 5. Questions regarding the possible application of the PTIA to the Westinghouse litigation appears to be moot at this time because of an out-of-court settlement reached between Westinghouse and the British defendant, Rio Tinto Zinc. See N.Y. Times, Mar. 18, 1981, at D1, col. 5.

149. 973 PARL. DEB., H.C. (5th ser.) 1539-40 (1979).

150. See Gordon, *supra* note 5, at 154. A copy of the Act, as proposed, and the explanatory memorandum prepared for the members of Parliament are on file at the office of the *Fordham International Law Journal* [hereinafter cited as PTIA Bill].

B. *The Provisions of the Act*

In the field of trade regulation, the PTIA is the strongest anti-American¹⁵¹ and anti-antitrust measure taken by any nation.¹⁵² The act represents an expansion of Great Britain's prior non-disclosure law and creates a new cause of action on behalf of British citizens who have paid multiple damage awards. The PTIA consists of eight sections. Section 1 authorizes the Secretary of State to exercise his discretion, subject to parliamentary review, in issuing orders under the act¹⁵³ to counter measures taken or proposed to be taken under the laws of other nations regarding the regulation or control of international trade, which in his opinion would be damaging to the trading interests of Great Britain.¹⁵⁴ Section 1 of the PTIA provides three means of exercising the power conferred on the Secretary of State. First, he may order that the PTIA be applied generally or specifically to measures taken or proposed to be taken under the law of a foreign nation.¹⁵⁵ Second, he may order that a person carrying on business in the United Kingdom be required to notify him of "any requirement of prohibition imposed or threatened to be imposed on that person . . . under such measures"¹⁵⁶ Third, he may prohibit compliance with any requirement or prohibition to avoid damage to the trading interests of the United Kingdom.¹⁵⁷

151. Despite Mr. Nott's statement that "this Bill is not anti-American, or indeed anti-anybody" the PTIA is carefully tailored to counter American antitrust legislation. 973 PARL. DEB., H.C. (5th ser.) 1546 (1979). See PTIA, Appendix, §§ 1(b), 5(1), 8(3) and compare the similarity of these provisions with the result achieved in *British Nylon Spinners*. See notes 132-36 *supra* and accompanying text. Other statements made by Mr. Nott and members of Parliament also make this explicit. See, e.g., 973 PARL. DEB., H.C. (5th ser.) 1533-91 (1979).

152. See note 7 *supra* and accompanying text.

153. See PTIA, Appendix, §§ 1(1), 1(4).

154. "Trade" and "trading interests" are broadly defined in § 1(6) as "any activity carried on in the course of a business of any description[,] and 'trading interests' shall be construed accordingly." *Id.* § 1(6).

155. *Id.* §§ 1(1), 1(4). As the British Undersecretary of Trade noted "[t]he first step is indicative only. No immediate consequences flow from the specification of extraterritorial foreign laws except perhaps political consequences from the fact that the order has been made." Sunderland Speech, *supra* note 72, at 13.

156. PTIA, Appendix, § 1(2). The PTIA, as proposed, contained the words "including any requirement to submit any contract or other document for approval thereunder." PTIA Bill, *supra* note 150, at 2. Although this reference to the Federal Maritime Commission regulations and similar regulations was omitted from the final version of the act, they are covered under the general language of § 1(1).

157. See PTIA, Appendix, §§ 1(3) & 1(5). The sweeping language of § 1 reflects

Section 2 delineates the circumstances under which the Secretary of State may exercise his discretion to prohibit compliance with a discovery request or order for commercial information¹⁵⁸ which has been or may be issued by a foreign court. Five such circumstances are described in the act: (1) where the foreign documents order infringes on the jurisdiction of the United Kingdom or is prejudicial to the sovereignty of the United Kingdom,¹⁵⁹ (2) where compliance with the order would be prejudicial to the security or foreign relations of the United Kingdom,¹⁶⁰ (3) where the documents are not required for ongoing civil or criminal proceedings,¹⁶¹ (4) where the order requires a statement regarding what documents a person had had in his possession relevant to the litigation,¹⁶² or (5) where the order requests the production of documents not specifically named in the order.¹⁶³

Section 3, the enforcement provision of the Act, states the penalties for failure to comply with an order issued under sections 1 or 2.¹⁶⁴ Section 4 prohibits British courts from giving effect to requests by foreign courts where it is shown that the request infringes on the jurisdiction of the United Kingdom. A certificate signed by the Secretary of State or his authorized agent certifying that the request infringes on the jurisdiction of the United Kingdom conclusively proves that fact to the court.¹⁶⁵ Section 5 concerns the enforcement of foreign judgments. Subsection 1 forbids

the attitude of the British courts toward United States laws and regulations. *See, e.g.,* *British Nylon Spinners, Ltd. v. Imperial Chem. Indus., Ltd.*, [1955] 1 Ch. 37.

158. "Commercial document" and "commercial information" according to § 2(6) "mean respectively a document or information relating to a business of any description . . . [including] any record or device by means of which material is recorded or stored." Mr. Sunderland expressed the British government view that such requirements for the production of documents or giving of evidence or law enforcement activity in the United Kingdom "may only occur with consent of H[er] M[ajesty's] G[overnment]." Sunderland Speech, *supra* note 72, at 14.

159. *See* PTIA, Appendix, § 2(2)(a).

160. *Id.* § 2(2)(b).

161. *Id.* § 2(3)(a). This subsection operates as an impediment to investigations and crucial pre-trial discovery.

162. *Id.* § 2(3)(b).

163. *Id.*

164. Failure to comply with an order issued under sections 1 or 2 of the PTIA is punishable, on indictment and conviction, by a fine of an unspecified amount. Summary conviction is punishable by fines of up to £1000. *Id.* §§ 3(1), 3(5).

165. Section 4, in effect, codifies the result reached in *Rio Tinto Zinc Corp. v. Westinghouse Elec. Corp.*, [1978] 1 A.C. 547 (C.A.). *See* note 119 *supra* and accompanying text; Gordon, *supra* note 5, at 162.

courts in the United Kingdom from enforcing judgments awarded by foreign courts to which the statute applies.¹⁶⁶ Subsections 2 and 4 authorize the Secretary of State to forbid the enforcement of multiple damage awards made under foreign competition laws enumerated by the Secretary of State.¹⁶⁷

Section 6, the "clawback" provision of the act, is the most controversial section of the PTIA. This section enables citizens of the United Kingdom and other persons carrying on business in the United Kingdom to recover punitive damages paid pursuant to foreign judgments.¹⁶⁸ No authorization or supervision by the Secretary of State is required prior to initiation of such an action. Section 6 also includes subsections pertaining to orders of foreign tribunals and authorities (as opposed to courts),¹⁶⁹ cases involving contribution,¹⁷⁰ partial recovery by foreign plaintiffs,¹⁷¹ the transfer of rights by a British party to the foreign litigation,¹⁷² and the extra-territorial jurisdiction of the British courts in enforcing the statute.¹⁷³

Section 7, which was not included in the original draft of the PTIA, provides for reciprocal enforcement of similar statutes enacted by other nations.¹⁷⁴ Section 8 contains definitions and rules relating to the enforcement of the act.¹⁷⁵

166. See PTIA, Appendix, § 5(1).

167. *Id.* §§ 5(2), 5(4).

168. *Id.* § 6(1). Sections 6(3) & 6(4) prohibit use of the clawback provision by persons ordinarily resident in the overseas country whose courts rendered the multiple damage judgment and those whose judgments are based on activities carried on exclusively in the overseas country. The operation of the clawback provision will, no doubt, be governed by existing British rules governing the attachment of assets for the satisfaction of judgments.

169. See PTIA, Appendix, § 6(7).

170. *Id.* § 6(6).

171. *Id.* For example, in a successful treble damage suit in which the defendant is ordered to pay \$20,000 in compensatory damages and \$40,000 in punitive damages the ratio of punitive damages to the total damage award would be 2/3. If the plaintiff is able to recover only \$30,000 of the total judgment, the defendant would be able to use the clawback provision to recover back \$20,000, representing 2/3 of the amount paid to the original plaintiff.

172. *Id.*

173. *Id.* § 6(5). It is ironic that Parliament empowered the British courts to use powers similar to those which they have found so repugnant and against which they have protested so loudly.

174. *Id.* § 7(1). This provision of the PTIA, in effect, encourages other nations to enact similar legislation.

175. Section 8 was enacted as proposed, with minor changes.

The British government has yet to issue regulations or published information regarding the operation of the act. The language of the statute indicates that sections 1 and 2 will operate only at the direction of the Secretary of State.¹⁷⁶ It is unclear whether private parties may request that action be taken under those sections, or whether the Secretary will act only on his own initiative. The Secretary's ability to apply section 1 of the PTIA generally or specifically, however, indicates that private parties may be permitted to request that the act be invoked.¹⁷⁷

Similarly, the language of section 2 appears to permit private parties to request application of the act to specific litigation.¹⁷⁸ The provisions in sections 1 and 2 which provide for application of the act to action likely to be taken by foreign governments or citizens also points to such a conclusion. It is far more likely that private parties who suspect that they may be affected by a foreign law would be more aware of that possibility than the British government. They would therefore be in a better position to predict such action and to counter it by utilizing the anticipatory provisions of the act than the British government.

Sections 4 and 5 apparently may be invoked by the British government or a British citizen who qualifies under the act.¹⁷⁹ This is in contrast to section 6 which seems to grant only to private parties the right to recover punitive damages paid pursuant to a foreign court judgment.¹⁸⁰

The time at which the provisions of the act may be invoked remains unclear. Sections 1 and 2 clearly provide for anticipatory use, that is, implementation of the provisions before any injury occurs.¹⁸¹ The operation of section 6 must necessarily follow payment of a multiple damage award,¹⁸² but the operation of section 5 is less clear.¹⁸³

Until the PTIA is actually implemented or regulations promulgated, the precise method of operation will remain unclear. Notwithstanding this lack of precision regarding its application,

176. See PTIA, Appendix, §§ 1, 2.

177. *Id.* § 1.

178. *Id.* § 2.

179. *Id.* §§ 4, 5.

180. *Id.* § 6.

181. *Id.* §§ 1, 2.

182. *Id.* § 6.

183. *Id.* § 5.

passage of the PTIA remains a highly significant event. Its impact on international antitrust can, at this time, be best assessed by examining the response of the United States and the international community to its enactment.

C. *American Reaction to Passage of the Protection of Trading Interests Act*

American reaction to the Protection of Trading Interests Act was initially one of great concern. Soon after the PTIA was introduced as a bill into the House of Commons, the United States government sent an official response to Her Majesty's government via diplomatic note. The United States expressed concern that the bill, if enacted, would "encourage a confrontational rather than cooperative approach to resolving issues in which both our countries are interested."¹⁸⁴ The note also made several specific comments on the bill's provisions and their enforcement against United States citizens.¹⁸⁵

184. See United States Diplomatic Note No. 56 from Secretary of State Vance to Her Majesty's Government (Nov. 9, 1979), *supra* note 12.

185. *Id.* The note expressed concern first, that enactment of the bill would foreclose or restrict opportunities for United States views to be taken into account in cases affecting both British and American trade. Second, § 2 could be applied to prohibit production of some documents located outside the United Kingdom or under the control of persons who are not British citizens, even though the United States interest in the documents was greater than that of the United Kingdom. Third, there was nothing in § 5 to limit its application to circumstances in which the British government believed the United States court did not have jurisdiction over the case or circumstances in which British sovereign interests were infringed. Finally, it was urged that § 6, the clawback provision, be deleted or modified to use the approach taken in other sections, which would permit but not require the Secretary of State to certify the need for that particular measure.

The British government's reply to these criticisms was as follows: first, hope was expressed that the circumstances in which the Secretary of State would find it appropriate to use the discretionary powers conferred in the bill would arise infrequently. Furthermore, it was emphasized that channels of communication with the United States would remain open so that he could consider all the relevant facts and circumstances when making his decision. Second, because the operation of § 2 is discretionary the Secretary of State could be expected to take into account all the aspects of any case, including considerations of international comity. Third, § 5 reflected a principle espoused by the British government whereby sovereign states do not accept an obligation to enforce the public economic policies of other sovereign states. Fourth, it was considered unfair to make the operation of § 6 subject to secretarial discretion because the use of discretion for the sole purpose of creating a private right would, in the eyes of the British government, be wrong in principle. British Diplomatic Note No. 225 from Her Majesty's Government to Secretary of State Vance (Nov. 27, 1979), *supra* note 12.

After the act's passage United States government criticism of the PTIA sharpened. In a speech delivered in Washington, D.C. by Assistant Attorney General Shenefield, the response of foreign governments to enforcement of United States antitrust laws was labeled as an overreaction.¹⁸⁶ This comment, obviously meant to include enactment of the PTIA, was not surprising in light of recent efforts by the government and the courts to consider foreign interests when deciding to enforce antitrust laws extraterritorially.¹⁸⁷

When viewed in isolation, it appears that the impact of the PTIA on enforcement of United States antitrust laws and on the overseas activities of United States corporations may, in fact, be minimal.¹⁸⁸ A far more pressing situation will occur, however, if laws similar to the Protection of Trading Interests Act are adopted by a number of the United States' trading partners. International reaction to the act indicates that such a situation may be in the making.

D. *International Reaction to the Act*

In the wake of the passage of the PTIA other nations have expressed an intent to enact or consider enacting similar legislation. In recent months, Australian government officials announced that they would consider legislation that would enable them to seize the assets of the Westinghouse Electric Company in the event that Westinghouse was successful in its suit now pending against the Australian companies allegedly involved in an uranium cartel.¹⁸⁹ A

186. Shenefield Remarks, *supra* note 1, at 6.

187. See notes 71-92 *supra* and accompanying text.

188. Given the many criteria required for imposition of the PTIA it seems that few antitrust cases could be subject to its provisions. Consider, for example, the many factors which coalesce in the following hypothetical in which the clawback provision could be used. A British citizen has lost a suit tried in a foreign court, despite the availability of the nondisclosure provisions of the PTIA. The original suit did not involve actions taken entirely in the foreign country, and the suit resulted in a multiple damage award to the plaintiff which was paid, at least in part. The British citizen now may begin a suit in British courts under § 6 of the act, after finding and attaching assets of the former plaintiff which may later be used to satisfy a judgment when the litigation is completed.

189. [1980] 980 ANTITRUST & TRADE REG. REP. (BNA), Sept. 11, 1980, at A-13; see note 13 *supra* and accompanying text. Currently, Australia has a strong anti-enforcement law which can be used to block enforcement of discovery orders or to frustrate enforcement of foreign judgments. See note 7 *supra*; 20 HARV. INT'L L.J. 663 (1979). The contemplated legislation would contain a provision similar to that in PTIA, Appendix, § 6.

bill modeled after the PTIA was introduced in the Canadian Parliament on July 11, 1980.¹⁹⁰ In a comment strikingly similar to that made by the British Secretary of State for Trade, the Canadian Justice Minister, Jean Chrétien, stated that "[i]n our view, it is objectionable that actions of the Canadian uranium industry, taken outside the United States in accordance with Canadian law in response to a declared national policy, should be the subject of legal proceedings in the United States."¹⁹¹ The British Commonwealth nations reacted to passage of the PTIA by adopting a non-binding resolution which criticized private enforcement of United States antitrust laws.¹⁹²

It is worth noting that at a time when foreign governments have expressed unprecedented hostility toward the enforcement of United States antitrust laws, bilateral negotiations were begun with at least one government, Australia, to discuss workable solutions to conflicts over antitrust enforcement.¹⁹³ To date, no formal agreements have resulted from these talks.¹⁹⁴

Agreement was, however, recently reached on an international antitrust code after five years of negotiations by United Nations representatives. The code, embodied in United Nations Resolution 35/63 on Restrictive Business Practices,¹⁹⁵ is an important step towards establishing international machinery designed to promote a world economy based on free competition and establishing a forum

190. The proposed Foreign Proceedings and Judgments Act was introduced into the Canadian House of Commons by the Minister of Energy, Mines, and Resources, Mr. Marc Lalond. Debate of the bill has not yet taken place. See note 13 *supra*.

191. [1980] 979 ANTITRUST & TRADE REG. REP. (BNA), Aug. 28, 1980, at A-5.

192. See [1980] 969 ANTITRUST & TRADE REG. REP. (BNA), June 19, 1980, at A-6-7; [1980] 963 ANTITRUST & TRADE REG. REP. (BNA), May 8, 1980, at A-10.

193. See [1980] 977 ANTITRUST & TRADE REG. REP. (BNA), Aug. 14, 1980, at A-10.

194. *Id.* The United States currently has formal agreements with West Germany, Canada and several trade organizations designed to promote cooperation in the international antitrust field. See generally B. HAWK, *supra* note 5, ch. 16; Kintner, Joelson & Vaghi, *Groping for a Truly International Antitrust Law*, 14 VA. J. INT'L L. 75 (1973).

195. Resolution on Restrictive Business Practices, adopting the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices, 35 U.N. GAOR, (83d plen. mtg.) (Agenda Item 61), U.N. Doc. A/RES/35/63 (Dec. 5, 1980). The passage of the resolution in committee was well received by the Justice Department and the United States business community. See [1980] 963 ANTITRUST & TRADE REG. REP. (BNA), May 8, 1980, at A-7; [1980] 961 ANTITRUST & TRADE REG. REP. (BNA), Apr. 24, 1980, at A-10.

for resolving conflicts in the enforcement of international antitrust judgments.

IV. PROSPECTS FOR THE FUTURE

The interdependence of nations, and the need for cooperation among nations in the fields of economics and world trade are fundamental concepts learned by every student of international relations.¹⁹⁶ Yet, in the area of international antitrust, there has been remarkably little broadly-based international cooperation aimed at establishing and enforcing multilateral antitrust laws.¹⁹⁷ Attempts by the United States to handle the problem almost single-handedly have met with mixed results. This is largely because United States laws were not designed to regulate the world economy, and because they reflect a strong national commitment to use antitrust laws as a vehicle for maximizing competition and ensuring the economic health of the nation. Applying such laws to foreign commerce, while balancing competing national interests, has been an enormous task for United States courts.¹⁹⁸

A. *Options Available to the United States and Suggested Course of Conduct*

The United States government is, of course, expected to respond to the passage of the Protection of Trading Interests Act. While the response may be expressed through a number of channels and with varying strength, it is likely to fall into one of two broad categories. It will either reaffirm the United States commit-

196. See, e.g., Silk, *A Growing Interdependence*, N.Y. Times, Feb. 8, 1981, § 12 (International Economic Survey) at 1, col. 1.

197. That is not to say that there has been a complete lack of cooperation concerning multilateral antitrust agreements; however, aside from the recent activity in the United Nations relatively few nations have been involved in prior discussions. Channels of communication and consultation on the subject of international antitrust are available under the General Agreement of Tariffs and Trade and through the Organization for Economic Cooperation and Development. Neither of these organizations has established guidelines for eliminating restrictive business behavior. To date, the most ambitious and successful supranational effort to combat restrictive trade practices is that undertaken by the European Economic Community under the Treaty of Rome. See generally COMMON MARKET AND AMERICAN ANTITRUST: OVERLAP AND CONFLICT (J. Rahl ed. 1970); B. HAWK, *supra* note 5, chs. 7-13, 16; Kinter, Joelson, & Vaghi, *supra* note 194.

198. At least one court has found it to be an overwhelming task. See *In re Uranium Antitrust Litigation*, [1980-1] TRADE REG. REP. (CCH) ¶ 63,124; notes 111-18 *supra* and accompanying text.

ment to existing statutes and procedures, or it will advocate consideration of alterations in the scope, application, and enforcement of these same laws.

Enactment of the PTIA represents the culmination of a long-standing fight against the extraterritorial application of United States antitrust laws.¹⁹⁹ It also demonstrates that those laws have alienated the United States from one of its closest allies and most valued trading partners. That other nations are considering similar statutes,²⁰⁰ and utilizing existing laws to inhibit enforcement of United States antitrust laws, indicates that hostility toward those laws is strong and growing. Moreover, it presents a serious impediment to achievement of the United States goal of free competition in both domestic and foreign commerce.²⁰¹ Any attempt to reaffirm support for existing United States antitrust legislation seems destined to aggravate an already strained situation.²⁰² Consequently, passage of the act should be accepted by the United States not only as a harbinger of the times, but also as a warning that the United States can no longer serve as the world's policeman in the international marketplace.²⁰³

Recent attempts by individual nations and the world community to come to an understanding regarding the need for antitrust law indicates that they have acknowledged their responsibility for maintaining free competition within the world economy.²⁰⁴ The United States should applaud and encourage such actions and seize the opportunity now available²⁰⁵ to begin bilateral and multilateral discussions aimed at encouraging the enactment of antitrust legislation where none exists, promoting vigorous enforcement procedures in nations that have antitrust laws,²⁰⁶ and establishing ma-

199. See notes 1-11 *supra* and accompanying text.

200. See note 13 *supra*.

201. See note 6 *supra*; D. WALDMAN, *ANTITRUST AND MARKET STRUCTURE* 15 (1978).

202. Reaffirming support for existing antitrust laws by enacting legislation to nullify the effect of the PTIA, or to permit judges to fashion remedies to do the same, would certainly exacerbate the existing conflict with Great Britain, and thus prove detrimental to the long-term interests of the United States.

203. See Birenbaum & Johnson, *supra* note 6.

204. See notes 193-95 *supra* and accompanying text.

205. The adoption of the UN Resolution of Restrictive Business Practices, see note 195 *supra*, is indicative of the spirit of cooperation regarding international antitrust prevailing among the nations of the world.

206. (Austria) Austrian Federal Act of 22 November, 1972, on rules concerning cartels and provisions designed to preserve the freedom of competition (Cartels Act);

chinery to attack cartels and monopolies on a global scale.

In light of recent developments in the United Nations and passage of the PTIA, the United States Congress and the Department of Justice should also undertake a thorough assessment of the scope and operation of existing antitrust laws as they relate to foreign commerce.²⁰⁷ Attention should be focused on the measures which provide for treble damage awards in successful private suits.²⁰⁸ One of the obvious means of reducing the number of private suits, which would also reduce tension over treble damage awards, would be to increase the enforcement activities of the Justice Department where treble damages are not available.²⁰⁹ In addition, alternative formulas for calculating private damage awards, including awards of compensatory damages only, ought to be given serious consideration. It is also of the utmost importance that the United States maintain channels of communication with other governments for discussion concerning antitrust laws and their enforcement.²¹⁰

(Belgium) Act of 27 May 1960 on protection against the abuse of economic power; (Denmark) Monopolies and Restrictive Practices Supervision Act 1955, as amended; (European Economic Community) EEC Treaty, Mar. 25, 1957, Arts. 85-86; (France) Arts. 419-20 of the Penal Code, Price Ordinance No. 45-1483 of 30 June 1945, as amended, Act No. 73-1193 of 27 December 1973; (Norway) Act on Control of Prices, Profits and Restraints of Competition; (Spain) Act against practices in restraint of competition of 20 July 1963; (Sweden) Restricted Trade Practices Act (Act of 25 September 1953 (1953:603)); (United Kingdom) Restrictive Trade Practices Act 1977, Restrictive Trade Practices Act 1976, Fair Trading Act 1973; (W. Germany) Act against restraints of competition of 4 April 1974. These statutes are reprinted in *COMPETITION LAW IN WESTERN EUROPE AND THE USA*, vols. A&B (D. Gijlstra ed. 1976 & Supp. 1979).

207. Undertaking such an assessment before the PTIA is implemented would serve a dual function; first, it would reaffirm the United States commitment to using antitrust laws as a vehicle for maintaining free competition in United States markets while demonstrating sensitivity to the concerns of foreign nations. Second, it might avoid a direct confrontation with the laws and policies of one of our closest allies. Unfortunately, Congress does not seem especially anxious to undertake such an assessment, particularly when the domestic implications are more politically imminent than the overseas ones. Gordon, *supra* note 5 at 164.

208. This would result in a two-fold benefit. First, it should reduce the irritation to our trading partners caused by treble damage awards. Second, it would allow the Justice Department to perform the delicate balancing of domestic and foreign interests involved in foreign commerce cases, a task which the courts have found particularly difficult.

209. See note 21 *supra*; Sunderland Speech, *supra* note 72, at 8.

210. Enactment of anti-American legislation by foreign governments and other attempts to evade the extraterritorial application of United States laws are likely to cause disruptions in the lines of communication which must remain open.

B. *Proposals for Action to be Taken
by Foreign Governments*

Foreign governments must realize that having circumscribed the enforcement of United States antitrust laws in the international arena, the likelihood that activities of cartels and monopolies will go unregulated has greatly increased.²¹¹ If the world community and our trading partners wish to avoid the harm engendered by international cartels and monopolies they must be willing to play a more active role in combating restraints on international trade. An active role means that foreign governments cannot merely pay lip service to resolutions passed in the United Nations. They must work diligently to establish supranational antitrust enforcement machinery to fight restraints of trade, enforce existing antitrust legislation vigorously,²¹² enact strong laws where none exist, and utilize existing multinational agreements which foster competition.

CONCLUSION

The United States and Great Britain have armed themselves with strong weapons to enforce competing economic policies designed to achieve similar goals. Having reached a temporary stalemate, both parties should now channel their energies into establishing and developing international mechanisms for dealing with restraints on free trade, a goal which they have both endorsed in the United Nations Resolution on Restrictive Business Practices.²¹³ The passage of this resolution indicates that the groundwork for such a system is already in place. Anglo-American cooperation in building the foundation for an international system designed to eliminate restraints on trade would unquestionably advance such an effort.

The United States should not forget that it was the commit-

211. Stocking and Watkins analyzed the detrimental impact on international commodity markets on a case-by-case basis. See STOCKING & WATKINS, *supra* note 6, at 125-34. See also D. WALDMAN, *supra* note 201; Askari, *The International Trade Implications of the Oil Cartel*, 12 TEX. INT'L L.J. 47 (1977).

212. See note 206 *supra*.

213. This same goal was previously embodied in the 1948 Havana Charter which contained plans for an International Trade Organization to regulate restrictive trade practices. The International Trade Organization never came into existence. The Charter and the plans for the organization were "endeavors . . . simply too premature for a binding agreement to have resulted at that time." Kintner, Joelson & Vaghi, *supra* note 194, at 89.

ment to extraterritorial enforcement of its own antitrust laws which led to the present confrontation. The time has come for an extensive review of existing antitrust laws and their application in foreign commerce cases. A thorough assessment of United States laws coupled with a sincere effort to establish international mechanisms for dealing with restraints on trade would substantially lessen the tension between Britain and the United States, as well as significantly enhance free trade among nations.

Arlene Daffada

APPENDIX

THE PROTECTION OF TRADING INTERESTS ACT

An Act to provide protection from requirements, prohibitions and judgments imposed or given under the laws of countries outside the United Kingdom and affecting the trading or other interests or persons in the United Kingdom.

BE IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

1.—(1) If it appears to the Secretary of State—

- (a) that measures have been or are proposed to be taken by or under the law of any overseas country for regulating or controlling international trade; and
- (b) that those measures, in so far as they apply or would apply to things done or to be done outside the territorial jurisdiction of that country by persons carrying on business in the United Kingdom, are damaging or threaten to damage the trading interests of the United Kingdom,

the Secretary of State may by order direct that this section shall apply to these measures either generally or in their application to such cases as may be specified in the order.

(2) The Secretary of State may by order make provision for requiring, or enabling the Secretary of State to require, a person in the United Kingdom who carries on business there to give notice to the Secretary of State of any requirement or prohibition imposed or threatened to be imposed on that person pursuant to any measures in so far as this section applies to them by virtue of an order under subsection (1) above.

(3) The Secretary of State may give to any person in the United Kingdom who carries on business there such directions for prohibiting compliance with any such requirement or prohibition as aforesaid as he considers appropriate for avoiding damage to the trading interests of the United Kingdom.

(4) The power of the Secretary of State to make orders under subsection (1) or (2) above shall be exercisable by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament.

(5) Directions under subsection (3) above may be either general or special and may prohibit compliance with any requirement or prohibition either absolutely or in such cases or subject to such conditions as to consent or otherwise as may be specified in the directions; and general di-

rections under that subsection shall be published in such manner as appears to the Secretary of State to be appropriate.

(6) In this section "trade" includes any activity carried on in the course of a business of any description and "trading interests" shall be construed accordingly.

2.—(1) If it appears to the Secretary of State—

- (a) that a requirement has been or may be imposed on a person or persons in the United Kingdom to produce to any court, tribunal or authority of an overseas country any commercial document which is not within the territorial jurisdiction of that country or to furnish any commercial information to any such court, tribunal or authority; or
- (b) That any such authority has imposed or may impose a requirement on a person or persons in the United Kingdom to publish any such document or information,

the Secretary of State may, if it appears to him that the requirement is inadmissible by virtue of subsection (2) or (3) below, give directions for prohibiting compliance with the requirement.

(2) A requirement such as is mentioned in subsection (1)(a) or (b) above is 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 the relations of the government of the United Kingdom with the government of any other country.

(3) A requirement such as is mentioned in subsection (1)(a) above is also inadmissible—

- (a) if it is made otherwise than for the purposes of civil or criminal proceedings which have been instituted in the overseas country; or
- (b) if it requires a person to state what documents relevant to any such proceedings are or have been in his possession, custody or power or to produce for the purposes of any such proceedings any documents other than particular documents specified in the requirement.

(4) Directions under subsection (1) above may be either general or special and may prohibit compliance with any requirement either absolutely or in such cases or subject to such conditions as to consent or otherwise as may be specified in the directions; and general directions under that subsection shall be published in such manner as appears to the Secretary of State to be appropriate.

(5) For the purposes of this section the making of a request or demand shall be treated as the imposition of a requirement if it is made in circumstances in which a requirement to the same effect could be or could have been imposed; and

- (a) any request or 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; or
- (b) any requirement imposed by such a court, tribunal or authority to produce or furnish any document or information to a person specified in the requirement, shall be treated as a requirement to produce or furnish that document or information to that court, tribunal or authority.

(6) In this section "commercial document" and "commercial information" mean respectively a document or information relating to a business of any description and "document" includes any record or device by means of which material is recorded or stored.

3.—(1) Subject to subsection (2) below, any person who without reasonable excuse fails to comply with any requirement imposed under subsection (2) of section 1 above or knowingly contravenes any directions given under subsection (3) of that section or section 2(1) above shall be guilty of an offence and liable—

- (a) on conviction on indictment, to a fine;
- (b) on summary conviction to a fine not exceeding the statutory maximum.

(2) A person who is neither a citizen of the United Kingdom and Colonies nor a body corporate incorporated in the United Kingdom shall not be guilty of an offence under subsection (1) above by reason of anything done or omitted outside the United Kingdom in contravention of directions under section 1(3) or 2(1) above.

(3) No proceedings for an offence under subsection (1) above shall be instituted in England, Wales or Northern Ireland except by the Secretary of State or with the consent of the Attorney General, or as the case may be the Attorney General for Northern Ireland.

(4) Proceedings against any person for an offence under this section may be taken before the appropriate court in the United Kingdom having jurisdiction in the place where that person is for the time being.

(5) In subsection (1) above "the statutory maximum" means—

- (a) in England and Wales and Northern Ireland, the prescribed sum within the meaning of section 28 of the Criminal Law Act 1977 (at the passing of this Act £1,000);
- (b) in Scotland, the prescribed sum within the meaning of section 289B of the Criminal Procedure (Scotland) Act 1975 (at the passing of this Act £1,000);

and for the purposes of the application of this subsection in Northern Ireland the provisions of the said Act of 1977 relating to the sum mentioned in paragraph (a) shall extend to Northern Ireland.

4.— A court in the United Kingdom shall not make an order under section 2 of the Evidence (Proceedings in Other Jurisdictions) Act 1975 for giving effect to a request issued by or on behalf of a court or tribunal of an overseas country if it is shown that the request infringes the jurisdiction of the United Kingdom or is otherwise prejudicial to the sovereignty of the United Kingdom; and a certificate signed by or on behalf of the Secretary of State to the effect that it infringes that jurisdiction or is so prejudicial shall be conclusive evidence of that fact.

5.—(1) A judgment to which this section applies shall not be registered under Part II of the Administration of Justice Act 1920 or Part I of the Foreign Judgments (Reciprocal Enforcement) Act 1933 and no court in the United Kingdom shall entertain proceedings at common law for the recovery of any sum payable under such a judgment.

(2) This section applies to any judgment given by a court of an overseas country, being—

- (a) a judgment for multiple damages within the meaning of subsection (3) below;
- (b) a judgment based on a provision or rule of law specified or described in an order under subsection (4) below and given after the coming into force of the order; or
- (c) a judgment on a claim for contribution in respect of damages awarded by a judgment falling within paragraph (a) or (b) above.

(3) In subsection (2)(a) above a judgment for multiple damages means a judgment for an amount arrived at by doubling, trebling or otherwise multiplying a sum assessed as compensation for the loss or damage sustained by the person in whose favour the judgment is given.

(4) The Secretary of State may for the purposes of subsection (2)(b) above make an order in respect of any provision or rule of law which appears to him to be concerned with the prohibition or regulation of agreements, arrangements or practices designed to restrain, distort or restrict competition in the carrying on of business of any description or to be otherwise concerned with the promotion of such competition as aforesaid.

(5) The power of the Secretary of State to make orders under subsection (4) above shall be exercisable by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament.

(6) Subsection (2)(a) above applies to a judgment given before the date of the passing of this Act as well as to a judgment given on or after that date but this section does not affect any judgment which has been registered before that date under the provisions mentioned in subsection

(1) above or in respect of which such proceedings as are there mentioned have been finally determined before that date.

6.—(1) This section applies where a court of an overseas country has given a judgment for multiple damages within the meaning of section 5(3) above against—

- (a) a citizen of the United Kingdom and Colonies; or
- (b) a body corporate incorporated in the United Kingdom or in a territory outside the United Kingdom for whose international relations Her Majesty's Government in the United Kingdom are responsible; or
- (c) a person carrying on business in the United Kingdom, (in this section referred to as a "qualifying defendant") and an amount on account of the damages has been paid by the qualifying defendant either to the party in whose favour the judgment was given or to another party who is entitled as against the qualifying defendant to contribution in respect of the damages.

(2) Subject to subsections (3) and (4) below, the qualifying defendant shall be entitled to recover from the party in whose favour the judgment was given so much of the amount referred to in subsection (1) above as exceeds the part attributable to compensation; and that part shall be taken to be such part of the amount as bears to the whole of it the same proportion as the sum assessed by the court that gave the judgment as compensation for the loss or damage sustained by that party bears to the whole of the damages awarded to that party.

(3) Subsection (2) above does not apply where the qualifying defendant is an individual who was ordinarily resident in the overseas country at the time when the proceedings in which the judgment was given were instituted or a body corporate which had its principal place of business there at that time.

(4) Subsection (2) above does not apply where the qualifying defendant carried on business in the overseas country and the proceedings in which the judgment was given were concerned with activities exclusively carried on in that country.

(5) A court in the United Kingdom may entertain proceedings on a claim under this section notwithstanding that the person against whom the proceedings are brought is not within the jurisdiction of the court.

(6) The reference in subsection (1) above to an amount paid by the qualifying defendant includes a reference to an amount obtained by execution against his property or against the property of a company which (directly or indirectly) is wholly owned by him; and references in that subsection and subsection (2) above to the party in whose favour the judgment was given or to a party entitled to contribution include references to

any person in whom the rights of any such party have become vested by succession or assignment or otherwise.

(7) This section shall, with the necessary modifications, apply also in relation to any order which is made by a tribunal or authority of an overseas country and would, if that tribunal or authority were a court, be a judgment for multiple damages within the meaning of section 5(3) above.

(8) This section does not apply to any judgment given or order made before the passing of this Act.

7.—(1) If it appears to Her Majesty that the law of an overseas country provides or will provide for the enforcement in that country of judgments given under section 6 above, Her Majesty may by Order in Council provide for the enforcement in the United Kingdom of judgments given under any provision of the law of that country corresponding to that section.

(2) An Order under this section may apply, with or without modification, any of the provisions of the Foreign Judgments (Reciprocal Enforcement) Act 1933.

8.—(1) This Act may be cited as the Protection of Trading Interests Act 1980.

(2) In this Act "overseas country" means 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.

(3) References in this Act to the law or a court, tribunal or authority of an overseas country include, in the case of a federal state, referred to the law or a court, tribunal or authority of any constituent part of that country.

(4) References in this Act to a claim for, or to entitlement to, contribution are references to a claim or entitlement based on an enactment or rule of law.

(5) The Shipping Contracts and Commercial Documents Act 1964 (which is superseded by this Act) is hereby repealed together with paragraph 18 of Schedule 2 and paragraph 24 of Schedule 3 to the Criminal Law Act 1977 (which contain amendments of that Act).

(6) Subsection (5) above shall not affect the operation of the said Act of 1964 in relation to any directions given under that Act before the passing of this Act.

(7) This Act extends to Northern Ireland.

(8) Her Majesty may by Order in Council direct that this Act shall extend with such exceptions, adaptations and modifications, if any, as may be specified in the Order to any territory outside the United Kingdom, being a territory for the international relations of which Her Majesty's Government in the United Kingdom are responsible.

