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# EXTRATERRITORIAL ENFORCEMENT OF U.S. ANTITRUST LAWS: THE BRITISH REACTION

NAJEEB SAMIE\*

## I. AN INTRODUCTION TO THE PROBLEM

In a world of international economic interdependence, it is inevitable that the economic policy of one state will have economic effects on others. The dilemma faced by the community of nations is that it is not possible for any state in this widely diversified world to comport its laws fully to the dimensions of international trade.

Recently, several nations have called into question the wide extraterritorial reach of U.S. antitrust laws.<sup>1</sup> To date, a number of countries have enacted defensive, retaliatory legislation, designed to inhibit the reach of U.S. laws. The British government's recent enactment of the "Protection of Trading Interests Act"<sup>2</sup> ("POTI Act") represents the strongest action taken to date by a government to resist foreign pressures and the encroachment of foreign government policy into its territory.

The purposes of this article are to identify the reasons why the British were provoked into enacting such assertive legislation, and to briefly outline the POTI Act itself.

## II. THE EXERCISE OF EXTRATERRITORIAL JURISDICTION

The exercise of extraterritorial jurisdiction covers a wide area. It encompasses crime generally and such particular areas as labor laws,

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1. The United States antitrust statutes affecting foreign trade are the Sherman Act, §§ 1 and 2 (15 U.S.C. §§ 1 and 2 (1976)), the Clayton Act, §§ 3, 7, and 12 (15 U.S.C. §§ 14, 18, and 22 (1976)), the Federal Trade Commission Act, §§ 4 and 5 (15 U.S.C. §§ 44 and 45 (1976)), the Wilson Tariff Act, §§ 73, 74, 75, and 76 (15 U.S.C. §§ 8, 9, 10, and 11 (1976)), the Webb-Pomerene Act, §§ 1, 2, 3, and 4 (15 U.S.C. §§ 61, 62, 63, and 64 (1976)). The problem faced in the extraterritorial reach of U.S. laws is not a problem peculiar to antitrust. Similar problems are also related to illicit payments (Foreign Corrupt Practices Act of 1977, 15 U.S.C. § 78m, 78dd-1, 78dd-2, 78ff (1976)). There are also some questions as to the Environmental Protection Act's extraterritorial reach (Environmental Policy Act of 1969, 42 U.S.C. §§ 4321 (1976 and Supp. III 1979)).

2. 1980, c.11; in force March 20, 1980; [Bill 66], Protection of Trading Interests Bill, introduced in the House of Commons on November 15, 1979. See Lowe, *Blocking Extraterritorial Jurisdiction: The British Protection of Trading Interests Act, 1980*, 75 AM. J. INT'L L. 257 (1981).

securities laws, currency laws, shipping contracts, production of documents, and others.<sup>3</sup> The many facets of international trade are usually controlled by national legislation. Jurisdictional problems, therefore, generally do not raise intractable problems in international trade. However, antitrust laws, and particularly their extraterritorial enforcement, have caused international conflicts which are the focus of this discussion.<sup>4</sup>

The two major theories of extraterritorial jurisdiction at loggerheads in the United States-British conflict are those of the "effects doctrine" and "strict territoriality." The United States' adherence to the "effects doctrine" is one extreme, while the United Kingdom's adherence to "territoriality" is the other.

The United States' concept of legislative jurisdiction is based upon the doctrine of "effects."<sup>5</sup> According to the "effects doctrine," any act abroad that was intended to and did affect U.S. interstate or foreign commerce is subject to U.S. antitrust laws — irrespective of the nationality of the parties or the place of occurrence.

At one time the United States supported the doctrine that a court in one state could order an act to be done in another state, provided the act did not violate the laws of the state in which it was to be performed.<sup>6</sup> Later, this rule was broadened to the point where courts assumed they had authority to order or regulate conduct abroad — regardless of the fact that such action might violate foreign statutes.<sup>7</sup>

3. Jennings, *The Proper Reach of Territorial Jurisdiction: A Case Study of Divergent Attitudes*, 2 GA. J. INT'L & COMP. L. 35 (1972).

4. "The Antitrust laws of the United States, of the European Communities, and of the Member States which have such laws, are all capable of some kind of extraterritorial applications." COMMON MARKET AND AMERICAN ANTITRUST at 50 (Rahl ed. 1970).

5. *United States v. Aluminum Co. of America*, 148 F.2d 416, 443 (2d Cir. 1945). "Any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends." See also, ANTITRUST DIVISION, U.S. DEPT. OF JUSTICE, ANTITRUST GUIDE FOR INTERNATIONAL OPERATIONS at 6 (1977).

6. RESTATEMENT OF CONFLICTS OF LAWS § 94 (1934); Onkelinx, *Conflict of International Jurisdiction: Ordering the Production of Documents in Violation of the Law of the Situs*, 64 NW. U. L. REV. 487, 502 (1969).

7. See, RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAWS OF THE UNITED STATES § 39 (1965). "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."

The majority of nations<sup>8</sup> take a much narrower view and do not accept the "effects doctrine" as a basis for exercising jurisdiction in the area of antitrust law. The nations opposing this doctrine argue that it was meant only to deal with conduct that is universally recognized to be criminal in nature. Thus, national policies are not abridged when foreign courts exercise wide extraterritorial jurisdiction over common crimes. A common example of support for such an attitude occurs when a person standing in State A fires a shot that kills another person on the other side of the border in State B. In such a case, State B (the country where the person was killed and thus where the effect was felt) would be considered to have subject matter jurisdiction.

The outlook reflected in the above example encourages the contention by most nations that since a violation of U.S. antitrust laws<sup>9</sup> is not considered to be a universal crime, U.S. courts cannot assume subject matter jurisdiction under the doctrine of "effects" when such effects are a result of anticompetitive conduct.<sup>10</sup>

The assumption of jurisdiction by U.S. courts over such anticompetitive conduct is regarded by these countries to be an infringement on their national sovereignty. The alleged infringement is often viewed with indignation, as was expressed by the House of Lords in *Rio Tinto Zinc Corp. v. Westinghouse Electric Corp.*<sup>11</sup>

The British attitude towards the question of extraterritorial antitrust law jurisdiction was officially stated in one case brought by Britain before the European Commission against a number of dyestuff companies including Imperial Chemical Industries.<sup>12</sup> The British government advanced its somewhat unusual stand by issuing to the European Commission an *aide memoire* in which it stated that jurisdiction should not be exercised on the basis of mere effects.<sup>13</sup> Additionally, extraterritorial enforcement of antitrust laws may sometimes conflict with the specific policies or interests of other states. The "Uranium Case" provides a classic example.<sup>14</sup>

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8. See, COMMISSION OF THE EUROPEAN COMMUNITIES, SIXTH REPORT ON COMPETITION POLICY at 31 (1977).

9. See *supra* note 1.

10. Griffin, *American Antitrust Law and Foreign Governments*, 13 J. INT'L L. & ECON. 137, 138 (1978).

11. *Rio Tinto Zinc Corp. v. Westinghouse Electric Corp.*, [1977] ALL E.R. 434.

12. Commission's Decision of July 24, 1969. *Ruling on Dyestuff Manufacturers*, 12 E.E.C.J.O. No. L195 (Aug. 1, 1969), [1965-1969 Transfer Binder] COMM. MKT. REP. (CCH) at 9314 (1969).

13. Jennings *supra* note 3 at 38.

14. *Westinghouse Electric Corp. v. Rio Algom Ltd.*, 448 F. Supp. 1284 (N.D. Ill. 1978), consolidated *sub nom.* In re Uranium Indus. Antitrust Litigation, 466 F. Supp. 958 (Jud. Pan. Mult. Lit. 1979).

Since many nations regard the assumption of jurisdiction by a foreign court based on economic effects as an intrusion upon their sovereignty, they believe such extraterritorial actions justify retaliation in the form of trade regulation legislation. Such an action may in turn be viewed as an infringement of the sovereignty of the state where the alleged conduct occurred. This chain of events can lead to an escalation in restrictive trade practices.

### III. THE ERA OF RETALIATORY MEASURES

Formerly, the United States was the only country with comprehensively-developed antitrust legislation.<sup>15</sup> Recently, however, there has been a remarkable increase in the number of countries adopting antitrust laws. This change has occurred not only in the developed or industrialized nations, but also in developing or non-industrialized countries.<sup>16</sup>

The emergence of antitrust legislation in many countries is considered to be a direct rebuttal to the United States' extraterritorial enforcement of its own antitrust laws.<sup>17</sup> Indeed, a primary purpose of these legislative enactments appears to be an attempt by national governments to frustrate or resist foreign enforcement actions in their territories. A number of states now have "blocking" legislation.<sup>18</sup> Such laws bar compliance with foreign direc-

15. See *supra* note 1.

16. See, *Hearings Before the Subcomm. on Antitrust and Monopoly of the Senate Judiciary Comm.*, 89th CONG., 1st SESS. 630, 903, 926 (1965) (Appendix, Antitrust Development and Regulations of Foreign Countries). Some of these newer laws exercise wider coverage than do U.S. antitrust laws. For instance, the antitrust legislation of the Organization for Economic Cooperation and Development ("OECD") prohibits refusal to sell, an offense not included in the U.S. laws. See OECD REPORT OF COMMITTEE OF EXPERTS ON RESTRICTIVE BUSINESS PRACTICES ON REFUSAL TO SELL (1969). The Scandinavian States were among the first group of nations to adopt a public cartel register, and a similar feature is now a part of many foreign antitrust laws. FUGATE, FOREIGN COMMERCE AND THE ANTITRUST LAWS 467 (2d ed. 1973).

17. One such example is the United Kingdom's Protection of Trading Interests Act ["POTI"]. "Britain's new Protection of Trading Interests Bill — target America; though it applies to all countries." THE ECONOMIST, Nov. 3-9, 1979, at 66.

18. *E.g.*, Canada, United Kingdom, Australia, France, the Netherlands, New Zealand, South Africa, Switzerland, and West Germany. See Marks, *State Department Perspectives on Antitrust Enforcement Abroad*, 13 J. INT'L L. & ECON. 153 (1978); "The Australians have taken a far tougher line. This year they passed a law — and have used it in the Uranium affair — empowering their government to declare unenforceable in Australia any foreign antitrust judgment that it deems extraterritorial or even merely against Australia's national interest." *Supra* note 17, at 66. See, *e.g.*, Foreign Proceedings (Prohibition of Certain Evidence) Act, 1976 Austl. Acts No. 121, § 5; Shipping Contracts and Commercial Documents Act, 1964, Laws of 1964 c. 87, § 2 (United Kingdom) (The POTI Act seeks to repeal this law; see Bill's Explanatory Memorandum,

tives that request inspection of documents or evidence that is located within the enacting nation's territory.<sup>19</sup>

#### IV. BRITISH RETALIATORY LEGISLATION AGAINST U.S. ANTITRUST LAWS

Of the laws enacted in retaliation against U.S. antitrust laws, the strongest measure to date comes from the United Kingdom. While the British

*supra* note 2, at 1); Canada, various statutes preventing compliance with subpoenas in uranium litigation. Atomic Energy Control Act, 1970, Can. Rev. Stat. C. A-19, and Uranium Information Security Regulations, Stat. O. & R. 76-644 (1976). See *In re Westinghouse Elec. Corp. & Duquesne Light Co.*, 16 Ont. 2d 273 (1977). Canadian Foreign Proceedings & Judgments Bill. Bill No. C41, July 11, 1980; The statutes of two Canadian provinces also prohibit the production of any documents pursuant to the order of any other jurisdiction. Business Records Protection Act, 1947, ONT. REV. STAT. c. 54 (1970); Business Concerns Records Act 1964, QUE. REV. STAT. c. 278 records and data pursuant to a foreign court order and compliance with foreign antitrust orders, decrees, and judgments has been recommended by the REPORT OF THE TASK FORCE ON THE STRUCTURE OF CANADIAN INDUSTRY, FOREIGN OWNERSHIP AND THE STRUCTURE OF CANADIAN INDUSTRY 408 (1968). In some other nations, general laws prohibit the removal or furnishing of certain kinds of materials. See arts. 89, 93, Law No. 17, Jan. 30, 1961, of the Republic of Panama, prohibiting the removal of, or copying of documents for use in an action outside of Panama in compliance with an order of an authority not of the Republic of Panama; *quoted in* Application of The Chase Manhattan Bank, 297 F.2d 611, 612 (2d Cir. 1962); STGB, C.P., COD. PEN, arts. 271, 273; 1951 ROLF 12, 1938 ROLF 846, prohibiting certain acts for a foreign state, and furnishing of secret economic information to a foreign official or firm; French Law Concerning Communication of Documents and Information of an Economic, Commercial, Industrial, Financial or Technical nature to Aliens. See Law Pertaining to the Disclosure of Documents and Information of an Economic, Commercial, Industrial, Financial, or Technical Nature or Juristic Persons, July 16, 1980; The Economic Competition Act of June 28, 1956, art. 39, stb. 401, *as amended* by Act of July 16, 1958, stb. 413 (Netherlands); "New Zealand has just joined Australia and the U.K. in passing legislation to restrict the flow of information to the United States on antitrust matters." Financial Times, Aug. 18, 1980, at 24, col. 5; South America, Atomic Energy Act, 1967, No. 90, § 30, 15 Stat. Rep. So. Afr. 1045 (1977); Switzerland: Section 271 of the Swiss Penal Code apparently imposes criminal sanctions on any person who, without permission of the Swiss government, provides documents on behalf of a foreign government; West Germany, Law of May 24, 1965, § 11 (1965) Burdesgesetzblatt [BGBl] II 835. British Commonwealth, resolution by 41 British Commonwealth Nations encouraging all members of the Commonwealth to pass legislation curtailing extraterritorial application of United States procedural and antitrust laws. [1980] ANTITRUST AND TRADE REG. REP. (BNA), at A-10, May 8, 1980.

19. See, KALINOWSKI, V., ANTITRUST LAWS AND TRADE REGULATIONS, section 94.09(1) (1977); 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).

have enacted a number of general, substantive antitrust laws since 1948,<sup>20</sup> the POTI Act is the first purely retaliatory act.

In Parliament, the British Secretary of Trade made two fundamental points in support of the POTI Act. First, he emphasized the United Kingdom's strict adherence to the principle of territoriality as a basis of jurisdiction, arguing that the United States' "pernicious extraterritorial effects doctrine has created uncertainty for international industry in this country and elsewhere."<sup>21</sup> Secondly, he viewed the imposition of treble damages by U.S. courts as penal rather than compensatory. Treble damages are "by no stretch of the imagination mere restitution or reparation to the injured party."<sup>22</sup>

The factors that led the British government to enact the POTI Act can be traced back to instances such as the famous *Imperial Chemical Industries* (I.C.I.) litigation.<sup>23</sup> In that case, the British court enjoined I.C.I. from complying with a decree issued by a U.S. court.<sup>24</sup> The vital element that served as a catalyst for the introduction and adoption of the POTI Act was

20. The monopolies and mergers in the United Kingdom are controlled by the Monopolies and Restrictive Practices (Inquiry and Control) Act of 1948. See 11 and 12 Geo. 6, c. 66, reprinted in 3 OECD Guide to Legislation on Restrictive Business Practices, § 1.0 (United Kingdom) (hereinafter cited as OECD Guide); MERGERS, CONSOLIDATION AND BIG BUSINESS (The Dichley Foundation, 1970); WILBERFORCE, CAMPBELL AND ELLES, *THE LAW OF RESTRICTIVE TRADE PRACTICES AND MONOPOLIES* (2d ed. 1966, with 1969 supplement) and the Monopolies and Mergers Act of 1965 (3 OECD Guide, § 1.1). The Monopolies and Restrictive Practices Commission Act of 1953 provided for the enlargement of the Commission. The Restrictive Trade Practices Act of 1956 (4 and 5 Eliz. 2, c. 68, 3 OECD Guide, § 1.2) and that of 1968 (3 OECD Guide, § 1.5) are the statutes which deal with restrictive business practices. The Fair Trading Act of 1973 created the office of Director General of Fair Trading with the power to make monopoly reference to the Commission. The other relevant legislation is the 1964 Shipping Contracts and Commercial Documents Act (Shipping Contracts and Commercial Documents Act, 1964) (the POTI Act seeks to repeal this Act) (Bill's Explanatory Memorandum, *supra* note 2, at i.). This Act was enacted primarily to thwart the Federal Maritime Commission's investigation of North Atlantic Conference activities which involved English vessels (Shipping Contracts and Commercial Documents Act, 1964).

21. See Hansard, November 15, 1979, 1533-91.

22. Jennings, *Extraterritorial Jurisdiction and the United States Antitrust*, 33 BRIT. Y.B. INT'L 146, 148 (1957).

23. *United States v. Imperial Chemical Industries, Ltd.*, 100 F. Supp. 504 (S.D.N.Y. 1951).

24. *British Nylon Spinners, Ltd. v. Imperial Chemical Industries, Ltd.*, [1953], 2 ALL E. R. 780 (C.A.) (injunction by lower court against compliance with U.S. decree affirmed; American decree was "intrusion" on British sovereignty); *British Nylon Spinners, Ltd. v. Imperial Chemical Industries, Ltd.* [1955], 1 Ch. 19, [1952], Ch. 37, 1954, 3 ALL E. R. 88 (Ch.).

the U.S. Justice Department's appointment of a grand jury to investigate an alleged international uranium cartel.<sup>25</sup> Additionally, in 1977 the House of Lords rejected Westinghouse Electric's attempt to obtain evidence relating to the same alleged international uranium cartel.<sup>26</sup> The British were further alarmed by the filing of legal actions by private American interests seeking damages allegedly caused by two primarily British consortia that had taken part in a cartel accused of fare-fixing on the North Atlantic.<sup>27</sup>

In the presence of these conflicts, one observer remarked that "the British government, like several others, is fed up with American attempts to extend American antitrust law to things — like the uranium cartel, whose reality is scarcely in question — done outside America by non-Americans."<sup>28</sup> Another commentator wrote that the POTI Act exists because "the simmering British frustration has come to a full boil."<sup>29</sup> It was further stated that in the area of antitrust law, "the level of conflict" between the United States and the United Kingdom "has continued to rise in recent years," and the following reasons were outlined for such a rise:

First the U.S. antitrust enforcement agencies have been increasingly active in international business practices. Secondly, in accordance with its general policy, the Justice Department has increasingly investigated in this field by use of the grand jury . . . Thirdly, the United States has been willing to prosecute as antitrust violations private business conduct which a foreign government has — at least privately — favored, encouraged or facilitated. Finally, expansion of British companies into the United States during the past decade has produced some highly visible merger suits (such as *BP-Sohio*) (1970 CHH Trade Cases, para 72988 (N.D. Ohio 1969)) and *British Oxygen-AIRCO* (557 F.2d 24 (2d Cir. 1977)) which has been widely criticized by the British press as discriminatory and protectionist.<sup>30</sup>

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25. See generally, "United Nuclear Wins Judgment In Uranium Case," *Wall St. J.*, Mar. 3, 1978, at 6 col. 1 "U.S. Charges Gulf Oil in Uranium Price Fixing," *Washington Post*, May 10, 1978, at A2; see also, Kohlmeier, *The Uranium Affair*, 13 J. INT'L L. & ECON. 149 (1978).

26. *In re Westinghouse Elec. Corp. Uranium Contract Litigation*, [1978], 2 W.L.R. 81 (H.L. 1977).

27. *THE ECONOMIST*, *supra* note 17, at 64-66.

28. *Id.* at 66.

29. Baker, "U.K. Using New Weapons to Attack Foreign Reach of U.S. Trust Laws," *Nat'l L.J.*, January 14, 1980, at 24.

30. *Id.*, at col. 1-2.



Prior to the introduction of the POTI in Parliament, extensive discussions took place between the governments of the United States and the United Kingdom, however, these talks were of no great consequence. "[E]nough's enough — this bloody nonsense has to stop" was the attitude of the government of the United Kingdom.<sup>31</sup> Consequently, in September, 1979, the British Secretary of Trade announced publicly that his government would introduce legislation to make some U.S. antitrust judgments unenforceable in the United Kingdom.<sup>32</sup> The following November, the British government introduced the POTI Bill in the Parliament which later gave its final approval to the legislation.

The POTI Act was intended to provide "protection for persons in the United Kingdom from certain measures taken under the laws of overseas countries when those measures apply to things done outside such countries . . ."<sup>33</sup> The POTI Act empowered the Trade Secretary to take measures to restrict the trade regulation efforts of another government when "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 . . ."<sup>34</sup>

The Act under section 2 authorizes the Secretary of Trade to prohibit export of documents in compliance with foreign directives to a court, tribunal or authority of an overseas country. The POTI Act also provides that a British court shall refuse discovery requests, 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."<sup>35</sup> Section 3 is a penal clause and provides penalties for failure to comply with the requirements under sections 1 and 2.<sup>36</sup> British courts are enjoined under section 5 from entertaining any foreign multiple damage awards,<sup>37</sup> and under section 4 from complying with a recovery request when the Secretary of State has given a certificate that the recovery request "infringes the jurisdiction of the United Kingdom or is otherwise prejudicial to the sovereignty of the United Kingdom . . ."<sup>38</sup> The Trade Secretary's certificate is binding on the courts.

A final, unique provision of the POTI Act is section 6. This section provides that British citizens, United Kingdom corporations, and other

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31. *Id.*, at col. 2.

32. *Supra* note 27 at 66.

33. Bill's Explanatory Memorandum, *supra* note 2 at i.

34. POTI Act, *supra* note 2 at § 1(1)(b).

35. *Id.*, at § 2(2)(a).

36. *Id.*, at § 3.

37. *Id.*, at § 5.

38. *Id.*, at § 4.

persons who carry on business within the United Kingdom, and have been subjected to a multiple-damage judgment overseas, are entitled to recover through the British courts the same damages awarded to the party overseas.<sup>39</sup>

#### V. CONCLUSION

In considering the problem of extraterritorial enforcement of antitrust law, the most important question to focus upon is whether it is possible to formulate any principles or procedures that will moderate and make reciprocally tolerable these encroachments on state sovereignty.<sup>40</sup> The existence of concurrent jurisdiction does not cause any difficulty where there is a common interest in the exercise of that jurisdiction. Such a common interest may be identified and agreed upon through bilateral or multilateral arrangements. What may be needed is simply a moderate approach, such as the "jurisdictional rule of reason" suggested by the U.S. Court of Appeals for the Ninth Circuit.<sup>41</sup>

If the present situation with regard to extra-territorial antitrust law enforcement persists, it appears that there will soon be a flood of "Protection of Trading Interests Acts." Such acts may not be confined simply to antitrust contexts, but may expand into retaliatory protection of other areas of national trading interests.

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39. *Id.*, at § 6.

40. See INTERNATIONAL LAW ASSOCIATION REPORT OF THE FIFTY-FIRST CONFERENCE, (TOKYO 1964), comments by McDougal at 331.

41. *Timberlane Lumber Co. v. Bank of America Nat'l Trust & Savings Assn.*, 549 F.2d 597, 613 (9th Cir. 1977).