

COMMENT

THE SEC AND FOREIGN BLOCKING STATUTES: NEED FOR A BALANCED APPROACH

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1. INTRODUCTION

The United States has a strong interest in protecting its securities markets.¹ By maintaining strict prohibitions against fraudulent activity² such as insider trading,³ the Securities and Exchange Commission (SEC) has succeeded in creating a securities market where investor protection is kept at a premium. When these prohibitions are enforced abroad, however, they may be perceived as threats to sovereignty interests.⁴

To protect their national interests, countries such as the United Kingdom have enacted "blocking statutes" which effectively limit the flow of information to foreign entities, including the SEC.⁵ These blocking statutes have the dual effect of frustrating the SEC's enforcement of its regulations abroad and of providing undue protection for those persons committing fraud on United States markets. By their very

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¹ For a summary of arguments for and against the protection of United States securities markets from fraudulent activity, see Carlton & Fischel, *The Regulation of Insider Trading*, 35 STAN. L. REV. 857 (1983).

² In this context, fraudulent conduct refers to "intentional or willful conduct designed to deceive or defraud investors by . . . artificially affecting the price of securities." *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 199 (1976). See also, L. LOSS, *FUNDAMENTALS OF SECURITIES REGULATION*, 799-818 (1983) (author giving comparative description of fraud under federal regulations).

³ By definition, "[i]nsider trading usually involves the sale or purchase of company shares or securities by persons connected with a company (insiders), who have price-sensitive information not generally known by the public or by the persons with whom the insiders deal." Herne, *Inside Information: Definition in Australia, Canada, the U.K., and the U.S.*, 8 J. COMP. BUS. & CAPITAL MKT. L. 1, 1 (1986).

⁴ In this context, sovereignty interests refer to the power of a nation to prescribe laws regulating activities within its territory. See, e.g., *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 136 (1812) (Chief Justice Marshall noting that "[t]he jurisdiction of the nation, within its own territory, is necessarily exclusive and absolute."); see *infra* notes 27-30 and accompanying text.

⁵ See *infra* notes 64-112 and accompanying text.

nature, these blocking statutes represent a serious impediment to valid SEC actions.⁶ While resembling overbroad assertions of protectionism designed solely to frustrate the policing efforts of other nations, blocking statutes embody important national sovereignty interests arising from circumstances wholly apart from securities market regulation. Therefore, an understanding of the various interests at issue requires an analysis of both the context in which blocking statutes arise and the interests of the SEC in extraterritorial enforcement of its securities laws.

This Comment argues that an accommodation of the SEC's and the foreign nation's interests requires the joint effort of the parties to reach a compromise of the interests at stake. While bilateral agreements have assisted the SEC's efforts in countries which maintain bank secrecy laws, the need for negotiations becomes even more acute when blocking statutes are present. In this latter context, this Comment focuses on the blocking statutes enacted by the United Kingdom and suggests (a) that unilateral efforts by the SEC in enforcing its regulations abroad will be counterproductive, and (b) that a proper balancing of competing national interests is better left to the executive political process than to the courts. While the recently negotiated Memorandum of Understanding between the SEC and the United Kingdom's Department of Trade and Industry (DTI) represents the beginnings of such a cooperative effort, the protection which it offers to valuable national interests is drastically insufficient.⁷ Therefore, as a proposal for future negotiations, this Comment argues that a procedural framework modeled on a recently negotiated antitrust treaty may provide a realistic means of balancing the interests of the SEC and the United Kingdom.

2. CONFLICT OF NATIONAL INTEREST BETWEEN THE UNITED STATES AND THE UNITED KINGDOM

2.1. *Interests of the United States in Policing International Securities Fraud and the Potential for Conflict with Other Nations*

The authority for the policing of international securities fraud by

⁶ See *infra* notes 113-15 and accompanying text.

⁷ See *infra* notes 220-48 and accompanying text. Memorandum of Understanding on Exchange of Information Between the United States Securities and Exchange Commission and the United Kingdom Department of Trade and Industry in Matters Relating to Securities and Between the United States Commodity Futures Trading Commission and the United Kingdom Department of Trade and Industry in Matters Relating to Futures, Sept. 23, 1986 (available from SEC, Washington, D.C.) [hereinafter Memorandum of Understanding].

the SEC is found in the Securities Act of 1933⁸ and the Securities and Exchange Act of 1934.⁹ Under the 1933 Act, investors in securities must receive from the issuer material information about a security offered for public sale.¹⁰ The Securities and Exchange Act of 1934 further protects investors beyond the public offering stage by restricting certain types of fraudulent transactions after the securities are issued and outstanding.¹¹ Section 10(b) of the 1934 Act prohibits any person from using "any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the commission may prescribe as necessary."¹² Adding substance to this provision, Rule 10b-5, promulgated under the authority of section 10(b) of the 1934 Act, makes the following unlawful while trading in securities:

- (1) to employ any device, scheme or artifice to defraud,
- (2) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
- (3) to engage in any act, practice or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.¹³

As interpreted, Rule 10b-5 creates a broad prohibition against the trading of securities by corporate insiders based on material non-public information belonging to the corporation of which the insiders are a part.¹⁴ The SEC is granted the authority to make investigations of any suspected violations in its enforcement of Rule 10b-5.¹⁵

⁸ 15 U.S.C. §§ 77a-77aa (1982).

⁹ 15 U.S.C. §§ 78a-78kk (1982).

¹⁰ 15 U.S.C. §§ 77g-77k, 77aa (1982).

¹¹ 15 U.S.C. § 78j(b) (1982).

¹² *Id.*

¹³ 17 C.F.R. § 240.10b-5 (1985).

¹⁴ See *Chiarella v. United States*, 445 U.S. 222, 233 (1980); *SEC v. Texas Gulf Sulfur Co.*, 401 F.2d 833, 847-49 (2d Cir. 1968).

¹⁵ 15 U.S.C. § 78u(a) (1982). Note, however, that under the Securities Exchange Act of 1934, the powers of the SEC in investigating securities fraud are not unlimited. As a general rule, unless a formal order of investigation has been issued, the SEC cannot properly proceed, 15 U.S.C. §§ 78s(b), 78u (1982); Moessle, *The Basic Structure of United States Securities Law Enforcement in International Cases*, 16 CAL. W. INT'L L.J. 1, 5 (1986). See generally, Recent Developments, *Securities Regulations Investigations — United States-Swiss Treaty Attempts to Increase Cooperation in Releasing Names of Swiss-Based Account Holders Involved in United States Securities and Exchange Commission Investigations*, 15 GA. J. INT'L & COMP. L. 135, 137 (1985) (discussing insider trading provisions as applied both domestically and internationally). For a general discussion of investigatory powers of the United States agencies,

Extending these prohibitions beyond the domestic setting has been fairly difficult for the SEC.¹⁶ While there is a general lack of legislative guidance for the extension of the antifraud provisions beyond United States borders,¹⁷ the federal courts generally have only applied United States securities laws extraterritorially in those instances where there has been either some conduct within the United States¹⁸ or a significant impact on the United States securities market¹⁹ by a foreign entity.²⁰ In *Bersch v. Drexel Firestone*,²¹ the court held that the antifraud provisions of Rule 10b-5 apply both to losses of United States citizens caused

see *infra* note 248 and accompanying text.

¹⁶ See Loomis & Grant, *The U.S. Securities and Exchange Commission, Financial Institutions Outside the U.S. and Extraterritorial Application of U.S. Securities Laws*, 1 J. COMP. CORP. L. & SEC. REG. 3, 7 (1978).

¹⁷ *Id.*

¹⁸ This notion of "conduct-based" jurisdiction has been widely used by the SEC in securities regulations. See, e.g., *IIT v. Cornfeld*, 619 F.2d 909 (2d Cir. 1980); *Continental Grain, Ltd. v. Pacific Oilseeds, Inc.*, 592 F.2d 409 (8th Cir. 1979); *SEC v. Kasser*, 548 F.2d 109 (3d Cir. 1977); *IIT v. Vencap, Ltd.*, 519 F.2d 1001 (2d Cir. 1975); see also Loomis & Grant, *supra* note 16, at 8; Moessle, *supra* note 15, at 10-12. A similar determination is also made under the *Restatement (Second)*, where a determination is made of "whether there was sufficient conduct in the United States and/or whether transactions performed entirely outside the United States nevertheless had a direct, foreseeable, and substantial impact on United States investors and securities markets." RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW §§ 17-18 (1965); Loomis & Grant, *supra* note 16, at 7; Moessle, *supra* note 15, at 10-12.

¹⁹ This assertion of "effects-based" jurisdiction was recognized by the court in *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974, 993 (2d Cir. 1975), as a separate basis of jurisdiction apart from "conduct-based" jurisdiction. Hermann, *Extraterritorial Criminal Jurisdiction in Securities Law Regulation*, 16 CUMB. L. REV. 207, 216-17 (1986). See generally Loomis & Grant, *supra* note 16, at 11-13 (noting that "it appears clear that, in order for there to be jurisdiction over foreign acts constituting a substantive violation of the United States securities laws, those acts must in and of themselves result in substantial damage to an interest protected by the United States securities laws."). While several commentators have noted that, in the area of securities law, effects-based jurisdiction was first established in *Schoenbaum v. Firstbrook*, 405 F.2d 200 (2d Cir. 1968) as an attempt to protect United States investors from foreign acts (see Hermann, *supra*, at 214-15; Loomis & Grant, *supra* note 16, at 19), the doctrine seems to have been first created in the area of antitrust laws in *United States v. Aluminum Co. of Am.*, 148 F.2d 416 (2d Cir. 1945), where Judge Learned Hand stated "it is settled law . . . that any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends; and these liabilities other states will ordinarily recognize." *Id.* at 443. As a limit to overly broad assertions of jurisdiction, Judge Hand noted that "[w]e should not impute to Congress an intent to punish all whom its courts can catch, for conduct which has no consequences within the United States." *Id.* Other commentators have agreed that a further limitation to "effects-based" jurisdiction should be created where the offense is not recognized as such by foreign nations. Rosen, *The Protection of Trading Interests Act*, 15 INT'L LAW. 213, 216 (1981).

²⁰ Hermann, *supra* note 19, at 213; Loomis & Grant, *supra* note 16, at 6-7; Thomas, *Extraterritorial Application of the United States Securities Laws: The Need for a Balanced Policy*, 7 J. CORP. L. 189, 192 (1982).

²¹ 519 F.2d 974 (2d Cir. 1975).

by fraudulent acts abroad and acts within the United States conducted by United States citizens residing abroad.²² A former SEC commissioner has noted that one justification for applying United States securities law extraterritorially is to uphold the strong interest of the United States in protecting its investors.²³ A related, but different, rationale is to prevent the United States securities market from being used as a forum for securities fraud.²⁴

While the interests of the United States in protecting its investors and preserving the integrity of its securities markets are undoubtedly valid,²⁵ the strength of these interests weakens when they are asserted outside its borders. At first glance, it might appear that the problem created by the extraterritorial application of the United States securities laws is simply due to an inevitable conflict between very different systems of securities regulation;²⁶ on closer inspection, it is apparent that foreign countries may well perceive attempts by the United States to apply its securities laws abroad as either an interference with national sovereignty,²⁷ a lack of deference by United States courts to principles of comity and procedural fair hearing,²⁸ a disrespect for internationally recognized principles restricting the extraterritorial reach of a nation's laws,²⁹ or an offense to public policy unworthy of recognition.³⁰ Ac-

²² *Id.* at 987-93.

²³ Thomas, *supra* note 20, at 190.

²⁴ *Id.*

²⁵ See generally Loomis & Grant, *supra* note 163, at 3 (authors noting that "[t]he Commission also has a legitimate concern, in this time of rapid and sophisticated international communications, to prevent anyone from using foreign instrumentalities to evade United States securities laws").

²⁶ One commentator has gone so far as to state that "[f]or most non-U.S. persons, in particular for Europeans, the U.S. securities laws constitute an incomprehensible bulk of infinitely complicated rules which are totally strange to them. Many look at them simply as one of the bases for that great U.S. pastime of suing one another." Widmer, *The U.S. Securities Laws — Banking Law of the World? (A Reply to Messrs. Loomis and Grant)*, 1 J. COMP. CORP. L. & SEC. REG. 39, 39 (1978).

²⁷ See Thomas, *supra* note 20, at 193 (former SEC Commissioner noting that "[a] foreign country might well view application of U.S. law to a securities transaction that takes place within the foreign country's borders and that involves non-U.S. citizens as interference with the foreign country's regulatory practices, economic philosophy or national policies").

²⁸ See Liftin, *Our Playing Field, Our Rules: An Analysis of the SEC's Waiver by Conduct Approach*, 11 BROOKLYN J. INT'L L. 525, 528 (1985) ("Under general principles of comity, recognition and enforcement of judicial decrees rendered by the courts of another sovereign nation are premised on observance by the rendering forum of the essentials of judicial jurisdiction and of a fair hearing").

²⁹ Moessle, *supra* note 15, at 20 (author quoting the S.S. "Lotus" Case (Fr. v. Turk.), 1927 P.C.I.J., ser. A, No. 10, at 18-19 (Judgment of Sept. 7)) (suggesting that foreign nations often restrict foreign laws on the basis of their territoriality):

Now the first and foremost restriction imposed by international law upon a State is that — failing the existence of a permissive rule — it may not

cordingly, the extraterritorial assertion of securities laws by the United States may potentially create bitter and unnecessary conflicts with foreign regulators,³¹ as well as a reduction in the free flow of capital in world commerce.³²

2.2. *Interests of the United Kingdom and the Development of Blocking Statutes*

2.2.1. *Extraterritorial Use of United States Law Leading Up to the Creation of Blocking Statutes*

Application of federal regulatory law to cover acts occurring in foreign nations is largely premised on the effect of such acts on United States commerce.³³ This "effects" doctrine, which requires an effect on United States commerce as a jurisdictional threshold,³⁴ was broadly expanded in scope by the United States courts.³⁵ By judging a foreign action solely on the consequences that the action may have on domestic commerce, however, the effects doctrine gives undue emphasis to domestic concerns, while it entirely ignores any counterbalancing foreign interests.³⁶

exercise its power in any form in the territory of another State. In this sense jurisdiction is certainly territorial; it cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from a convention.

³⁰ See *id.* at 20.

³¹ Williams & Spencer, *Regulation of International Securities Markets: Towards A Greater Cooperation*, 4 J. COMP. CORP. L. & SEC. REG. 55, 59 (1982).

³² Thomas, *supra* note 20, at 190.

³³ See *supra* note 19 and accompanying text.

³⁴ Kestenbaum, *Antitrust's "Extraterritorial" Jurisdiction: A Progress Report on the Balancing of Interests Tests*, 18 STAN. J. INT'L L. 311, 333 (1982). For discussion of "effects-based" jurisdiction, see *supra* note 19 and accompanying text.

³⁵ *Id.* at 312. One author has noted that the original "effects" doctrine was intended only to cover those acts affecting United States commerce which were shown to possess an "intent" to affect commerce. *Id.* at 416. In Learned Hand's holding in *Alcoa*, 148 F.2d 416 (2d Cir. 1945), however, this limitation is not readily apparent. Looking to the possibility that Congress intended to regulate acts which had only an effect on United States commerce, the court only went so far as to note that, "[w]hen one considers the international complications likely to arise from an effort in this country to treat such agreements as unlawful, it is safe to assume that Congress certainly did not intend the Act to cover them." *United States v. Aluminum Co. of Am.*, 148 F.2d at 443. However, the court never explicitly stated that once an effect on United States commerce was found, proof of existence of such intent was a prerequisite to maintaining jurisdiction.

³⁶ This lack of deference given by the effects doctrine created under the *Alcoa* decision has been particularly troublesome for the British. Beyond the obvious problems of enforcement jurisdiction, whereby a state cannot coercively force acts within the jurisdiction of a foreign state without some form of permission from that state (Moessle, *supra* note 15, at 16 n.88), there is a general feeling that the United Kingdom considers the effects doctrine as "pay[ing] comparatively little attention to the interests of

In the area of antitrust, affronts to interests of the United Kingdom through the assertion of effects-based jurisdiction have been widely recognized.³⁷ In large part, the animosities that arise from such international conflicts are attributable to a difference in national policies towards collective commercial enterprises.³⁸ This difference in orientations is particularly evident in the divergent approaches to international shipping.³⁹ As noted in the parliamentary debates prior to the passage of the Protection of Trading Interests Act, an essential distinction between United States and British shipping policies derived from the fact that collective shipping activities were usually not illegal in the United Kingdom.⁴⁰ The resulting unilateral attack on the shipping interests of

foreign states." 404 PARL. DEB., H.L. (5th ser.) 554, 556 (1980) (debates prior to passage to the Protection of Trading Interests Act, 1980). As one author has noted, "Great Britain has stood virtually alone in maintaining that extraterritorial jurisdiction based on economic effects is contrary to the law of nations." Cira, *The Challenge of Foreign Laws to Block American Antitrust Actions*, 18 STAN. J. INT'L L. 247, 248 (1982).

³⁷ In *Westinghouse Elec. Corp. v. Rio Algom, Ltd.*, 617 F.2d 1248 (7th Cir. 1980), the court favored American interests in finding that an alleged cartel of international uranium suppliers had illicitly engaged in acts prohibited under the antitrust laws, despite strong arguments made by the British government on amicus curiae brief:

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

- (1) The formation of a cartel and other activities against which anti-trust legislation is directed are not universally recognized as unlawful
- (2) The assertion of extraterritorial jurisdiction in anti-trust matters represents an extension of the economic policy of one state which is likely to conflict with that of other states.

Amicus Curiae Brief of the Government of the United Kingdom of Great Britain and Northern Ireland, *Westinghouse Elec. Corp. v. Rio Algom Corp.*, quoted in Rosen, *supra* note 19, at 222. For a detailed account of this case, see Cira, *supra* note 36, at 250; Kohlmeier, *The Uranium Affair*, 12 J. INT'L L. & ECON. 149 (1978).

Apart from the uranium cartel cases, similar conflicts of American antitrust concerns and British commerce interests have occurred in the several shipping cases. See generally Cira, *supra* note 36, at 251; Rosen, *supra* note 19, at 223-24 (both Cira and Rosen giving fairly thorough accounts of shipping antitrust cases leading up to the Protection of Trading Interests Act, 1980). Less prominent instances of conflicts of United States and British interests in the antitrust setting are numerous. See also Simon & Waller, *Analyzing Claims of Sovereignty in International Economic Disputes*, 7 NW. J. INT'L L. & BUS. 1, 1-2 (1985).

³⁸ See Amicus Curiae Brief of the Government of the United Kingdom of Great Britain and Northern Ireland, *Westinghouse*, *supra* note 37; Beckett, *Symposium of Transnational Litigation II, United Kingdom*, 18 INT'L LAW. 773 (1984); Novicoff, *Blocking And Clawing Back in the Name of Public Policy: The United Kingdom's Protection of Private Economic Interests Against Adverse Foreign Adjudications*, 7 NW. J. INT'L L. & BUS. 12, 28 (1985).

³⁹ See 404 PARL. DEB., H.L. (5th ser.) 554, 581-83 (1980) (remarks of Earl of Inchcape).

⁴⁰ *Id.* at 581.

the United Kingdom by the United States through the enforcement of its antitrust legislation had been felt heavily by the United Kingdom.⁴¹ Both the importance in British commerce and the intrinsically international character of British shipping has increased British sensitivity to this attack.⁴² The affront to British national interests is further highlighted by feelings that the United States, in attempting to exercise jurisdiction over its international antitrust cases, pays "comparatively little attention to the interests and policies of foreign Governments where [those interests] have been in conflict with those of the United States."⁴³ In terms of the actual harm caused to British trading interests by the extraterritorial application of United States antitrust laws, the potential award of treble damages provided for in these laws may cause British corporate defendants significant economic hardship.⁴⁴ As perceived by several British commentators, treble damage awards clearly go beyond compensation⁴⁵ for the actual damages suffered by the United States plaintiff; instead, they are understood as being purely punitive in nature,⁴⁶ and clearly constituting double jeopardy.⁴⁷ Not surprisingly, in light of the perceived damage to British sovereignty caused by the punitive damage awards provided for in United States antitrust legislation, arguments calling for a strong assertion of British national interests have been advanced.⁴⁸

Apart from the substantive differences between United States and

⁴¹ See, e.g., *id.* at 481-83.

⁴² *Id.* at 581.

⁴³ 973 PARL. DEB., H.C. (5th ser.) 1533, 1535 (1979) (remarks of Mr. John Nott, Secretary of State for Trade). Critics of United States exportation of economic policy, however, have noted United States court deference to foreign interests. See, e.g., 976 PARL. DEB., H.C. (5th ser.) 1024, 1047 (remarks of Mr. Jeffrey Thomas concerning *Timberland Lumber Co. v. Bank of Am.*, 549 F.2d 597 (9th Cir. 1976) and *Manning Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287 (3d Cir. 1979)).

⁴⁴ Sherman Act, 15 U.S.C. §§ 4, 15 (1982).

⁴⁵ See 973 PARL. DEB., H.C. (5th ser.) 1533, 1536 (1979) (Mr. John Nott noting the unfair burdens placed upon British defendants by certain aspects of litigation unique to the United States, such as the class action suit and the contingency fee agreement).

⁴⁶ Lord Lloyd of Kilgerran has stated in debate that "[o]ur companies do not mind paying damages, but punitive damages go against our general legal system, and I am sure that a modification of this attitude in your country would do a great deal to help us." *Debate: Extraterritorial Application of U.S. Antitrust Law (Economic Imperialism or Protecting Competition Against Foreign Invasion?)*, 50 ANTITRUST L.J. 617, 633 (1981).

⁴⁷ 404 PARL. DEB., H.L. (5th ser.) 554, 557 (1980) (L. MacKay commenting, "[the] possibility of concurrent criminal and civil penal proceedings introduces a clear element of double jeopardy").

⁴⁸ See, e.g., 405 PARL. DEB., H.L. (5th ser.) 926, 932-35 (1980) (L. Hacking noting that, in passage of the Protection of Trading Interests Act of 1980, the United Kingdom should be strong in asserting national policy).

British legal theories, differences in what is perceived to be proper judicial procedure have also led to dissension between the two nations. While English courts have occasionally given undue deference to the interests of the United Kingdom over those of other nations,⁴⁹ the extent to which the United States courts have convoluted United States antitrust principles⁵⁰ and exported them abroad,⁵¹ has led a member of Parliament, during the debates prior to the enactment of the Protection of Trading Interest Act, to note:

[a]ll courts have, latent within them, a deep imperialism. They all wish to extend their jurisdiction. No court is more inclined to do that than one suffused with an ideology that is almost equivalent to a religion. Anyone who has talked to American competition lawyers, whether on the Bench or at the Bar, will know that the Sherman and Clayton Acts in the United States are the equivalent of holy books.⁵²

One area of particular trouble is the scope of discovery ordered by the United States courts.⁵³ Under domestic rules of procedure, the scope of discovery requests can be very broad. In federal court, for example, a party is entitled to pretrial discovery of any nonprivileged information as long as it is "relevant to the subject matter involved in the pending action" and "appears reasonably calculated to lead to the discovery of

⁴⁹ As Sir John Donaldson M.R. has stated on one occasion:

Relations between the United Kingdom and foreign states are not the subject of direct Parliamentary action, but are a matter for her Majesty acting on the advice of her Government. *The foreign policy which is adopted is referred to as that of the United Kingdom Government, but this is misleading since in reality it is that of the nation. Accordingly, it would be strange if in this field courts and the executive spoke with different voices and they should not do so.*

British Airways Bd. v. Laker Airways Ltd., 1984 Q.B. 142, 193 (C.A. 1983) (emphasis added).

⁵⁰ One British commentator has noted that "[w]hat we cannot quite comprehend is how the United States courts have managed to turn [an easily comprehensible body of antitrust laws] into such an instrument of torture. We are not used to trusting to our courts such extensive powers." Beckett, *supra* note 38, at 774. See also, 973 PARL. DEB., H.C. (5th ser.) 1533, 1551 (1979) (remarks of Mr. Graham Page noting that the principle reaction embodied in the Protection of Trading Interests Act is to the "way . . . American courts have developed the American anti-trust law").

⁵¹ See 973 PARL. DEB., H.C. (5th ser.) 1533, 1572 (1979) (remarks of Mr. Ivan Lawrence noting that the American courts have used their antitrust laws to "clobber the closest friend and ally that they have. It is a cruel stroke").

⁵² *Id.* at 1566 (remarks of Mr. Charles Fletcher-Cooke).

⁵³ See, e.g., Atwood, *Blocking Statutes and Sovereign Compulsion in American Antitrust Litigation*, 27 SWISS REV. INT'L COMPETITION L. 5, 9-11 (1986); Beckett, *supra* note 38, at 778.

admissible evidence."⁵⁴ Such broad standards give the courts substantial freedom to order discovery from parties, which latitude has, in turn, subjected courts to accusations of undertaking fishing expeditions.⁵⁵

Given the breadth of pretrial discovery in the United States, it should come as no surprise that a similar vigor also carries over to the international setting.⁵⁶ The broad scope of international discovery attempted by United States litigants, derogatorily termed by one British author as "fishing discovery"⁵⁷ or as a "knee-jerk reaction,"⁵⁸ had led to hostile reactions prior to the passage of the Protection of Trading Interests Act.⁵⁹ It is important, therefore, to bear in mind that many of the negative reactions to discovery requests issued by United States courts relate not to the contents of the documents which are sought, but rather to the means used to obtain them.⁶⁰

Aside from British reactions to the differences in law and judicial procedure between the United States and Great Britain, another area of concern relates to the nature of the party bringing suit. A private party is entitled to bring a civil action for treble damages against a defendant

⁵⁴ FED. R. Civ. P. 26(b)(1).

⁵⁵ As the Supreme Court stated:

No longer can the time-honored cry of "fishing expedition" serve to preclude a party from inquiring into the facts underlying his opponent's case. Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation. To that end, either party may compel the other to disgorge whatever facts he has in his possession. The deposition-discovery procedure simply advances the stage at which the disclosure can be compelled from the time of trial to the period preceding it, thus reducing the possibility of surprise.

Hickman v. Taylor, 329 U.S. 495, 507 (1947) (footnotes omitted).

⁵⁶ An illustration of the reluctance of the United States to limit pretrial discovery between nations is provided by the signing of the Hague Convention on the Taking of Evidence Abroad. Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, Mar. 18, 1970, 23 U.S.T. 2555, T.I.A.S. No. 7444, 847 U.N.T.S. 231 *reprinted in* 28 U.S.C.A. § 1781 (West Supp. 1985). Under the Convention, each signatory country is permitted not to cooperate in pretrial discovery of documents; all representative signatories, except the United States, opted to prohibit pretrial discovery under the Convention. Atwood, *supra* note 53, at 9.

⁵⁷ Beckett, *supra* note 38, at 778.

⁵⁸ *Id.*

⁵⁹ Nelson, *Insider Trading Originating Abroad and "Waiver by Conduct"*, 19 INT'L LAW. 817, 830, n. 68 (1985). *See also*, 405 PARL. DEB., H.L. (5th ser.) 907, 910-13 (1980) (remarks of L. Hacking noting that the scope of clause 2(3)(b) of the Protection of Trading Interests Act should be broadened to protect against pretrial discovery in the United States).

⁶⁰ *See generally*, Newcomb, *Policing Trans-Border Fraud: The View From the Bridge*, 11 BROOKLYN J. INT'L L. 559, 574 (1985) (describing reactions to acts taken by United States courts and concluding that, "most often the foreign reaction to unilateral efforts by the United States to obtain information is a reaction not to the content of the information sought, but rather to the heavy-handed methods employed").

corporation under the antitrust laws of the United States.⁶¹ Apart from the potential threat of punitive sanctions, a separate concern is that private plaintiffs might be unable to exercise either the deference to foreign interests or the degree of self-restraint necessary in cases where national interests collide.⁶² Therefore, the resulting fear of civil antitrust actions reaches beyond a concern with the private character of the plaintiff. Unfortunately, this fear may spread to civil actions generally, including those brought by United States federal agencies.⁶³

2.2.2. *The Protection of Trading Interests Act and the Assertion of National Interests*

In reaction to the extraterritorial expansion of United States antitrust laws, many countries have enacted "blocking" statutes.⁶⁴ Under these forms of retaliatory legislation, judgments of foreign nations against a country's residents or foreign requests for discovery may be "blocked" and rendered ineffective in the jurisdiction in which such remedy or discovery is being sought.⁶⁵ Often, such blockage of judgments or information is within the discretion of a government official.⁶⁶

⁶¹ See *supra* notes 45-48 and accompanying text.

⁶² A similar point is developed in *Timberland Lumber Co. v. Bank of Am.*, 549 F.2d 597 (9th Cir. 1976), where the court noted, as a second prong of a three-part balancing test, that "a greater showing of burden or restraint may be necessary to demonstrate that the effect is sufficiently large to present a cognizable injury to the plaintiffs and, therefore, a civil violation of the antitrust laws" (emphasis added). *Id.* at 613. See also, 404 PARL. DEB., H.L. (5th ser.) 554, 557 (1980) (remarks of L. MacKay noting concern that civil actions in the United States are not "subject to any of the limitations we would regard as appropriate to criminal proceedings").

⁶³ This strong ancillary concern with United States governmental agencies bringing civil actions was developed most strongly during the debates prior to the passage of the Protection of Trading Interests Act. 973 PARL. DEB., H.L. (5th ser.) 1533, 1534, 1538, 1541 (1979) (remarks of Mr. John Nott, Secretary of State); 404 PARL. DEB., H.L. (5th ser.) 554, 559 (1980) (remarks of L. Mackay). The principle concern felt was that United States governmental agencies asserted their powers too broadly in imposing penal sanctions under the guise of "civil" actions. *Id.*

⁶⁴ One estimate of the number of retaliatory blocking statutes created in other countries held that 26 countries have blocking statutes that either require refusal of compliance with foreign informational requests or disallow recognition of foreign judgments. Hurd, *Insider Trading and Foreign Bank Secrecy*, 24 AM. BUS. L.J. 25, 47 n.185 (1986).

⁶⁵ Blocking statutes can be categorized into "discovery blocking statutes" (where compliance with discovery requests of foreign courts, agencies, or private parties is blocked) and "judgment blocking statutes" (where judgments rendered by foreign courts or agencies are not recognized in the state enacting such legislation, if certain preconditions stated in the statute exist). Fedders, Wade, Mann, Matthew, Bizer, *Waiver by Conduct — A Possible Response to the Internationalization of the Securities Markets*, 6 J. INT'L COMP. BUS. & CAPITAL MKT. L. 6, 35-37 (1984).

⁶⁶ For instance, under the Protection of Trading Interests Act,

If it appears to the Secretary of State —

In addition to being retaliatory in form, blocking statutes are also a reaction to the scope of the extraterritorial assertion of United States laws. For instance, two blocking statutes were enacted in Great Britain in reaction to surges in United States antitrust litigation:⁶⁷ the Shipping Contracts and Commercial Documents Act⁶⁸ in 1964 and the Protection of Trading Interests Act⁶⁹ in 1980.

The Protection of Trading Interests Act was, in effect, a revision of its predecessor, the Shipping Contracts and Commercial Documents Act. The earlier blocking statute was passed to protect several shippers in Great Britain against United States antitrust actions.⁷⁰ At the time of its passage, the policy of the United Kingdom, as well as that of the European Economic Community in general, was that "the best way of achieving efficient and effective shipping services and [of] protecting the interests of the consumer" was through deregulation of collective commercial activities.⁷¹ The Shipping Contracts and Commercial Documents Act was aimed at ensuring that this vital policy would not be abused by actions from within the United States.⁷² The 1964 Act, however, was intended to be limited to the shipping industry.⁷³ After the *Westinghouse Elec. Corp. v. Rio Algom, Ltd.* case⁷⁴ the 1964 Act was found to be too limited in application to address the concerns raised by the second thrust of United States antitrust laws.⁷⁵ Accordingly, the

(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 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 those measures either generally or in their application to such cases as may be specified in the order.

Protection of Trading Interests Act, 1980, ch. 11, § 1 (emphasis added). As a general matter, blocking statutes can be classified by whether their blocking effect is discretionary on the part of some government official or automatic upon the satisfaction of certain threshold events. Moessle, *supra* note 15, at 22.

⁶⁷ See generally Newcomb, *supra* note 60, at 570-71 (brief description of waves of blocking statutes in reaction to United States litigation).

⁶⁸ Shipping Contracts and Commercial Documents Act, 1964, ch. 87, *repealed by* Protection of Trading Interests Act, 1980, ch. 11, § 8(5).

⁶⁹ Protection of Trading Interests Act, 1980, ch. 11.

⁷⁰ 973 PARL. DEB., H.C. (5th ser.) 1533, 1538-39 (1979) (remarks of Mr. John Nott).

⁷¹ *Id.*

⁷² See *id.* at 1544 (Mr. John Nott noting that the 1964 Act was "passed in response to a specific and offensive instance of extra-territorial claim to jurisdiction by the United States in shipping matters").

⁷³ *Id.*; see also *supra* notes 39-42 and accompanying text.

⁷⁴ 617 F.2d 1248 (7th Cir. 1980). See *supra* notes 37-38 and accompanying text.

⁷⁵ 973 PARL. DEB., H.C. (5th ser.) 1533, 1539-40, 1544 (1979) (remarks of Mr.

need for more protective legislation was a key motivation for the adoption of the Protection of Trading Interests Act in 1980.

As drafted, the Act was intended to focus on the protection of the trading interests of the United Kingdom.⁷⁶ As originally introduced in the House of Commons by the British Secretary of State,

[the] objective in introducing this Bill [was] to reassert and reinforce the defenses of the United Kingdom against attempts by other countries to enforce their economic and commercial policies unilaterally on [the United Kingdom] [T]he most objectionable method by which this [wa]s done [wa]s by the extra-territorial application of domestic law.⁷⁷

Therefore, the Act goes further than merely protecting British interests; it also buttresses them against distortions of comity and sovereignty.⁷⁸

Section 2 of the Protection of Trading Interests Act, which provides the framework for establishing the basic conditions under which documents may not be produced, confers substantial authority to the Secretary of State.⁷⁹ The broadest allowance for discretion is found in subsection 2(2) of the Act which prohibits the production of documents:

- (a) if [production] 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

John Nott noting that 1964 Act was too limited in light of uranium cartel cases).

⁷⁶ *Id.* at 1538-39.

⁷⁷ *Id.* at 1533 (address of Mr. John Nott). See also *Debate: Extraterritorial Application of U.S. Antitrust Law*, *supra* note 46, at 620 (L. Kilgerran noting that intent of Protection of Trading Interests Act is to improve the defenses of the United Kingdom against “attempts by other countries to enforce their economic and commercial policies outside their own territories”); See also 405 PARL. DEB., H.L. (5th ser.) 1501, 1517 (1980) (L. MacKay noting that intent of the Act was to protect the interests of the United Kingdom). Novicoff, *supra* note 38, at 33 (author noting that a strong motivation for the Act was a “British conviction that the nation’s public policy was being steadily undercut by judicial activity in the United States”). It is worth noting that the protection of British interests created under the Protection of Trading Interests Act extends to not only protect against the specific extraterritorial actions of a foreign state, but also to deter acts by persons within the United Kingdom who should decide to abide by those foreign interests by violating the Act. Under section 3 of the Act, criminal sanctions are imposed on persons who violate an order not to produce documents. Protection of Trading Interests Act, 1980, ch. 11, § 3(1).

⁷⁸ The Act “also emphasises [sic] that, in so far 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, 1533-34 (1979) (remarks of Mr. Nott); see also 404 PARL. DEB., H.L. (5th ser.) 554, 586 (1980) (remarks of L. Mishcon).

⁷⁹ Protection of Trading Interests Act, 1980, ch. 11, § 2(2).

to the security of the United Kingdom or to the relations of the government of the United Kingdom with the government of any other country.⁸⁰

The degree of discretion left to the Secretary of State clearly implies that the Act has no automatic application. There are several factors which may sway the Secretary of State to bar the production of documents; examples may be:

[w]hether in the view of the United Kingdom, the subject matter of the investigation is within the legitimate jurisdiction of the foreign country, whether the United Kingdom's significant interests are involved and whether a genuine need for documents is demonstrated, and whether the scope of compulsory discovery is consistent with practice in the United Kingdom.⁸¹

This broad grant of discretionary powers to the Secretary of State was intended to expand the powers conferred under the 1964 Act,⁸² and to promote the Act's ease and breadth of application.⁸³

In addition to the far-reaching nature of the Protection of Trading Interests Act, the Act is also retaliatory in application.⁸⁴ While protecting national interests against the expansiveness of the effects doctrine,⁸⁵ the Act also represents a strong effort to deter encroachments of foreign policy into the United Kingdom.⁸⁶ Perhaps the strongest deterrent aspects of the Act can be found in its nonrecognition of multiple damages⁸⁷ and in its so-called "clawback" provisions.⁸⁸ Under section 6 of the Act, any "qualifying defendant" who has been forced to pay damages in excess of a compensatory remedy

shall be entitled to recover from the party in whose favour the judgment was given so much of the amount . . . as exceeds the part attributable to compensation; and that part shall be taken to be such part of the amount as bears to the

⁸⁰ *Id.*

⁸¹ Beckett, *supra* note 38, at 778.

⁸² 973 PARL. DEB., H.C. (5th ser.) 1533, 1547-48 (1979) (remarks of Mr. John Smith).

⁸³ Rosen, *supra* note 19, at 227. *See also* 973 PARL. DEB., H.C. (5th ser.) 1533, 1547-48 (1979) (remarks of Mr. John Smith).

⁸⁴ *See* Rosen, *supra* note 19, at 214.

⁸⁵ *See supra* note 19 and accompanying text.

⁸⁶ Samie, *Extraterritorial Enforcement of U.S. Antitrust Laws: The British Reaction*, 7 INT'L TRADE L.J. 58 (1981-1982).

⁸⁷ Protection of Trading Interests Act, 1980, ch. 11, § 5.

⁸⁸ *Id.* § 6.

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 the party bears to the whole of the damages awarded to that party.⁸⁹

While the clawback of damages in excess of compensation is in line with the underlying policy of nonrecognition of multiple damages created by section 6 of the Act,⁹⁰ it is novel and unprecedented⁹¹ in its pointed attack on multiple and punitive damages allowed in United States lawsuits⁹² and may make the collection of such damages impossible.⁹³ The broad scope of the clawback provision is made more evident by the number of defendants who are its potential beneficiaries. Under the Act, any person who is "carrying on business in the United Kingdom,"⁹⁴ is potentially qualified to bring an action for recovery of multiple damages. While appearing to be an "extraordinary gift"⁹⁵ to non-British defendants affected under United States law but carrying on business within the United Kingdom, the Act does not give "the right to companies from third countries to enter this country and take action for recovery under clause six."⁹⁶ Defendants that conduct any ongoing businesses within the United Kingdom have the clawback provision as a potential remedy.

While the clawback provision is broadly drafted, its actual effectiveness may be somewhat limited. During the debates preceding the passage of the Act, there was a grave concern as to the legitimacy, under principles of international law, of a "hit-back"⁹⁷ made through

⁸⁹ *Id.* § 6(2).

⁹⁰ Apparently, section 5 is premised on concepts of international law:

It is a rule of international law that no country's courts will be allowed to be used by other countries for the benefit of recovering penalties that are enforced by other countries . . . There is no earthly reason why our courts should be used as instruments for the recovery of foreign penalties.

973 PARL. DEB., H.C. (5th ser.) 1533, 1567 (1979) (remarks of Mr. Fletcher Cooke).

⁹¹ The novelty of the remedy caused dissension during the debates prior to the passage of the Act. As one member of the House of Commons inquired, "[w]hy is it that Britain goes much further than anyone else in developing this principle [of clawback?]" 973 PARL. DEB., H.C. (5th ser.) 1533, 1562-63 (1979); 974 PARL. DEB., H.C. (5th ser.) 1024, 1033 (1979) (remarks of Mr. Prescott).

⁹² 404 PARL. DEB., H.L. (5th ser.) 554, 562 (1980) (L. MacKay noting focus of Act on punitive aspects of antitrust litigation in the United States, which effectively allowed for an unjustified enrichment of American interests); Cira, *supra* note 36, at 249; Rosen, *supra* note 19, at 214.

⁹³ Rosen, *supra* note 19, at 214.

⁹⁴ Protection of Trading Interests Act, 1980, ch. 11, § 6(1)(c).

⁹⁵ 404 PARL. DEB., H.L. (5th ser.) 554, 590 (1980) (remarks of L. Mishcon).

⁹⁶ 974 PARL. DEB., H.C. (5th ser.) 1024, 1027 (1979) (remarks of Mr. John Nott).

⁹⁷ 973 PARL. DEB., H.C. (5th ser.) 1533, 1549 (1979) (remarks of Mr. Smith).

the clawback provision.⁹⁸ Whether the clawback provision, however, is ever used in contesting an award of multiple damages in a United States antitrust case is irrelevant because it appears that Parliament had intended the clawback provision to constitute either a "warning shot fired across the American judicial bow"⁹⁹ or a symbol of "determination to do what [could] be done effectively to counter" objectionable United States policy.¹⁰⁰

The heart of the conflict giving rise to the Protection of Trading Act was a fear of an exportation of United States economic policy. As one author has noted, "[i]f American law could regulate British meetings and agreements with such consequences, it [was] feared, British law itself would be completely displaced whenever a disquieted consumer or partner chose to take his grievance across the Atlantic."¹⁰¹ At the same time, United States commentators recognize the breadth of the effects doctrine, but feel that a "deliberate frustration"¹⁰² of the enforcement of United States laws or pretrial discovery would be unfair.¹⁰³ Despite the valid interests of the United States, British concerns are premised on the preservation of national sovereignty and run quite deep.¹⁰⁴

The national interests supporting the Protection of Trading Interests Act can be contrasted with a nation's concern for the protection of the rights of its citizens. For instance, many countries that place a strong emphasis on upholding privacy interests¹⁰⁵ have enacted bank

⁹⁸ 405 PARL. DEB., H.L. (5th ser.) 926, 942 (1980) (concern raised by L. MacKay as to whether such actions taken against a United States act accords with recognized principles of international law).

⁹⁹ Novicoff, *supra* note 38, at 34.

¹⁰⁰ 404 PARL. DEB., H.L. (5th ser.) 554, 594 (1980) (remarks of L. Lloyd of Clashfern). See also 973 PARL. DEB., H.C. (5th ser.) 1533, 1550 (1979) (Mr. Smith effectively arguing that the real power of the clawback provision lies in its symbolic existence); Kestenbaum, *supra* note 34, at 315 (noting that the clawback provision "demonstrates the extent to which U.S. antitrust jurisdiction over foreign entities and foreign conduct has come to be viewed abroad as an overreaching interference with policies and laws of sovereign nations").

¹⁰¹ Novicoff, *supra* note 38, at 30.

¹⁰² *Id.* at 31.

¹⁰³ *Id.*

¹⁰⁴ See *supra* notes 67-78 and accompanying text.

¹⁰⁵ For instance, in Switzerland, one's right to privacy is considered as an "integral part of his or her personality rights." Hurd, *supra* note 64, at 27; Meyer, *Swiss Banking Secrecy And Its Legal Implications in the United States*, 14 NEW ENG. L. REV. 18, 20-21 (1978). See also Note, *The Effect of Swiss Bank Secrecy on the Enforcement of Insider Trading Regulations & the Memorandum of Understanding Between the United States and Switzerland*, 7 B.C. INT'L & COMP. L. REV. 541, 544 n.32 (1984) (noting that personality rights protected in civil law jurisdictions typically encompass "physical and intellectual integrity, including the protection of health, family life, and financial affairs").

secrecy laws.¹⁰⁶ While United States courts have held that such secrecy laws represent serious impediments to the enforcement actions of the SEC,¹⁰⁷ the interests which these laws seek to protect may be accommo-

¹⁰⁶ An individual's right to privacy in his own banking affairs is considered to be immediately derivative from the right of individual privacy and is given substantial protection. Note, *supra* note 105, at 544. In a country such as Switzerland, the duties placed upon a banker owe their existence to the privacy rights of the account holder; the Swiss banker is obligated by the agency duty owed by him to maintain the confidentiality of the customer. Hurd, *supra* note 64, at 29; Note, *supra* note 105, at 546. While some commentators have argued that the Swiss rights of bank secrecy are directly analogous to their counterparts in countries such as the United States (*see, e.g.*, Newcomb, *supra* note 60, at 566 ("one finds that [such statutes] provide similar, limited protections against investigation with more than ample means for domestic policy authority to conduct investigations deemed appropriate")) it would appear that bank secrecy rights in the United States are, by comparison, superficial (*see* Hurd, *supra* note 64, at 32 (author noting that the banking relationship recognized in the United States resembles "little more than that of an ordinary debtor to a creditor")) and lack "any legitimate expectation of privacy concerning the information kept in bank records." *United States v. Miller*, 425 U.S. 435, 442 (1976).

Swiss law specifically enumerates exceptions to the secrecy laws where it is understood that public good preempts private interests. Hurd, *supra* note 64, at 31. The rationale understood to be operative in such instances is that public law, in civil law countries, will outweigh private law where the two are in direct conflict. Note, *The Effect of the U.S.-Swiss Agreement on Swiss Banking Secrecy and Insider Trading*, 15 L. & POL'Y INT'L BUS. 565, 575 (1983). Therefore, since bank secrecy rights are founded on private law, they must be put aside where public law is brought into play. In addition to exceptions to secrecy rights created by public law, other exceptions can be created where there is an effective "waiver" of one's rights through involvement in certain types of transactions. Moessle, *supra* note 15, at 21-22. While some commentators have noted that waivers to Swiss secrecy rights when combined with other limitations makes such rights more illusory than real (Newcomb, *supra* note 60, at 566-69), the recognized scope of such waivers typically only extends to those acts which, by their very nature, reveal a protected fact (e.g., a client's identity) to such an extent as to imply that a waiver has been made. Moessle, *supra* note 15, at 21-22. Such a waiver will rarely, if ever, arise in the context of an investor's securities transaction. *Id.*

¹⁰⁷ The court in *SEC v. Banca Della Svizzera Italiana*, 92 F.R.D. 111 (S.D.N.Y. 1981), was faced with an action brought by the SEC against a Swiss corporation and several unnamed parties for violation of insider trading provisions. In holding that the defendants in that case could be compelled to disclose information to satisfy the SEC's discovery requests despite the possibility of criminal liability in Switzerland, the court noted that the strength of United States interests clearly outweighed the Swiss interests involved. *Id.* at 117 (the court noting "[t]he strength of the United States interest in enforcing its securities laws to ensure the integrity of its financial markets cannot seriously be doubted. That interest is being continually thwarted by the use of foreign bank accounts."). Emphasizing the clear preference for United States interests over that of the Swiss, the court noted in conclusion that "[i]t would be a travesty of justice to permit a foreign company to invade U.S. markets, violate American laws if they were indeed violated, withdraw profits and resist accountability for itself and its principals for the illegality by claiming their anonymity under foreign law." *Id.* at 119. In this same theme, one SEC official has noted that, given the deep-rooted American interests in obtaining information, there is a feeling among investigative authorities that Swiss secrecy laws serve only as "an infringement of their ability to enforce federal securities legislation." Interview with Edward Greene, former General Counsel, Securities and Exchange Commission, in Washington, D.C. (Nov. 15, 1982), *cited in* Note, *supra* note 105, at 570.

dated by agreements such as the Memorandum of Understanding of August 31, 1982.¹⁰⁸ Through the procedural safeguards provided for in the Memorandum, both the SEC interests in policing insider trading were satisfied,¹⁰⁹ and the Swiss interests in preserving the privacy rights of persons within its territory were upheld.¹¹⁰ In the area of blocking legislation, however, the interests at stake are of a wholly different character: rather than reflecting the rights of the individual,¹¹¹ blocking legislation represents the sovereign interests of an entire nation.¹¹² Accordingly, a procedural mechanism such as the Swiss Memorandum of Understanding cannot easily serve as an adequate means for

¹⁰⁸ Reprinted in 22 I.L.M. 1 (1983) [hereinafter Memorandum]. This Memorandum supplemented the Treaty between the United States and Swiss Confederate on Mutual Assistance in Criminal Matters, Jan. 23, 1977, 27 U.S.T. 2019, T.I.A.S. No. 8302, which made assistance by the Swiss government mandatory in investigations if the offense was a crime in both Switzerland and the United States and was within the "Schedule of Offenses" attached to the Treaty. See generally, Hurd, *supra* note 64, at 43 (discussing provisions of Treaty). The Memorandum provided that SEC investigations of insider trading fall within the scope of the Treaty if that investigation was in relation to "conduct which might be dealt with by the criminal courts." Memorandum, at art. II, ¶ 3(a). The Memorandum goes further to note that insider trading could be an offense under the Swiss Penal Code. *Id.* at art. II, ¶ 3(b). Accordingly, the basic effect of the Memorandum was to clarify the terms of the Treaty of Mutual Assistance so as to make it effective in providing the SEC with assistance in its investigations of insider trading. For a brief description of the problems faced by the SEC in such investigations prior to the development of the Memorandum, as well as a general description of the effect of the Memorandum in ensuring Swiss cooperation, see Note, *supra* note 105, at 565-66, 585-86.

¹⁰⁹ Most significantly for the SEC, cooperation by the Swiss is ensured in many of its investigations of insider trading. While the terms of the Memorandum appear to limit the scope of assistance by the Swiss to those areas where a criminal investigation is being made, see *supra* note 108 and accompanying text, it is generally understood that the remote possibility that the Department of Justice will punish those inside traders is sufficient to invoke the language of the Memorandum in providing assistance in the civil actions brought by the SEC. Note, *supra* note 105, at 563. Under the broad language of the Memorandum, as long as the activities for which information is being requested might be brought in criminal court, the SEC is given assistance in its investigations. See *supra* note 108 and accompanying text.

¹¹⁰ Note, *supra* note 105, at 564-65. Under the provisions of the Memorandum, the SEC, when making a request to the Swiss Commission of Inquiry, is required to divulge all relevant information in the investigation and to demonstrate that there are "reasonable grounds" for proceeding with the request. Memorandum, *supra* note 108, at arts. III, ¶¶ (2)-(4). This request is then granted either automatically or if found to be reasonable, depending on such factors as whether trading volume has increased by a sufficient amount over a specific span of time and whether the Swiss Commission of Inquiry determines that insider trading may have actually occurred. *Id.* By constructing adequate procedural safeguards to SEC investigations of insider trading, the Memorandum effectively ensures that the private bank secrecy rights are not lost in the flood of discovery requests made from the United States. At the same time, the Memorandum also provides the SEC of some assurance that its investigations of insider trading are not frustrated by irreconcilable assertions of bank privacy.

¹¹¹ See *supra* notes 105-06 and accompanying text.

¹¹² See *supra* notes 67-78 and accompanying text.

lessening the tensions created by blocking statutes.

While the Protection of Trading Interests Act may try to protect legitimate interests, it runs the danger of asserting national interests beyond the intended scope of countering United States antitrust investigations. The Act has the effect of deterring any legal actions supported by the United States government.¹¹³ Therefore, while there have been situations where the Act was used to preserve interests that were intended to be protected,¹¹⁴ the Act is potentially overbroad. For instance, where the SEC is investigating an insider trading violation by investors within the United Kingdom, there is little to prevent Great Britain from invoking the Act and refusing to cooperate in any investigations.¹¹⁵ The possible frustration of United States interests in preserving the integrity of its securities markets through enforcement actions in the United Kingdom is thus conditioned upon the unfettered discretion of the British Secretary of State.¹¹⁶ Therefore, the Act poses the danger of frustrating enforcement of United States securities law abroad.

3. RESOLVING CONFLICTS OF NATIONAL INTERESTS

Few would doubt that the United States has a legitimate interest in the protection of its securities markets from fraudulent activities at home and abroad. In achieving this end, the SEC will have to enforce aggressively its regulations in both the foreign and domestic settings.¹¹⁷

¹¹³ *Debate: Extraterritorial Application of U.S. Antitrust Law*, *supra* note 46, at 627 (remarks of Professor Rahl).

¹¹⁴ One such use of the Protection of Trading Interests Act was made by statutory instrument in response to the actions of the American court in *Laker Airways v. Pan Am. World Airways*, 568 F. Supp. 811 (D.D.C. 1983). 1983 STAT. INSTRUMENT 900 (order by Secretary of State pursuant to § 1(1) of the Protection of Trading Interests Act). For a general discussion, see Novicoff, *supra* note 38, at 26-32; Atwood, *supra* note 53, at 7.

¹¹⁵ If release of any information requested by the SEC can be deemed, within the discretion of the Secretary of State, to be "prejudicial to the sovereignty of the United Kingdom" (Protection of Trading Interests Act, 1980, ch. 11, § 2(2)(a)), then it may be barred from being released. *Id.* For a general discussion of discretion left to Secretary of State under the Act, see *supra* notes 79-83 and accompanying text.

¹¹⁶ Although the discretion of the Secretary of State in applying blocking statutes has not previously presented a problem to enforcement efforts of the SEC, the potential for future abuse of that discretion, however, does exist. See *infra* notes 173-78.

¹¹⁷ This author wholly subscribes to the view posited by Mr. John Fedders:

If aggressive policing is not carried out, the SEC and United States investors will be accepting a de facto double standard of law enforcement — one standard for those trading from within the United States and a lesser standard for those trading from outside. The United States cannot permit foreign investors to violate its laws with impunity while holding its own citizens accountable for violations of the same laws.

Regrettably, due to such obstacles as blocking statutes and secrecy laws, the regulatory activities of the SEC are frustrated.¹¹⁸ In response to both the possible abuse of United States securities laws by foreign parties abroad and the rapid internationalization of the world securities markets, there is a growing sentiment that the SEC must devise alternative means of regulating international activities¹¹⁹ beyond those presently in effect.¹²⁰

3.1. *Unilateral Efforts*

In upholding the interests of the United States in protecting its securities markets, a possible solution would be for the SEC to unilaterally extend its regulations to cover all securities transactions in United States markets. Under the "waiver by conduct" doctrine,¹²¹

foreigners would automatically waive the protection of secrecy laws as a precondition for engaging in securities transactions in the United States. Such waiver would be implied by the fact that the transaction took place in our markets. Thus, the United States could require that foreign investors make an explicit choice — either forego the investment opportunities available here or give up the protection of foreign laws that might be used to conceal the identity of the investor and the circumstances of the transaction.¹²²

Viewed narrowly, the waiver by conduct doctrine constitutes merely an assertion of jurisdiction over conduct with substantial effects in the United States.¹²³ From this same perspective, supporters of the doctrine

ussions?, 11 BROOKLYN J. INT'L L. 477, 487-88 (1985).

¹¹⁸ *Id.* at 480 n.10. See also *id.* at 506 n.54 (noting that where a foreign person commits a fraud on the United States securities markets, "a country which protects such a person and blocks United States jurisdiction in effect condones interference with legitimate United States law enforcement efforts").

¹¹⁹ See, e.g., Note, *supra* note 106, at 608-09 (noting that the Memorandum of Understanding between Switzerland and the United States is a definite step towards effective regulation in light of the internationalization of the securities markets). See also Fedders, *supra* note 117, at 478 (describing need for SEC to devise new strategies).

¹²⁰ The present system of international regulations has led one author to note that "[t]he present system of treaties and other discovery mechanisms is woefully inadequate as a tool for policing trans-border fraud." Fedders, *supra* note 117, at 478.

¹²¹ Exchange Act Release No. 21,186; 49 Fed. Reg. 31,300, *reprinted in* 16 SEC. REG. & L. REP. (BNA) (Aug. 3, 1984).

¹²² Fedders, *supra* note 117, at 500.

¹²³ Advocates of the waiver by conduct doctrine argue that the proposal recognizes that "an essential attribute of sovereignty is the effective exercise of jurisdiction over conduct that occurs within a nation's territory." *Id.* As a jurisdictional argument, however, many advocates of the doctrine refer to settled United States law. See, e.g., *id.* at

note that it is not an attempt to export United States economic policy abroad,¹²⁴ but rather a form of protective legislation¹²⁵ without unfair effects on other nations' sovereignty interests.¹²⁶ While simple and cost-effective,¹²⁷ the doctrine is inconsistent with the need for a cooperative approach to securities regulation since it takes an immovable stance in claiming jurisdiction. Where national interests collide as clearly as in the case of the assertion of extraterritorial jurisdiction in the face of blocking legislation, it makes little sense to suggest that the adoption of the waiver by conduct doctrine is in any way a "starting point"¹²⁸ for the resolution of those conflicts.¹²⁹ Furthermore, while United States securities law has not been subject to the foreign reactionary legislation which United States antitrust law has faced when applied abroad, an extension of the effects doctrine, as embodied in the waiver by conduct proposal, may trigger hostile reaction since it gives little deference to foreign interests. Not surprisingly, the SEC has never given much credence or serious consideration to the proposal.¹³⁰ Given both the bitterly hostile reactions which the extraterritorial use of United States antitrust laws have received, and the growing perceptions that the United States is exporting its economic policy to foreign nations without giving proper deference to conflicting foreign interests, it would be an insult to nondomestic interests to suggest that a broad imposition of enforcement jurisdiction, such as that embodied in the waiver by conduct proposal, represents an attempt to apply principles of comity.¹³¹

In application, the waiver by conduct doctrine is counterproductive in the face of blocking legislation. The waiver only extends the personal

504 n.49 (presenting argument through *International Shoe Co. v. Washington*, 326 U.S. 310 (1945) and *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980)); Hurd, *supra* note 64, at 48 (basing argument in support of waiver by conduct doctrine on *Hanson v. Denckla*, 357 U.S. 235 (1958)).

¹²⁴ Fedders, *supra* note 117, at 503 n.48; Hurd, *supra* note 64, at 48-49.

¹²⁵ Fedders, *supra* note 117, at 503 n.48.

¹²⁶ Fedders also notes the other advantages to the waiver by conduct doctrine are that it (i) ensures that no person engaged in transactions can avoid scrutiny, (ii) enhances those aspects of the United States markets that attract capital investments, (iii) does not constitute an extraterritorial application of United States securities laws, (iv) creates a waiver consistent with and recognizable under foreign secrecy laws, (v) accords with principles of international justice, (vi) is constitutionally sound and (vii) places no presumption of guilt on the party investigated. Fedders, *supra* note 117, at 503-06.

¹²⁷ *Id.* at 481.

¹²⁸ See also Hurd, *supra* note 64, at 47 (making analogous statement that the waiver by conduct doctrine is necessary since prior efforts at negotiation and balancing of interests have failed). *Contra* Fedder, *supra* note 117, at 480.

¹²⁹ See *supra* notes 65-104 and accompanying text.

¹³⁰ Moessle, *supra* note 15, at 43.

¹³¹ See *supra* text accompanying notes 64-104. *But see* Fedders, *supra* note 117, at 480.

interests of the investor. Since bank secrecy laws provide privacy rights to the individual,¹³² the waiver by conduct doctrine is clearly applicable in that context.¹³³ In confronting blocking statutes, however, the doctrine only creates international discord.¹³⁴ Unlike secrecy laws, the interests upheld by blocking statutes are entirely those of the state.¹³⁵ It would be difficult to conceive how a person could "waive" the interests of the state; therefore, claiming jurisdiction against a person in a blocking statute jurisdiction through the waiver by conduct doctrine would be useless.

The most obvious downfall of the waiver by conduct doctrine is its inability to weigh foreign and domestic interests before granting jurisdiction to the United States courts.¹³⁶ Unilaterally claiming jurisdiction¹³⁷ is not as justifiable as obtaining jurisdiction after accounting for both foreign and United States interests.¹³⁸ The waiver by conduct doctrine fails to take such a balanced approach. Unilateral assertions of jurisdiction in contexts unrelated to securities law (principally antitrust enforcement) originally led to the formation of blocking statutes.¹³⁹ Therefore, should history provide any lesson, unilateral attempts to enforce United States securities laws abroad may be not only ineffective, but also counterproductive due to their potential to create reactionary legislation such as blocking statutes.¹⁴⁰ Furthermore, assertions made by such unilateral efforts offend principles of international comity.¹⁴¹

[U]nder general principles of comity, recognition and enforcement of judicial decrees rendered by the courts of another sovereign nation are premised on observance by the

¹³² See *supra* notes 105-06 and accompanying text.

¹³³ Note, *The Reaction of the Securities and Exchange Commission to the Internationalization of the Securities Markets: Three Concept Releases*, 4 B.U. INT'L L.J. 111, 113 (1986).

¹³⁴ Moessle, *supra* note 15, at 46-47 ("legal war").

¹³⁵ See *supra* notes 64-104 and accompanying text; Moessle, *supra* note 15, at 22; Note, *supra* note 133, at 22.

¹³⁶ It should be noted that the waiver by conduct doctrine has been attacked on a variety of fronts in addition to those relevant here. See, e.g., Liftin, *supra* note 28, at 555-56 (noting that the waiver by conduct doctrine is a weak imposition of jurisdiction due to its lack of due notice of its effect to foreign investors); Moessle, *supra* note 15, at 44-45 (noting that waiver by conduct doctrine would effectively create a set of double standards for foreign banks with clients investing in the United States); Widmer, *supra* note 26, at 42 (noting that, due to unilateral efforts by the United States, foreign banks would probably have to give up their securities business with the United States).

¹³⁷ Moessle, *supra* note 15, at 42-43.

¹³⁸ *Id.*

¹³⁹ See *supra* notes 64-104 and accompanying text.

¹⁴⁰ See also, Moessle, *supra* note 15, at 46-47 (for a similar argument in a somewhat different context).

¹⁴¹ Liftin, *supra* note 28, at 528.

rendering forum of the essentials of judicial jurisdiction and of a fair hearing. In addition to reservations based on procedural considerations, courts of foreign nations may decline to enforce a United States judicial order if the United States law on which the order is based *offends the public policy* of the forum nation.¹⁴²

If one goal in these times of rapid internationalization of the world securities markets is to facilitate the free flow of capital between markets,¹⁴³ a unilateral approach to enforcing one nation's securities laws will have the effect of impeding that result.¹⁴⁴ Unilateral approaches are inappropriate in addressing the problems of international securities fraud. Considerations of both domestic and foreign interests must be made.

3.2. *Balance of Interests*

3.2.1. *Towards a Balancing Approach*

A viable alternative to the unilateral actions taken by the United States in preserving its securities markets would have to involve a balancing of both the domestic and foreign national interests at issue. Many authors have both advocated a need for such an approach¹⁴⁵ and attacked the reluctance of administrative bodies or national governments to balance interests.¹⁴⁶ Several different balancing tests have been proposed. One example is provided by the *Restatement (Revised) of Foreign Relations Law of the United States*,¹⁴⁷ which outlines several relevant considerations:

In issuing an order directing production of information located abroad, a court in the United States should take into account the importance to the investigation or litigation of the documents or other information requested; the degree of specificity of the request; whether the information originated in the United States; the extent to which compliance with the request would undermine important interests of the state

¹⁴² *Id.* (emphasis added).

¹⁴³ Widmer, *supra* note 26, at 40-42.

¹⁴⁴ *Id.* See also Williams & Spencer, *supra* note 31, at 59 (noting that assertions of extraterritorial jurisdiction can create "counterproductive confrontations between regulators"); Thomas, *supra* note 20, at 190 (author noting that "adverse reaction" to foreign regulators may "impede free flow of capital").

¹⁴⁵ See, e.g., Thomas, *supra* note 20, at 189; Widmer, *supra* note 26, at 43.

¹⁴⁶ See, e.g., Novicoff, *supra* note 38, at 13-14.

¹⁴⁷ RESTATEMENT (REVISED) OF FOREIGN RELATIONS LAW OF THE UNITED STATES (Tent. Draft No. 6, 1985).

where the information is located; and the possibility of alternative means of securing the information.¹⁴⁸

The drafters of these provisions clearly intended to prevent the courts from broadly expanding the effects doctrine¹⁴⁹ by forcing them to consider carefully an enumerated set of factors which bring foreign interests into focus.¹⁵⁰

A more elaborate balancing approach was adopted in *Timberlane Lumber Co. v. Bank of America*.¹⁵¹ In this antitrust action against several Honduran entities for allegedly attempting to maintain control of the Honduran lumber export business, the court developed a three prong test in deciding whether extraterritorial jurisdiction should be exercised.¹⁵² The first prong of the test resembled the traditional effects doctrine — was there an effect or an intent to cause an effect to the foreign commerce of the United States.¹⁵³ Under the second prong, a determination was made as to whether the harm done was of such a scope and nature as to justify use of the antitrust laws.¹⁵⁴ Under the last prong, the inquiry was, “[a]s a matter of international comity and fairness, should the extraterritorial jurisdiction of the United States be asserted to cover [the activity]?”¹⁵⁵ In adding substance to this last prong, the court noted:

The elements to be weighed include the 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 abroad.¹⁵⁶

This standard, like that of the *Restatement*, gives substantial deference to interests of international comity by requiring a careful balancing of

¹⁴⁸ *Id.* § 437(1)(c).

¹⁴⁹ See Hermann, *supra* note 19, at 225-28.

¹⁵⁰ Hurd, *supra* note 64, at 34.

¹⁵¹ 549 F.2d 597 (9th Cir. 1976).

¹⁵² *Id.* at 615.

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 614.

national interests.¹⁵⁷ A substantial degree of discretion, however, is necessarily vested in the court. Some degree of comity must be exercised by each state's executive in order to ensure the reciprocal effectiveness of each nation's "regulatory expectations,"¹⁵⁸ but injecting comity as a consideration to be weighed by the courts does not ensure that those interests will be sufficiently considered when domestic policy is perceived to be strong.¹⁵⁹ This may be a result of the flexibility underlying the notion of comity.¹⁶⁰

3.2.2. *Interests in the Balance*

The unilateral exportation of United States economic policy does not accord with the cooperative spirit of internationalizing the world securities markets, but neither does an absolute blockage of the information necessary to the SEC. Given their effect on regulatory proceedings in this country, blocking statutes, although created in reaction to extraterritorial actions, have an extraterritorial reach of their own¹⁶¹ and represent a serious impediment to the regulation of the international securities markets.¹⁶²

¹⁵⁷ See Hurd, *supra* note 64, at 35; Liftin, *supra* note 28, at 553.

¹⁵⁸ *Laker Airways v. Sabena, Belgian World Airlines*, 731 F.2d 909, 937 (D.C. Cir. 1984).

¹⁵⁹ As one judge has stated,

No nation is under an unremitting obligation to enforce foreign interests which are fundamentally prejudicial to those of the domestic forum. Thus, from the earliest times, authorities have recognized that the obligations of comity expire when the strong public policies of the forum are vitiated by the foreign act.

Laker Airways, 731 F.2d 937; see also Liftin, *supra* note 28, at 553 (for a similar point in a different context).

¹⁶⁰

"[C]omity" summarizes in a brief word a complex and elusive concept — the degree of deference that a domestic forum must pay to the act of a foreign government not otherwise binding on the forum. *Since comity varies according to the factual circumstances surrounding each claim for its recognition, the absolute boundaries of the duties it imposes are inherently uncertain.* However, the central precept of comity teaches that, when possible, the decisions of foreign tribunals should be given effect in domestic courts, since recognition fosters international cooperation and encourages reciprocity, thereby promoting predictability and stability through satisfaction of mutual expectations. The interests of both forums are advanced — the foreign court because its laws have been vindicated; the domestic country because international cooperation and ties have been encouraged, which benefits all nations.

Laker Airways, 731 F.2d at 937 (emphasis added).

¹⁶¹ See Simon & Weller, *supra* note 37, at 2-3 (1985).

¹⁶² Inasmuch as it is absurd to argue that unilateral efforts to enforce securities overseas represents a "starting point" for international negotiation among market regulators, see *supra* notes 128-31 and accompanying text, so too is it difficult to maintain

Blocking statutes are premised on an interest in protecting the sovereignty interests and public policy of the state; however, since virtually any international action may intrude upon a nation's sovereignty interests, something more than a mere request for assistance in a discovery proceeding is expected before a broad assertion of national sovereignty can be made through the use of sweeping blocking legislation.¹⁶³ One problem with raising claims of sovereignty interests is their inherent indefiniteness. Sovereignty interests are, after all, completely within the eye of the beholder.¹⁶⁴ Where foreign actions clearly go beyond the scope which is necessary to protect the interests which they were intended to support, a balance of national interests may tip in favor of some limited form of discovery by United States courts.¹⁶⁵

In principle, sovereignty interests are as vague as comity concerns. Sovereignty, like jurisdiction,¹⁶⁶ represents a notion of territorial integrity.¹⁶⁷ The actions of one state are bound to the territory of that state, unless a permissive rule exists allowing actions in other states.¹⁶⁸ In reality, such permissive rules must exist in order to avoid isolationism.¹⁶⁹ Therefore, claims to international sovereignty should be limited to those situations where actual macroeconomic harm may be done to the nation. Otherwise, any dispute between parties of differing nations can escalate into a conflict of national interests, thereby evading the actual underlying issues.¹⁷⁰ Several commentators have noted that in a

that unilateral action in the form of blocking statutes is, in any way, conducive to eventual negotiations. *Contra* 973 PARL. DEB., H.C. (5th ser.) 1533, 1577 (1979) (Mr. Thomas noting that "[i]t is important the [Protection of Trading Interests] bill should be regarded by our trading partners not as an exercise of economic nationalism but as a measure that fosters international trade); 974 PARL. DEB., H.C. (5th ser.) 1024, 1044 (1979) (Mr. Lawrence noting that intent of Protection of Trading Interests Bill is to "liberate" international trade); 405 PARL. DEB., H.L. (5th ser.) 1515, 1518 (L. MacKay noting that Protection of Trading Interests Bill will help to contribute to international understandings and negotiations with the United States); 405 PARL. DEB., H.L. (5th ser.) 1515, 1519-20 (remarks of L. Hacking noting that, in light of the United States interest in enforcing its economic policy abroad, the Protection of Trading Interests Bill is a spur to further negotiations).

¹⁶³ See, e.g., Atwood, *supra* note 53, at 15 (noting a similar conclusion reached by several nations in bilateral agreements with the United States).

¹⁶⁴ *Debate, Extraterritorial Application of U.S. Antitrust Law, supra* note 46, at 628.

¹⁶⁵ Kestenbaum, *supra* note 34, at 326.

¹⁶⁶ Moessle, *supra* note 15, at 20.

¹⁶⁷ Simon & Weller, *supra* note 37, at 6.

¹⁶⁸ Moessle, *supra* note 15, at 20.

¹⁶⁹ Note, *supra* note 106, at 606.

¹⁷⁰ Simon & Weller, *supra* note 37, at 11. One example of such an abuse of both sovereignty interests and public policy has been noted with respect to the divorce laws of the United Kingdom. Under the Recognition of Divorces and Legal Separations Act, 1971, ch. 53, a British court can arbitrarily decide to refuse to recognize a foreign divorce decree if it is deemed to be against "public policy." *Id.* § 8(2)(b). See also

variety of contexts, claims of public policy and sovereignty interests have been abused by other nations,¹⁷¹ and such assertions of national sovereignty now constitute little more than self-serving declarations to preserve the interests of a country's nationals.¹⁷² Therefore, in giving credence to claims of sovereignty, considerations of actual harm in terms of such factors as overall "macroeconomic effect,"¹⁷³ and relative degree of closeness of the two nations to the underlying controversy¹⁷⁴ must be carefully appraised.¹⁷⁵

Apart from the potential for abuse in laying broad claims to sovereignty interests, other considerations also weigh in favor of assisting the SEC in its regulatory affairs. United States securities law is unlike other regulatory areas such as antitrust because it does not represent "a misguided sense of United States economic imperialism."¹⁷⁶ While some commentators have argued against the broad extraterritoriality of United States securities laws,¹⁷⁷ the SEC's efforts may represent both a "genuine concern for the regulation and integrity of a finite and specific marketplace"¹⁷⁸ and a promotion of friendly internationalization of the world securities markets.¹⁷⁹ Since blocking legislation is in large mea-

Novicoff, *supra* note 38, at 16-23 (persuasively argues that this public policy limitation evades cooperation in international law and "allows the United Kingdom to abandon its facilitative practices at will and resort to the sort of international intransigence observed in litigation of a more public and commercial nature").

¹⁷¹ The United Kingdom is included in these nations. *See infra* note 174 and accompanying text.

¹⁷² *See, e.g.*, Novicoff, *supra* note 38, at 15 (arguing that "the concept of public policy, as used in the United Kingdom, has itself lost much of its own internal integrity and is now being used merely to further private British economic interests at the expense of international comity"); Simon & Weller, *supra* note 37, at 8 (stating "[a]ny recognized notion of pure economic sovereignty unrelated to territorial considerations should be a narrow concept that is used with precision").

¹⁷³ Simon & Weller, *supra* note 37, at 8-11.

¹⁷⁴ Novicoff, *supra* note 38, at 35-36 (advocating that, for the United Kingdom to impose a blocking order, it should demonstrate that the British court has a "closer relationship to the underlying controversy" in terms of the implications felt on the United Kingdom's own affairs).

¹⁷⁵ One significantly valuable approach advocated by two authors involves a carefully drawn three-part analysis to claims of sovereignty. Simon & Weller, *supra* note 37, at 8-11. Under the first prong, one looks to determine whether there is a "preexisting fundamental state policy" justifying the claim. *Id.* at 8-9. Under the second prong, one looks to the type of party in dispute and the nature and degree of control which is exercised over the activity of that party by the state. *Id.* at 9-10. Under the third and most significant prong, one looks to determine whether there is a "demonstrable likelihood of inequitable injury to the integrity of the state" in the form of a "significant macroeconomic effect that threatens the state itself." *Id.* at 10-11.

¹⁷⁶ Fedders, *supra* note 117, at 504 n.50.

¹⁷⁷ Thomas, *supra* note 20, at 193; Note, *supra* note 106, at 606-07.

¹⁷⁸ Fedders, *supra* note 117, at 504 n.50.

¹⁷⁹ *See, e.g.*, Thomas, *supra* note 20, at 194-95 (noting means by which the SEC accommodates foreign interests and investors through a principle of "voluntarism").

sure a reaction to the enforcement and not the substance of foreign law,¹⁸⁰ the relatively limited nature of the SEC's discovery requests,¹⁸¹ as well as the limited injunctive relief typically sought by the SEC against foreign acts which pose potential harm to the United States markets,¹⁸² combine to weigh heavily in favor of United States interests. In addition, arguments have been made that blocking statutes are intended as protection against extraterritorial use of antitrust law and are thereby inappropriate when used against the SEC;¹⁸³ any use of blocking legislation is entirely improper for a nation hoping to participate in a worldwide securities market.¹⁸⁴

Another significant fact that weighs heavily for the SEC is that, unlike the antitrust laws, the antifraud provisions of the United States securities laws have analogous provisions in the United Kingdom. The basic prohibitions against insider trading recognized in Great Britain are provided by the Company Securities (Insider Dealing) Act 1985:¹⁸⁵

an individual who is, or at any time in the preceding six months has been, knowingly connected with a company shall not deal on a recognised stock exchange in securities of that company if he has information which —

- (a) he holds by virtue of being connected with the company,
- (b) it would be reasonable to expect a person so connected, and in the position by virtue of which he is so connected, not to disclose except for the proper performance of the functions attaching to that position, and
- (c) he knows is unpublished price sensitive information in relation to those securities.¹⁸⁶

This regulation of securities fraud may not be enforced to the same degree as that in the United States due to the "inadequacy of the methods of enforcement and the scope for clandestine dealing behind the

¹⁸⁰ Newcomb, *supra* note 60, at 569-70.

¹⁸¹ Fedders, *supra* note 117, at 506 n.56 (noting, "[t]he SEC does not engage in fishing expeditions. But were it to abuse its power — whether it did so with respect to a United States or foreign citizen trading on American markets — it would be restrained by United States courts").

¹⁸² Loomis & Grant, *supra* note 16, at 18-19.

¹⁸³ Fedders, *supra* note 117, at 484 n.18.

¹⁸⁴ *Id.* at 496.

¹⁸⁵ Company Securities (Insider Dealing) Act, 1985, ch. 8.

¹⁸⁶ *Id.* § 1(1).

front of a foreign bank nominee";¹⁸⁷ however, the legislation does nonetheless recognize the importance of limiting fraudulent activity.¹⁸⁸ The only substantial difference between the two policies is that the United Kingdom's legislation readily imposes criminal sanctions,¹⁸⁹ whereas the United States' securities laws do not.¹⁹⁰

Counterbalancing the factors weighing in favor of the SEC's efforts abroad, several considerations remain which suggest that it is unwise to attempt to export United States securities laws too strongly. One reaction made to United States securities law resembles that made to United States antitrust laws:¹⁹¹ courts have convoluted United States securities law to the point of incomprehensibility.¹⁹²

For most non-U.S. persons, in particular for Europeans, the U.S. securities laws constitute an incomprehensible bulk of infinitely complicated rules which are totally strange to them. Many look at them as one of the bases for that great U.S. pastime of suing one another.¹⁹³

A further complication involves the type of the civil remedies allowed under United States securities laws. Under the Insider Trading Sanctions Act,¹⁹⁴ the SEC is allowed to bring civil actions for treble damages:

The legislation gives the Commission authority to seek from a court a civil penalty of up to three times the amount of profit gained or loss avoided by a person who violates the federal securities laws by purchasing or selling a security while in possession of material nonpublic information. The new civil penalty may also be sought by the Commission from a person who aids and abets a violation, within limitations discussed below. The Committee believes the new penalty provided by the legislation will serve as a powerful de-

¹⁸⁷ Lee, *Law and Practice with Respect to Insider Trading and Trading on Market Information in the United Kingdom*, 4 J. COMP. CORP. L. & SEC. REG. 389, 390 (1982).

¹⁸⁸ As one author has noted, "it is the deterrent effect that advocates of the legislation see as the main purpose of the law." *Id.*

¹⁸⁹ Company Securities (Insider Dealing) Act, 1985, ch. 8, § 8.

¹⁹⁰ This distinction is also drawn by other authors. *See, e.g.*, Lee, *supra* note 187, at 390 ("In the United States, civil remedies have dealt with the problem for many years, and the criminal provisions have rarely been invoked.").

¹⁹¹ *See supra* notes 49-52 and accompanying text.

¹⁹² Widmer, *supra* note 26, at 39.

¹⁹³ *Id.*

¹⁹⁴ Securities and Exchange Act, § 21(d)(2), 15 U.S.C. § 78u (1984).

terrent to insider trading abuses.¹⁹⁵

While this powerful legislation provides a substantial deterrent to insider trading,¹⁹⁶ the United Kingdom has already vehemently reacted to the use of similar treble damages in the antitrust context.¹⁹⁷ If the United States wants to avoid the same bitter international reaction that its antitrust law suffered prior to the passage of the Protection of Trading Interests Act, it must avoid the same pitfalls. Therefore, the United States, while enforcing its securities laws abroad, should proceed with carefully enumerated policies and nonoffensive remedies.

3.2.3. *Balancing by the Courts and Government*

Assuming that a balancing approach must be adopted, the next obvious question is to whom that task should be left. The balancing of interests is usually left to the courts. Occasionally, the courts, in cases such as *Timberlane Lumber*,¹⁹⁸ strike an accord under principles of comity,¹⁹⁹ which adequately balances competing interests. In other cases, the result is less than satisfactory for foreign concerns. A recent example of this latter situation is provided by the court in *Laker Airways v. Sabena, Belgian World Airlines*.²⁰⁰ Plaintiff, a transatlantic airline carrier, brought an antitrust action against several defendants who had allegedly engaged in monopolistic behavior to drive the plaintiff out of business.²⁰¹ After noting the place of comity in balancing national interests,²⁰² the court stated that a limitation is placed on comity considerations where "the foreign act is inherently inconsistent with the policies underlying comity."²⁰³ The court criticized the British government's use of the Protection of Trading Interests Act²⁰⁴ and noted

¹⁹⁵ H.R. REP. NO. 355, 98th Cong., 2d Sess. 8, reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS 2274, 2281.

¹⁹⁶ Moessle, *supra* note 15, at 5-6.

¹⁹⁷ See *supra* notes 40-47, 61-63 and accompanying text.

¹⁹⁸ *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597 (9th Cir. 1976); see *supra* notes 33-78 and accompanying text. In a later case, *Mannington Mills Inc. v. Congoleum Corp.*, 595 F.2d 1287 (3d Cir. 1979), plaintiffs alleged that defendant's licensing practices in foreign countries for the manufacturing of vinyl floor tiles violated the Sherman Act. In passing on the issue of whether the defendant's act, if as alleged, were held accountable under the Sherman Act, the court, after tracing through the history of the Alcoa effects doctrine, adopted a balancing of interests test very similar to the test adopted in *Timberlane Lumber. Congoleum Corp.*, 598 F.2d at 1291-98.

¹⁹⁹ See *supra* notes 156-60 and accompanying text.

²⁰⁰ 731 F.2d 909 (D.C. Cir. 1984).

²⁰¹ *Id.* at 916-17.

²⁰² *Id.* at 937-39. See generally *supra* notes 158-60 and accompanying text.

²⁰³ *Laker Airways*, at 939-41.

²⁰⁴ *Id.* at 940-41. The Protection of Trading Interests Act, 1980, authorizes a "losing British defendant in a U.S. antitrust action to sue a prevailing U.S. plaintiff in

that in this situation, a balancing of interests clearly favored the plaintiff's cause. The *Laker Airways* decision has been often criticized, due to its apparent bias toward American interests.²⁰⁵ The value of the *Laker Airways* decision, however, derives not from its eventual holding, but from lengthy dicta placed in a footnote:

Of course, the British government does not intend to invoke the Protection of Trading Interest Act to bar all jurisdiction exercised by United States courts over foreign airlines — just that necessary to provide a forum for the enforcement of American antitrust laws. This illustrates that the conflict here is between deeply felt and long held economic and political policies of both the United States and the British governments, and that the courts of the respective jurisdictions are in no position to resolve that dispute by conceding comity to the decrees of the other. *The comity we are asked to invoke is thus the comity for the British Executive — and that is something better left to the American Executive to negotiate.* Conceding comity to the actions of the British courts, which were brought about and directed rather specifically by the actions of the British Executive, and whose sole purpose is the unilateral subjugation of United States interests to those of Great Britain, would require the American judges to abdicate their oath of office to uphold the laws of the United States. This we cannot conscientiously do, however much we understand and respect the position that our English peers are in.²⁰⁶

Despite arguments that the fault lies in the United States court's failure to give adequate deference to the interests of foreign countries,²⁰⁷ the actual fault may lie with the inadequacy of the political branch in arriving at mutual understandings between the executive branches of foreign governments which hold competing interests.

A related argument can be made that the judiciary is simply not the proper body for bearing the responsibility of balancing national in-

Britain for return of two-thirds of any treble-damage award entered by a U.S. court." Larose, *Conflicts, Contracts, and Cooperation: Extraterritorial Application of the United States Securities Law*, 12 SEC. REG. L.J. 99, 119 n.99 (1984).

²⁰⁵ Liftin, *supra* note 28, at 553.

²⁰⁶ *Laker Airways*, 731 F.2d at 941-42 n.121 (emphasis added).

²⁰⁷ See, e.g., Hurd, *supra* note 64, at 35-37 (criticizing failure of United States courts to accord adequate deference to foreign interests in nondisclosure from the decision of Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers, 357 U.S. 197 (1958)).

terests. Unlike many countries, the United States maintains a relatively strong and independent judicial system.²⁰⁸ The potential exists for a United States court to abuse its power by transcending the immediate issues raised in international cases and prematurely considering the respective national interests which are affected.²⁰⁹ Experience has shown that courts will almost invariably favor domestic interests over foreign ones when balancing national interests.²¹⁰ Superficially, this empirical fact may be explained by the inherent nationalism of any state's judiciary system.²¹¹ A more thorough analysis reveals, however, that when national interests are sufficiently divergent and incongruous, a balancing of those interests may not work. A perceived bias towards domestic interests may properly reflect different national outlooks to the same problem. In the antitrust area, for instance, American and British interests diverge because "cartel and competition are direct opposites[;]"²¹² since each nation's view arguably has some degree of validity, a true balance of interests by courts on either side of that controversy becomes impossible. Shortly after writing the majority opinion in the *Laker Airways* decision, Judge Wilkey stated on a separate occasion:

[t]he basis of our decision [in *Laker Airways*] therefore is that we as judges do not have the authority to decide that the longstanding, definite, clear antitrust policy of the political branches of our government can be compromised because it comes into conflict with the desires and policy of another government. That is not for the judges to do It may be that it is very unwise for the United States to insist on jurisdiction in this case. But if so, that should be spelled out by negotiations which judges are not in a position to conduct.²¹³

²⁰⁸ Griffin, *Possible Resolutions of International Disputes Over Enforcement of U.S. Antitrust Laws*, 18 STAN. J. INT'L L. 279, 286 (1982).

²⁰⁹ Liftin, *supra* note 28, at 553-55.

²¹⁰ See Fedders, *supra* note 117, at 505-06 n.53 (citing to English case, where court noted, in weighing foreign interests in nondisclosure, "[w]hy should a true foreigner, while able to enjoy all the benefits of holding shares in an English company, be intended to escape the burdens?"); Liftin, *supra* note 28, at 551 (noting that, in a balance of national interests, there is "substantial judicial authority" holding that fundamental United States interests outweigh competing foreign ones); Moessle, *supra* note 15, at 32 (noting "[t]he case analysis has demonstrated that the application of a mere *balancing of interests* test provides for litigation certainty only insofar as the interests of the enforcing state usually prevail").

²¹¹ See *supra* notes 51-52 and accompanying text.

²¹² Kestenbaum, *supra* note 34, at 325.

²¹³ Wilkey, *Symposium: Transnational Litigation — Part II: Perspectives from the U.S. and Abroad: United States of America*, 18 INT'L LAW. 779 (1984).

Some might argue that a balancing approach taken by the judiciary would solve many of the problems encountered in international securities regulations.²¹⁴ However, an understanding of the difficulties facing other regulatory areas such as antitrust, as well as an appreciation for the political undercurrents of any judicial decision, suggest that a balancing of national interests should not be entirely entrusted to the judiciary.

The only practical means by which national interests can be balanced in this area is through negotiations between the political branches of the two countries. While admittedly somewhat slow, costly and potentially inconsistent in treatment,²¹⁵ such cooperative ventures between nations have the advantage that "cooperation increases mutual understandings of the goals and methods of the various regulatory schemes. It permits a beneficial exchange of ideas, information and experiences."²¹⁶ Additionally, such an approach has the advantage of easing international tensions,²¹⁷ thereby fostering a movement towards the eventual formation of multilateral agreements in policing the world securities markets.²¹⁸ At the very least, "[f]ormalization regularize[s] contacts so that people can respond quickly to create the flexible ad hoc arrangements for special situations [of securities fraud]."²¹⁹

4. TOWARDS A MORE ADEQUATE BALANCING OF NATIONAL INTERESTS

4.1. *Approach Under the Present Memorandum of Understanding*²²⁰

On September 23, 1986, the United States SEC and Commodity Futures Trading Commission and the United Kingdom's Department of Trade and Industry (DTI) formed an agreement addressing a "corresponding need for mutual cooperation between relevant national authorities"²²¹ in light of "increasing international activity in the securi-

²¹⁴ Thomas, *supra* note 20, at 194.

²¹⁵ Fedders, *supra* note 117, at 488, 498-99.

²¹⁶ Williams & Spencer, *supra* note 31, at 60. This recognition of the need for mutual cooperation has been realized in the antitrust area by both the United Kingdom, 973 PARL. DEB., H.C. (5th ser.) 1533, 1534 (1979) (remarks of Mr. John Nott); 404 PARL. DEB., H.L. (5th ser.) 554, 555 (1980) (remarks of L. MacKay); 404 PARL. DEB., H.L. (5th ser.) 554, 583 (1980) (remarks of Earl of Inchcape) and the United States Justice Department (Cira, *supra* note 36, at 263) for quite some time.

²¹⁷ Fedders, *supra* note 117, at 497.

²¹⁸ Newcomb, *supra* note 60, at 576-77.

²¹⁹ Lee, Robert, Hirsch, Pollack, *Secrecy Laws and Other Obstacles to International Cooperation*, 4 J. COMP. CORP. L. & SEC. REG. 63, 80 (1982).

²²⁰ Memorandum of Understanding, *supra* note 7.

²²¹ *Id.* at preamble.

ties, futures and investment markets.”²²² Among the regulatory interests specifically addressed under the Memorandum of Understanding are those rules of either nation “relating to the prevention of insider dealing in, misrepresentation in the course of dealing in, and market manipulation in, securities listed on an investment exchange.”²²³

The Memorandum of Understanding is a cooperative effort assuring the SEC that it can obtain much of the information needed for its regulatory functions if the terms of the Memorandum of Understanding are satisfied.²²⁴ The DTI and the SEC agree that they “*shall* assist the other by providing to [each other] any information that is either already in its hands or that it can by its best efforts obtain in order to enable the other to secure compliance with the relevant legal rules and requirements.”²²⁵

Furthermore, the SEC’s ability to gather information under the terms of the Memorandum of Understanding is clarified. The scope of the SEC’s information gathering abilities extends to investigations which comply with the domestic rules under which the information is sought,²²⁶ and to any “civil or administrative enforcement proceeding, assisting in a criminal prosecution, or conducting any investigation related thereto for any general charge applicable to the violation of the legal rule or requirement identified in the request.”²²⁷ The SEC is also not rigidly limited to the procedures created under the Memorandum of Understanding,²²⁸ provided that the SEC observes certain minimal guidelines.²²⁹ Finally, the SEC has the assurance that the protections given under the Memorandum of Understanding will have effect and will not be revoked without either thirty days notice²³⁰ or until such time as a treaty between the United States and the United Kingdom relating to insider trading is created.²³¹

While the SEC is given broad rights of enforcing its securities laws, the Memorandum of Understanding also confers substantial protection to the national interests of the United Kingdom. A principal concern of Great Britain embodied by the Protection of Trading Inter-

²²² *Id.*

²²³ *Id.* § 1(h)(i)(A).

²²⁴ Under the terms of the Memorandum of Understanding, both the DTI and the SEC agree to a “statement of intent,” *id.* § 3, to reciprocally “exchange information for the purpose of facilitating the performance of their respective duties.” *Id.* § 2.

²²⁵ *Id.* § 4 (emphasis added).

²²⁶ *Id.* § 8(a).

²²⁷ *Id.* § 8(c).

²²⁸ *See id.* § 12.

²²⁹ *Id.*

²³⁰ *Id.* § 18.

²³¹ *Id.* § 17.

ests Act was the breadth of the antitrust actions being brought by private plaintiffs in the United States.²³² A similar concern is addressed in the Memorandum of Understanding because private plaintiffs are specifically excluded from obtaining any rights under the Memorandum of Understanding.²³³ The flexibility of the United Kingdom's sovereignty interests²³⁴ is accommodated by conditioning disclosure of information on public interest.²³⁵ A strong objection to the extraterritorial use of the United States antitrust laws has been that discovery requests made within the United Kingdom constituted "fishing expeditions"²³⁶ beyond the realm of relevant information.²³⁷ To accommodate this concern, the scope of informational requests allowed by the SEC must satisfy three requirements for disclosure. The first two are the relatively strict standards of disclosing both the purpose²³⁸ and the legal grounds²³⁹ for which the information is sought. There are also strict limitations upon the purposes for which the SEC can use such information²⁴⁰ as well as explicit rules of confidentiality that apply once that information is released.²⁴¹ The third requirement is the imposition of a minimal standard of "reasonable relevancy" of the information to justify disclosure.²⁴² Apart from the limitations placed on the SEC in its requests under the Memorandum, an alternative set of requirements ensures that the SEC does not engage in broad discovery proceedings through alternate channels. The Memorandum of Understanding does not force the SEC to make all of its requests for information through the Secretary of State.²⁴³ In following such alternate channels, however, the SEC must exercise "moderation and restraint"²⁴⁴ and follow separate procedures which require, except in cases of urgency,²⁴⁵ that the SEC first make its requests through the Secretary of State.²⁴⁶

The Memorandum of Understanding accommodates both the interests of the United States and the United Kingdom without any obvi-

²³² See *supra* notes 61-63 and accompanying text.

²³³ Memorandum of Understanding, § 3.

²³⁴ For a description of the indefinite quality of sovereignty interests, see *supra* notes 159-60, 166-75 and accompanying text.

²³⁵ Memorandum of Understanding, § 5.

²³⁶ See *supra* notes 56-60 and accompanying text.

²³⁷ *Id.*

²³⁸ Memorandum of Understanding, § 7(b)(ii).

²³⁹ *Id.* § 7(b)(iii).

²⁴⁰ *Id.* § 7(d).

²⁴¹ *Id.* § 8.

²⁴² *Id.* § 9.

²⁴³ See *supra* note 228-29 and accompanying text.

²⁴⁴ Memorandum of Understanding, § 12(a).

²⁴⁵ *Id.* § 12(b).

²⁴⁶ *Id.*

ous favoritism towards either side. The United States' interests are satisfied to the extent that assurances are created to give some degree of legitimacy to the enforcement of its regulations in the United Kingdom. At the same time, the United Kingdom's interests in maintaining its sovereignty are for the moment accommodated. As an "interim" agreement,²⁴⁷ the Memorandum of Understanding provides a temporary compromise to the balance of two otherwise irreconcilable national interests.

As a temporary framework, the Memorandum of Understanding fails to create any mechanisms for ensuring that an adequate balance of those interests is maintained. For United States concerns, the greatest accomplishment of the Memorandum of Understanding may be its effect of extending the investigatory powers of the SEC.²⁴⁸ However, the

²⁴⁷ *Id.* § 17.

²⁴⁸ Under the statutory provisions of the 1934 Act, the SEC has the authority to issue subpoenas and to compel the production of witnesses in its investigations of potential violations of the federal securities laws. 15 U.S.C. § 78u(b) (1982). When applied within the territorial boundaries of the United States, such exercises of power are considered valid uses of sovereign power, *Federal Trade Commission v. Compagnie de Saint-Gobain-Pont-a-Mousson*, 636 F.2d 1300, 1316 (D.C. Cir. 1980) (noting that "[t]raditionally, a state has plenary power to prescribe rules within its own territorial boundaries"), and are supported by the enforcement powers of the federal courts. *Id.* at 1311. However, when applied outside of the United States, the powers of the SEC are not so clearly defined. See Case Comment, *Grunenthal GmbH v. Hotz: An Undue Extension of Subject Matter Jurisdiction Under the Extraterritorial Application of the Federal Securities Laws*, 11 BROOKLYN J. INT'L L. 579, 584-85 (1985) (noting that neither legislative history nor express wording places any guidelines on the extraterritorial use of the antifraud provisions of the 1934 Act).

A distinction should be noted between prescriptive and enforcement jurisdiction.

Jurisdiction to prescribe signifies a state's authority to enact laws governing the conduct, relations, status or interests of persons or things, whether by legislation, executive act or order, or administrative rule or regulation. Jurisdiction to enforce, by contrast, describes a state's authority to compel compliance or impose sanctions for noncompliance with its administrative or judicial orders.

Compagnie de Saint-Gobain-Pont-a-Mousson, 636 F.2d at 1315.

Therefore, although the United States may have the authority to prescribe laws relating to securities regulations where there is a showing of either an effect on American investors or conduct in the United States, see *supra* note 19 and accompanying text, a court order enforcing an agency's investigatory subpoena "represents an attempt by the U.S. to exercise its enforcement jurisdiction within foreign territory before its prescriptive jurisdiction over the investigated conduct has been proved to exist." *Compagnie de Saint-Gobain-Pont-a-Mousson*, 636 F.2d at 1317.

Agencies such as the SEC, are severely limited in their ability to issue investigatory subpoenas abroad. *Id.* at 1309; *Securities and Exchange Commission v. Zanganeh*, 470 F. Supp. 1307 (D.C. 1978); *Securities and Exchange Commission v. Minas de Artemisa*, 150 F.2d 215, 218 (9th Cir. 1945). In large measure, this result is due to the fact that enforcement of a subpoena issued by a United States agency through a federal court represents an exercise of enforcement jurisdiction without a requisite showing of prescriptive jurisdiction. *Compagnie de Saint-Gobain-Pont-a-Mousson*, 636 F.2d at 1316.

need for a sensible balance of national interests becomes acute once a case proceeds towards litigation before a United States court. The Memorandum of Understanding provides no permanent mechanisms for guaranteeing that a proper balance is struck. A procedural framework is needed through which the agencies of governments with conflicting interests can arrive at such a compromise.

4.2. *Establishing a Balancing Procedure: The Australian-United States Antitrust Approach*

Much of the hostility felt in the United Kingdom against the extraterritorial use of United States' laws is generated by the application of the effects doctrine.²⁴⁹ Since it is the use, rather than the theoretical existence of that doctrine which appears to generate foreign irritation,²⁵⁰ an acceptable limit to its application should be found before any resulting international conflicts develop. A well-formulated balance of national interests may provide such a limit.²⁵¹ Therefore, to avoid potential conflict which may otherwise be generated by SEC actions abroad, it is necessary that both sides of any controversy establish a preliminary balance of interests at the earliest possible moment.²⁵²

A means of balancing the United States' interests with those of the United Kingdom can be derived from the approach taken in the Agreement Between the Government of the United States of America and the Government of Australia Relating to Cooperation on Antitrust Matters (Agreement).²⁵³

An alternative means by which American agencies can obtain information from abroad is through the use of international agreements and treaties. Through such mechanisms, a nation may specify the appropriate procedural channels for an agency to proceed thereby ensuring that a minimal infringement of another nation's jurisdiction occurs. *Compagnie de Saint-Gobain-Pont-a-Mousson*, 636 F.2d at 1313-14 n.69.

²⁴⁹ Larose, *supra* note 204, at 119 (noting that "[t]he Reporters are undoubtedly correct in identifying chauvinistic applications of U.S. regulations based solely on the economic effect of a foreign transaction in the United States as a source of irritation to foreign sovereigns").

²⁵⁰ Note, *The United States — Australian Antitrust Cooperation Agreement: A Step in the Right Direction*, 24 VA. J. INT'L L. 127, 168 (1983).

²⁵¹ See *supra* notes 128-44 and accompanying text.

²⁵² This same need for an early balance of interests has also been perceived in the antitrust context. Kestenbaum, *supra* note 34, at 342 (1982) (noting that "every effort should be made to accommodate the balancing of interests process at an early stage").

²⁵³ Agreement Relating to Cooperation on Antitrust Matters, June 29, 1982, Australia-United States, T.I.A.S. No. 10365, reprinted in 21 I.L.M. 702 (1982) [hereinafter Agreement]. In the area of antitrust law, agreement has been viewed quite favorably.

The existing antitrust cooperative agreements with Canada and West Germany have functioned well. They and the new Australian government may be useful models for other bilateral agreements on notification and

Australia, like the United Kingdom, has had numerous difficulties with extraterritorial assertions of jurisdiction in United States antitrust cases.²⁵⁴ Objections have been voiced against the broad discovery requests,²⁵⁵ treble damages actions,²⁵⁶ and, in particular, the private party character of United States antitrust litigation.²⁵⁷

The point is that exactly the same principle of jurisdiction — of extraterritorial jurisdiction — applies in those private suits. In that event, the same possibilities exist for collision between the United States national economic policy and those of foreign governments and there is the same likelihood of the sovereignty of other countries being affected by extraterritorial enforcement Questions of sovereignty or comity are matters between nations. In no way should the principle of international comity depend upon private litigants.²⁵⁸

Largely in response to perceptions that the United States was exporting its economic policy, the Australian government passed strong blocking statutes.²⁵⁹ The stated intent was to “[prevent] the [p]roduction of

consultation. The subject matter of the future agreements should elaborate on the Australian agreement proviso on extraterritorial discovery and intervention by the Executive Branch in private cases.

Griffin, *supra* note 208, at 305 (1982).

Although the Australian Agreement was created in the antitrust context, the principles of balancing of interests involved in creating such antitrust agreements may be applied quite easily in the securities regulations area. Murano, *Extraterritorial Application of the Antifraud Provisions of the Securities Exchange Act of 1934*, 2 INT'L TAX & BUS. LAW. 298, 317-19 (1984).

²⁵⁴ For a general discussion of Australian objection to American exportation of economic policy, see Note, *supra* note 250, at 127 (1983).

²⁵⁵ *Id.* at 146.

²⁵⁶ *Id.*

²⁵⁷ *Id.*

²⁵⁸ Press Release of Australian Attorney-General Durack on Oct. 5, 1980, *quoted in* Note, *supra* note 250, at 146.

²⁵⁹ *E.g.*, Foreign Proceedings (Prohibition of Certain Evidence) Act 1976, No. 121, Austl. Acts (1976), *as amended*, Foreign Proceedings (Prohibition of Certain Evidence) Amendment Act 1976, No. 202, Austl. Acts (1976).

It is particularly noteworthy both that the Australian blocking legislation was passed very quickly in response to litigation arising from the case of *In re Uranium Antitrust Litigation*, 617 F.2d 1248 (7th Cir. 1980), and that the resulting blocking legislation vested considerable discretion in the Attorney-General in deciding whether information was to be released. As amended, the Act provides that:

The Attorney-General shall exercise his powers under this Act so as to impose restriction only where he is satisfied that . . . a foreign tribunal is exercising or proposing or likely to exercise jurisdiction or powers of a kind or in a manner not consistent with international law or comity in proceedings having a relevance to matters to which the laws or executive powers of the Commonwealth relate, being the only proceedings of a for-

[c]ertain [d]ocuments, and the [g]iving of [c]ertain [e]vidence, for the purposes of [p]roceedings in [f]oreign [c]ourts.”²⁶⁰ The Agreement was intended to allow the United States to enforce its antitrust laws in light of this blocking legislation.

As a protection to United States interests, the Agreement obligates the Australian government to cooperate in any antitrust investigations or enforcement actions, as long as there is no “adverse effect” on Australian interests.²⁶¹ As long as adequate notice is given, United States investigations and discovery requests in Australia will not automatically trigger the use of blocking statutes.

The mere seeking by legal process of information or documents located in its territory shall not in itself be regarded by either Party as affecting adversely its significant national interests, or as constituting a basis for applying measures to prohibit the transmission of such information or documents to the authorities of the other Party, provided that in the case of United States legal process prior notice has been given of its issuance. Each party shall, to the fullest extent possible under the circumstances of the particular case, provide notice to the other before taking action to prevent compliance.²⁶²

Other provisions also act to protect Australian interests. For instance, the obligation to notify the Australian government starts before investigations have commenced.²⁶³ When a United States governmental agency “decides to undertake an antitrust investigation that may have implications for Australian laws, policies or national interests, the Government of the United States shall notify the Government of Australia

eign tribunal in relation to which the restriction are to have effect.

Foreign Proceedings (Prohibition of Certain Evidence) Act 1976, No. 121, Austl. Acts, § 4(1)(a) (1976), *as amended*, Foreign Proceedings (Prohibition of Certain Evidence) Amendment Act 1976, No. 202, Austl. Acts, § 4(a) (1976).

For a general discussion of the conflict giving rise to the Australian blocking legislation, see Note, *supra* note 250, at 145.

²⁶⁰ Foreign Proceedings (Prohibition of Certain Evidence) Act 1976, No. 121, Austl. Acts (1976), preamble, *as amended*, Foreign Proceedings (Prohibition of Certain Evidence) Amendment Act 1976, No. 202, Austl. Acts (1976).

²⁶¹ Under article five,

When a proposed investigation or enforcement action under the antitrust laws of one nation does not adversely affect the laws, policies or national interests of the other, each Party shall cooperate with the other in regard to that investigation or action, including through the provision of information and administrative and judicial assistance to the extent permitted by applicable national law.

Agreement, art. 5, ¶ 1.

²⁶² *Id.* at art. 5, ¶ 2.

²⁶³ *Id.* at art. 1, ¶ 2.

of the investigation.”²⁶⁴

A further procedural mechanism for assuring that an adequate balance of interests is struck is provided by the obligation of mutual consultation created under article two.²⁶⁵ Whenever either the United States or the Australian government perceives that actions of one nation have effects on the other’s national interests, an affirmative obligation is placed on the nation causing the effects to participate in consultations after notice and a request from the affected nation.²⁶⁶ These consultations are required to focus on the effects that a nation’s acts have on the interests of the other nation.²⁶⁷

Of significant importance to the Australian government,²⁶⁸ article six of the Agreement adds substance to the consultation and notification requirements by obligating the United States government to notify its courts of the relevant national interests balanced during such consultations.

When it appears to the Government of Australia that private antitrust proceedings are pending in a United States court relating to conduct, or conduct pursuant to a policy of the Government of Australia, that has been the subject of notification and consultations under this Agreement, the Government of Australia may request the Government of the United States to participate in the litigation. The Government of the United States shall in the event of such request report to the court on the substance and outcome of the consultations.²⁶⁹

²⁶⁴ *Id.*; see, Griffin, *supra* note 208, at 290-91 (noting that such obligations to notify and consult with foreign governments prior to bringing enforcement or investigatory actions is essential to a balance of national interests).

²⁶⁵ Agreement, art. 2.

²⁶⁶ *Id.* at art. 2, ¶¶ 1-3.

²⁶⁷ Under the Agreement,

Both parties during consultations shall seek to identify any respect in which (a) implementation of the Australian policy has or might have implications for the United States in relation to the enforcement of its anti-trust laws; and (b) the antitrust enforcement action by the Department of Justice or the Federal Trade Commission of the United States has or might have implications for Australian laws, policies or national interests.

Id. at art. 2, ¶ 4.

²⁶⁸ Note, *supra* note 250, at 159 (noting that foreign governments should welcome the procedural framework established in article six of the Agreement, since “relevant foreign interests should now be clear to the court before it decides to exercise subject matter jurisdiction in private treble damages suits. These reports also will add legitimacy to foreign government *amici* briefs and discourage denigrating language by United States courts in the future”).

²⁶⁹ Agreement, art. 6.

Since it is essential that courts strike an adequate balance of national interests once international antitrust litigation has commenced,²⁷⁰ a requirement that the United States government report to the courts as to the outcome of such balancing consultations goes far to reduce international tensions.²⁷¹

Under the Agreement, joint negotiating efforts are entirely apart from the judicial setting. In this way, the Agreement adds legitimacy to its eventual result by dispelling any claims of latent "imperialism" thought to inhere in any decision by the United States courts.²⁷² Furthermore, by allowing the Australian government the right to require the United States government to "participate in the litigation"²⁷³ and to "report to the court on the substance and outcome of the consultations,"²⁷⁴ the Agreement ensures that a balance acceptable to Australian interests is presented to United States courts at any subsequent stage of litigation.

Since the Agreement appears to present an ideal procedure for accommodating national interests in the antitrust setting, there is reason to believe that a similar procedural safeguard might be useful in limiting the enforcement of United States securities laws. A procedural mechanism similar to that embodied in article six of the Agreement could provide protection of foreign interests in litigation — a safeguard which the Memorandum of Understanding does not ensure. Given the divergence of interests represented by blocking statutes from those supporting the United States efforts in regulating securities fraud,²⁷⁵ a negotiated effort outside of the courtroom may be more important in securities law than in the antitrust context. A securities regulation treaty modeled on article two of the Agreement could provide a listing of negotiated factors to be balanced by the courts under their own balancing procedures. The appropriate considerations to be balanced could be easily provided by the United States government to its courts whenever balancing became necessary.²⁷⁶ Therefore, by allowing for provisions

²⁷⁰ Kestenbaum, *supra* note 34, at 342-43.

²⁷¹ An analogous point raised by several commentators is that the United States government should impress upon the courts both the foreign and domestic interests at stake. *Id.*; Note, *supra* note 250, at 151-52 (1983).

The need for the United States government to address the balance of interests before the courts arises from the fact that "an unfortunate lesson of the uranium cases for foreign governments is that their views may have little impact unless endorsed, seconded, or presented by the American government." Kestenbaum, *supra* note 34, at 342.

²⁷² See *supra* notes 49-52 and accompanying text.

²⁷³ See *supra* note 269 and accompanying text.

²⁷⁴ *Id.*

²⁷⁵ See *supra* notes 176-90 and accompanying text.

²⁷⁶ See *supra* notes 199-219 and accompanying text.

such as those contained in article six of the Agreement in any eventual cooperative effort between the United States and Britain pursuant to the Memorandum of Understanding, a balance of the interests of both the SEC and Britain could be maintained at virtually any stage of litigation.

In addition to creating provisions modeled on article six of the Agreement, other considerations must be addressed in the negotiation of an agreement to supersede the Memorandum of Understanding. Limitations should be imposed on the discretion given to the British Secretary of State in the application of blocking legislation. Again, the Agreement, which both establishes an obligation on the part of Australia to cooperate in United States agency efforts²⁷⁷ and forbids the automatic blocking of information,²⁷⁸ is instructive. If the SEC wishes to apply United States securities laws in the face of blocking legislation, it should seek guarantees from foreign nations similar to those outlined in the Agreement. The United Kingdom should seek protections in addition to those created under the present Memorandum of Understanding. For instance, a requirement may be imposed that the SEC notify the DTI prior to its starting any investigations of securities fraud²⁷⁹ and enter into consultations similar to those provided under the Agreement.²⁸⁰ More importantly, protection of British interests may require that the SEC seek information only on the condition that it would not seek treble damages under the Insider Trading Sanctions Act.²⁸¹ Such a condition to disclosure may help to prevent the harsh criticism which treble damages evoke from the United Kingdom when the United States seeks such damages in the antitrust context.²⁸²

5. CONCLUSION

World securities regulators are faced with rapid internationalization of the world capital markets. With advances in technology, communicative barriers of oceans and continents fade away and transactions between nations become almost instantaneous.²⁸³ At the same time, important national interests, in the form of sovereignty and integrity of national markets, remain and become new barriers to the grow-

²⁷⁷ See *supra* note 261 and accompanying text.

²⁷⁸ See *supra* note 262 and accompanying text.

²⁷⁹ See *supra* notes 265-74 and accompanying text.

²⁸⁰ Such a provision may be modeled on the requirements presently in effect under the Agreement. See *supra* notes 263-64 and accompanying text.

²⁸¹ See *supra* notes 194-97 and accompanying text.

²⁸² See *supra* notes 44-47 and accompanying text.

²⁸³ Thomas, *supra* note 20, at 190; Williams & Spencer, *supra* note 31, at 55.

ing trend towards the internationalization of these markets. While it is improper to lightly compromise national interests, a functioning interaction between markets may be sacrificed by stubbornly clinging to national ideals. Insofar as we are willing to believe that “[a] properly functioning world securities market would permit the more efficient allocation of the increasingly scarce world resources,”²⁸⁴ such a sacrifice is one which few of us should be willing to make.

The only efficient remedy for this dilemma is through cooperative approaches that recognize and give credence to the various interests that each nation holds. From this perspective, bilateral agreements must be undertaken to lessen international conflict. This need is even greater when national interests, such as those represented in blocking statutes, are buttressed by tensions created by transnational conflicts. Admittedly, a cooperative approach offers no expedient solution to the problems faced by the SEC in enforcing its regulations abroad. However, given the difficulties which unilateral measures may create through bold assertions of enforcement jurisdiction, expedient solutions are not always best.²⁸⁵ As this Comment has argued, such quick solutions may be disastrous and counterproductive.

²⁸⁴ Williams & Spencer, *supra* note 31, at 56.

²⁸⁵ *Id.* at 61.

