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COMMENTS

EXTRATERRITORIAL APPLICATION OF THE ANTITRUST LAWS AND RETALIATORY LEGISLATION BY FOREIGN COUNTRIES

Donald J. Curotto*

I. INTRODUCTION

The doctrine of territorial sovereignty grants each nation the power to exercise supreme authority over all acts performed in its territory, and to do so at the exclusion of other nations.¹ This principle developed in a period when interaction among nations was very limited, and it has been undermined by the continuous rise in transnational activity.² Increasing contacts between subjects of different nations inevitably involves conduct in more than one country, thereby making difficult the determination of which nation is justified in regulating the conduct. While the right of each nation to control conduct within its borders is still recognized, the power to do so at the exclusion of other nations is much debated.

In some instances it has been common for nations to apply domestic laws to acts performed beyond their borders. In general, this extraterritorial application has been tolerated when the countries involved have similar laws and thereby agree that the

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1. See J. BRIERLY, *THE LAW OF NATIONS* 162 (6th ed. 1963); G. SCHWARZENBERGER & E. BROWN, *A MANUAL OF INTERNATIONAL LAW* 51-52 (6th ed. 1976); J. STARKE, *AN INTRODUCTION TO INTERNATIONAL LAW* 172-73 (7th ed. 1972).

2. See W. LEVI, *CONTEMPORARY INTERNATIONAL LAW: A CONCISE INTRODUCTION* 97-99 (1979).

conduct should be regulated.³ The same has not been true when extraterritorial application extends to acts that were not illegal in the country of performance. This has been most evident in the area of international trade and commerce, where approaches to economic regulation, as well as substantive laws, rarely coincide.⁴ The extent to which a nation applies its domestic laws to foreign conduct has developed unilaterally. Although various guidelines have evolved in an attempt to clarify and control the reach of domestic laws, universal agreement remains absent.⁵ Consequently, for certain nations, the doctrine of territorial sovereignty has retained little significance.

The erosion of the territorial sovereignty doctrine is best exemplified by the extraterritorial application of the United States antitrust laws.⁶ This stems from the relatively liberal standard used by the United States courts to find subject matter jurisdiction over conduct that occurs outside the United States.⁷ In the past, the protests of foreign nations over this threat to their territorial sovereignty have been voiced mainly through diplomatic

3. This has been most common in the field of criminal law. See generally Strausberg, *Erdos v. United States: Expansion of Extraterritoriality and Revival of Extraterritoriality*, 3 GA. J. INT'L & COMP. L. 257 (1973).

4. For a brief review of British, Japanese, Canadian and Common Market antitrust laws, see W. FUGATE, *FOREIGN COMMERCE AND THE ANTITRUST LAWS* 468-91 (2d ed. 1973).

5. See generally Baker, *Antitrust and World Trade: Tempest in an International Teapot*, 8 CORNELL INT'L L.J. 16 (1974); Fortenberry, *Jurisdiction Over Extraterritorial Antitrust Violations—Paths Through the Great Grimpen Mire*, 32 OHIO ST. L.J. 519 (1971); Jones, *Extraterritoriality in the U.S. Antitrust: An International "Hot Potato,"* 11 INT'L LAW. 415 (1977).

6. The relevant United States antitrust laws are the Sherman Act, the Clayton Act, the Federal Trade Commission Act, and the Wilson Tariff Act. See 15 U.S.C. §§ 1-77 (1976).

7. Subject matter jurisdiction is the power to regulate foreign commerce. It is based upon the Constitution (Article I, Section 8, Clause 3), and is implemented by statute. [It] is the threshold issue in any dispute to determine whether the antitrust laws have been violated by conduct involving foreign commerce. It is not to be confused with whether, in other respects, a substantive offense has occurred.

Kiltgaard, *Subject Matter Jurisdiction*, in 17TH ANNUAL ADVANCED ANTITRUST LAW SEMINAR: INTERNATIONAL TRADE AND THE ANTITRUST LAWS 19 (Practicing Law Institute 1979) (citing *Occidental Petroleum Corp. v. Buttes Gas & Oil Co.*, 331 F. Supp. 92, 102-03 (C.D. Cal. 1971), *aff'd*, 461 F.2d 1261 (9th Cir.), *cert. denied*, 409 U.S. 950 (1972)). See also K. BREWSTER, *ANTITRUST AND AMERICAN BUSINESS ABROAD* 53-74 (1976); W. FUGATE, *supra* note 4, at 29-86; E. KINTNER & M. JOELSON, *AN INTERNATIONAL ANTITRUST PRIMER* 29-32 (1974). Subject matter jurisdiction is a distinct and separate requirement from personal jurisdiction. See KINTNER & JOELSON at 21.

channels.⁸ The inability to discourage the United States from use of the broad reach of its antitrust laws contributed to the recent enactment of retaliatory legislation by some foreign countries. This Comment will review the United States approach to subject matter jurisdiction determinations in foreign antitrust suits, articulate the provisions of the retaliatory legislation, and finally, evaluate the impact of such legislation on United States antitrust enforcement.

II. THE STATUS OF SUBJECT MATTER JURISDICTION IN ANTITRUST ENFORCEMENT

A. BACKGROUND

The most common limitation on subject matter jurisdiction has been the territorial principle⁹—a concept that limits a nation's jurisdictional reach to conduct that occurs within its territory.¹⁰ This simple definition has not been easily applied because the precise location of a particular activity has been subject to varied interpretations. The strict position is that jurisdiction can be based only on physical conduct that occurs in the territory (subjective territorial principle).¹¹ The expanded

8. See Lectures by legal scholars and government officials printed in International Law Association, Report of the Fifty-First Conference 384-562 (Tokyo 1964); Silkin, *The Perspective of the Attorney General of England and Wales* in AMERICAN BAR ASSOCIATION, PERSPECTIVES ON THE EXTRATERRITORIAL APPLICATION OF U.S. ANTITRUST AND OTHER LAWS 28-34 (J. Griffin ed. 1979).

9. The other principles of international jurisdiction that are referred to in antitrust stem largely from the criminal area. The *nationality principle* confers jurisdiction on the country in which the defendant is a national. The *passive nationality principle* grants jurisdiction on the basis of the nationality of the victim. The *protective principle* looks to whether the national interest is affected. The *universality principle* authorizes jurisdiction to a state that has custody of the offender. See Strausberg, *supra* note 3, at 260-61. In the civil area, the views have centered around the territorial and protective principles. See generally Snyder, *Foreign Investment and Trade: Extraterritorial Impact of United States Antitrust Law*, 6 VA. J. INT'L L. 1 (1965). However, even the protective principle has been limited only to activities which threaten the political structure of a nation rather than the economic structure. See Report of the Fifty-First Conference, *supra* note 8, at 444.

10. See RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 11-20 (1965); Report of the Fifty-First Conference, *supra* note 8, at 396.

11. See *The Schooner Exchange v. M'Faddon*, 11 U.S. (7 Cranch) 116, 136 (1812):
The jurisdiction of the nation, within its own territory, is necessarily exclusive and absolute; it is susceptible of no limitation, not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty, to the extent of the restriction, and an investment of that sovereignty, to the same extent, in that power

view confers jurisdiction when there is some form of intangible effect within the territory, even though the physical conduct occurred outside the nation's boundaries (objective territorial principle or effects test).¹²

Both interpretations of the territorial principle have been applied in the enforcement of the United States antitrust laws. Initially, in *American Banana v. United Fruit Company*,¹³ the subjective territorial principle was adopted, resulting in the dismissal of the suit because the alleged antitrust violation took place outside the United States.¹⁴ This strict interpretation of the territorial principle was not followed in subsequent cases, as courts struggled to find some anticompetitive conduct inside the United States to warrant jurisdiction over the activity.¹⁵ This was done even though the activity in the United States was minimal compared to the activity abroad.¹⁶

which could impose such restriction.

See also RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 17 (1965).

12. See *id.* § 18.

13. 213 U.S. 347 (1909).

14. Plaintiff and defendant were American corporations operating separate banana plantations in Central America. Plaintiff alleged that the defendant attempted to monopolize the banana industry by buying out competitors, restraining production, fixing prices, and ultimately conspiring with the Costa Rican government to seize the plaintiff's plantations. The anticompetitive acts were performed entirely outside the United States. Justice Holmes responded:

But the general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done [A statute is] intended to be confined in its operation and effect to the territorial limits over which the lawmaker has general and legitimate power. "All legislation is *prima facie* territorial." *Ex parte Blain, In re Sawers*, 12 Ch. Div. 522, 528; *State v. Carter*, 27 N.J. (3 Dutcher) 499; *People v. Merrill*, 2 Parker, Crim. Rep. 590, 596.

Id. at 356-57.

15. See *Thomsen v. Cayser*, 243 U.S. 66 (1917). A group of foreign defendants agreed to fix shipping rates and to restrain trade by preventing other competing shippers from profitable trade. The alleged antitrust violations occurred in foreign countries, but the shipping lines operated between the United States and South America. The court in distinguishing *American Banana* found that "the combination affected the foreign commerce of this country and was put into operation here." *Id.* at 88 (citing *United States v. Pacific and Arctic Ry. and Navigation Co.*, 228 U.S. 87 (1913)).

16. See *United States v. Sisal Sales Corp.*, 274 U.S. 268 (1927). The alleged antitrust violation in *Sisal* was a conspiracy among defendants to monopolize the market for sisal, accomplished by the procurement of discriminatory Mexican laws: Virtually all of the acts occurred in Mexico. The court found jurisdiction because the combination was "en-

In *United States v. Aluminum Company of America (Alcoa)*,¹⁷ the court opted for the objective territorial principle, and asserted subject matter jurisdiction over alleged antitrust violations which were performed entirely outside the United States.¹⁸ The sole basis for subject matter jurisdiction over the foreign activity was that the defendants "intended to affect imports and did affect them."¹⁹ Since the *Alcoa* case, the effects test has been the guideline for antitrust enforcement over restraints on interstate²⁰ and foreign commerce,²¹ brought about by any type of anticompetitive behavior. This extraterritorial application has continued despite harsh criticism by,²² and uncooperative behav-

tered into by the parties within the United States," in spite of the fact that the acts were permitted by the local law. *Id.* at 276.

17. 148 F.2d 416 (2d Cir. 1945). The objective territorial principle was subsequently approved by the Supreme Court. *See, e.g., Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 705 (1962).

18. 148 F.2d at 443. The defendants were two French corporations, two British corporations, and a Canadian subsidiary of the Aluminum Company of America. A conspiracy to divide world aluminum trade was alleged. Judge Learned Hand stated: "[I]t is settled law . . . that any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders which has consequences within its borders . . ." *Id.* Judge Hand required an intent to harm United States commerce and some effect on that commerce.

The *Alcoa* rule was clarified in *United States v. General Electric Co.*, 82 F. Supp. 753 (D.N.J. 1949). There, one of the defendants, a foreign company contended that the United States antitrust laws could not apply because there was no intent to restrain trade and no effect on U.S. foreign commerce. On the issue of intent, the court stated that only a general intent to violate the antitrust laws need be found, and that an agreement to refrain from its use of U.S. patents for ten years constituted a substantial effect on commerce. *Id.* at 891.

19. 148 F.2d at 443.

20. "When foreign transactions have a substantial and foreseeable effect on U.S. commerce, they are subject to U.S. law regardless of where they take place." Antitrust Division, U.S. Dept. of Justice, Antitrust Guide for International Operations 6 (1977). *See also, Westinghouse v. Rio Algom Corp.*, 617 F.2d 1248 (1980); *United States v. Holophane Co.*, 119 F. Supp. 114 (S.D. Ohio 1954), *aff'd*, 352 U.S. 903 (1956); *United States v. Timken Roller Bearing Co.*, 83 F. Supp. 284 (N.D. Ohio 1949), *aff'd and modified*, 341 U.S. 593 (1951); *United States v. National Lead Co.*, 63 F. Supp. 513 (S.D.N.Y. 1945), *aff'd*, 332 U.S. 319 (1947).

21. *See Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962); *Occidental Petroleum Corp. v. Buttes Gas & Oil Co.*, 331 F. Supp. 92 (C.D. Cal. 1971), *cert. denied*, 409 U.S. 950 (1972); *United States v. R.P. Oldham Co.*, 152 F. Supp. 818 (N.D. Cal. 1957); *United States v. Minnesota Mfg. & Mining Co.*, 92 F. Supp. 947 (D. Mass. 1950). Note that *Alcoa* has not been precisely followed because the subsequent cases have involved, in part, American corporations and their subsidiaries abroad. *See* 1 E. KINTNER, FEDERAL ANTITRUST LAW 299-327 (1980).

22. *See* critical opinions by foreign government representatives in Report of Fifty-First Conference, *supra* note 8, at 565-92. But compare the resolution adopted in 1972:

A State has jurisdiction to prescribe rules of law governing conduct that occurs outside its territory and causes an effect

ior of,²³ foreign countries.

Recently, in *Timberlane Lumber Company v. Bank of America*,²⁴ the Ninth Circuit determined that the effects test was an inadequate standard for subject matter jurisdiction determinations in foreign antitrust suits. The court selected a balancing of interests approach based upon the principles of international comity.²⁵ The *Timberlane* court reasoned that while the effects test sufficiently articulates the United States interest in a foreign antitrust suit, the interests of other nations involved are not always considered. To resolve this inequity, the court set forth a new approach to determine subject matter jurisdiction. The court stated that after a showing of some effect on United States commerce and a violation of the antitrust laws, international comity requires an evaluation of "the interests of, and links to, the United States . . . vis-a-vis those of other

within its territory if:

- (a) the conduct and the effect are constituent elements of activity to which the rule applies,
- (b) the effect within the territory is substantial and
- (c) it occurs as a direct and primarily intended result of the conduct outside the territory.

International Law Association, Report of Fifty-Fifth Conference (New York 1973). See generally Whitney, *Sources of Conflict Between International Law and the Antitrust Laws*, 63 YALE L.J. 655 (1954); Haight, *International Law and Extraterritorial Application of the Antitrust Laws*, 63 YALE L.J. 639 (1954); Jennings, *Extraterritorial Jurisdiction and the U.S. Antitrust Laws*, 33 BRIT. Y.B. INT'L L. 146 (1957); Katzenbach, *Conflicts on an Unruly Horse: Reciprocal Claims and Tolerances in Interstate and International Law*, 65 YALE L.J. 1087 (1956).

23. The process of suing a foreign corporation in an American court quite often forces the court to fashion a decree requiring conduct by the defendant outside the United States. See *United States v. Imperial Chemical Indus., Ltd.*, 100 F. Supp. 505 (S.D.N.Y.), *opinion on relief*, 105 F. Supp. 215 (S.D.N.Y. 1952), where the court ordered the defending British company to transfer various patents obtained in England because of their adverse effects on U.S. antitrust laws. Compliance by the defendant would mean cancellation of other agreements between the defendant and another British company. In a subsequent suit brought in England, *British Nylon Spinners, Ltd. v. Imperial Chemical Indus., Ltd.*, [1952] 2 All E.R. 780, 783-84, the English tribunal held that Imperial was bound by English law to perform the contract with British Nylon irrespective of the U.S. court order. See, e.g., *Bulova Watch Co. v. Steele*, 194 F.2d 567 (5th Cir.), *aff'd*, 344 U.S. 280 (1952); *United States v. The Watchmakers of Switzerland Information Center, Inc.*, [1963] Trade Cas. (CCH) ¶ 70,600 (S.D.N.Y. 1962).

24. 549 F.2d 597 (9th Cir. 1976).

25. *Id.* at 613-14. International comity is defined as "[t]he recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience and to the rights of its own citizens or of other persons who are under the protection of its laws." BLACK'S LAW DICTIONARY 334 (rev. 4th ed. 1968).

nations"²⁶ One of the comity factors that the court deemed important for this analysis was "the relative significance of effects on the United States as compared to those elsewhere"²⁷ Thus the effects on United States commerce was transformed from the sole determinant of jurisdiction to one of a group of factors to be weighed in determining relative national interests.

As the following three circuit court opinions demonstrate, the novel approach of the *Timberlane* court has not been precisely followed. This has caused further uncertainty among foreign businesses and continued foreign disapproval. As a result, certain foreign governments have enacted retaliatory legislation to combat the extraterritorial reach in American foreign anti-trust cases.

B. RECENT DEVELOPMENTS

*Mannington Mills, Inc. v. Congoleum Corporation*²⁸

In *Mannington Mills*, a violation of section 2 of the Sher-

26. 549 F.2d at 613. The alleged restraint on foreign commerce was a conspiracy among defendants to prohibit plaintiff from successfully operating a lumber business in Honduras. A portion of the finished product was exported to the United States. The plaintiffs were a United States partnership, and two Honduran corporations. The defendants were citizens and incorporates of the United States. The restrictive act occurred on foreign territory. The lower court dismissed the case, in part because the effects on United States foreign commerce were insubstantial. After analyzing the nature of the effect needed for jurisdiction, the appellate court stated: "The effects test by itself is incomplete because it fails to consider other nations' interests. Nor does it expressly take into account the full nature of the relationship between the actors and this country." *Id.* at 611-12 (footnote omitted). The court then set forth a three-step test for examining the actual and intended effects on U.S. commerce, the magnitude of the impact and the international comity factors, including:

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.

Id. at 614; see also *id.* at 614 n.31 (citing RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, § 40 (1965)).

27. 549 F.2d at 614.

28. 595 F.2d 1287 (3d Cir. 1979).

man Act was alleged against Congoleum through their unlawful procurement of foreign patents.²⁹ Mannington and Congoleum were American corporations engaged in the business of manufacturing floor coverings. Congoleum obtained a United States patent for a chemically embossed vinyl floor covering, and Mannington was licensed to use the Congoleum patent in the United States. Congoleum also obtained similar patents in twenty-six foreign countries.³⁰ Initially, Mannington unsuccessfully attempted to extend its Congoleum license beyond the United States. An action was then filed by Mannington in the New Jersey District Court,³¹ alleging that its United States export trade had been restricted both by Congoleum's fraudulent representation to foreign governments in obtaining the patents,³² and by its enforcement tactics when it filed or threatened to file patent infringement suits.³³

Although the alleged anticompetitive conduct occurred entirely in foreign countries and was specifically approved by foreign governments, the court found jurisdiction over the subject matter because "two American litigants are contesting alleged antitrust activity abroad that results in harm to the export business of one"³⁴ Thus, the *Alcoa* effects test was the sole consideration for the finding of jurisdiction.

After establishing jurisdiction, the court accepted the comity approach of *Timberlane*, but provided for that consideration in a separate analysis,³⁵ in which it adopted its own list of the relevant comity factors and remanded for further consideration on that basis. The relevant factors to be considered included:

- [1] Degree of conflict with foreign law or policy;
- [2] Nationality of the parties;

29. *Id.* at 1290.

30. *Id.*

31. *Mannington Mills, Inc. v. Congoleum Indus., Inc.*, 197 U.S.P.Q. 145 (D.N.J. 1977).

32. 595 F.2d at 1290.

33. *Id.* A finding for Mannington would effectively invalidate Congoleum's right to license foreign patents or to enforce foreign violations through the U.S. courts.

34. 595 F.2d at 1292. Essentially, this was an application of the effects test. See *Zenith Radio Corp. v. Hazeltine Research Inc.*, 395 U.S. 100 (1969).

35. "Having concluded that . . . there is subject matter jurisdiction, the question remains whether jurisdiction should be exercised." 595 F.2d at 1294.

[3] Relative importance of the alleged violation of conduct here compared to that abroad;

[4] Availability of a remedy abroad and the pendency of litigation there;

[5] Existence of intent to harm or affect American commerce and its foreseeability;

[6] Possible effect upon foreign regulations if the court exercises jurisdiction and grants relief;

[7] If relief is granted, where a party will be placed in the position of being forced to perform an act illegal in either country or be under conflicting requirements by both countries;

[8] Whether the court can make its order effective;

[9] Whether an order for relief would be acceptable in this country if made by the foreign nation under similar circumstances;

[10] Whether a treaty with the affected nations has addressed the issue.³⁶

By relying on only the effects test to determine if jurisdiction exists, and using the comity factors only with regard to whether jurisdiction should be exercised, the court provided a much different standard than in *Timberlane*.³⁷

36. *Id.* at 1297-98 (footnotes omitted).

37. See the concurring opinion of Judge Adams in *Mannington Mills*, *id.* at 1299. This difference has been underscored in a recent case:

Accordingly, the proper standard is a balancing test that weighs the impact of the foreign conduct on United States commerce against the potential international repercussions of asserting jurisdiction. In some cases, this analysis has been used to determine whether subject matter jurisdiction exists in the first instance. See *Mannington Mills*, *supra*, at 1299-1300 (Adams, J., concurring); *Timberlane*, *supra*, at 613. In others, the courts have first used the effects test alone to decide if jurisdiction is proper and then applied the foreign relations impact factors to determine if abstention would nevertheless be appropriate. See *Mannington Mills*, *supra* at 1294-1298 (majority opinion).

Dominicus Americana Bohio v. Gulf & Western Indus., Inc., 473 F. Supp. 680, 687-88

*Westinghouse Electric Corporation v. Rio Algom Limited*³⁸

The lengthy Westinghouse uranium litigation provided the next subject matter determination in foreign antitrust.³⁹ In *Westinghouse Electric Corporation v. Rio Algom Limited*, Westinghouse claimed that it was forced to default on numerous contracts because the sharp increase in the price of uranium rendered performance financially impractical. Westinghouse had alleged that a cartel among United States and foreign entities to restrain uranium trade was the proximate cause of the price increase. The threshold issue for the *Westinghouse* court was to determine its legislative authority over nine defaulting foreign corporations in view of the emerging trend toward international comity.⁴⁰

Westinghouse argued that the forum possessed jurisdiction over the controversy on the basis of the effects doctrine.⁴¹ It alleged that price-fixing agreements were entered into by the defendants at locations in the United States and abroad, and that the parties intended to affect United States commerce. The defaulters maintained that the comity factors must be considered either initially to determine if jurisdiction exists or subsequently to determine if jurisdiction should be exercised.⁴²

As in *Mannington Mills*, the court explicitly viewed the jurisdiction issue as a two-step process: "(1) [D]oes subject matter jurisdiction exist; and (2) if so, should it be exercised?"⁴³ The *Alcoa* effects test was deemed sufficient to satisfy the first con-

(S.D.N.Y. 1979). For further discussions on *Mannington Mills*, see Comment, *Defense to Actions Against Foreign States Under the United States Antitrust Laws*, 20 HARV. INT'L L.J. 583 (1979); Note, *A Further Step Toward a Complete Subject Matter Jurisdiction Test*, 2 NW. J. INT'L L. & BUS. 241 (1980).

38. 617 F.2d 1248 (7th Cir. 1980).

39. For background on the litigation, see Comment, *The International Uranium Cartel: Litigation and Legal Implications*, 14 TEX. INT'L L.J. 64 (1979). See, e.g., *In re Westinghouse Electric Corp. Uranium Contract Litigation*, [1977] 3 All E.R. 703, [1977] 3 W.L.R. 430; *Rio Tinto-Zinc Corp. v. Westinghouse Electric Corp.*, [1978] 1 All E.R. 434, [1978] 2 W.L.R. 81, involving the British Court's denial of discovery attempts by Westinghouse.

40. 617 F.2d at 1253. Four Australian companies, two British companies, two South African companies and one Canadian corporation were in default. *Id.* at 1253 n.11.

41. *Id.* at 1253-56.

42. *Id.* at 1254.

43. *Id.* at 1253.

sideration, and proper jurisdiction was found.⁴⁴ The court responded to the defaulters' argument by interpreting *Timberlane* to be consistent with the notion that jurisdiction still rests solely on the basis of the effects test.

In deciding whether jurisdiction over the foreign corporations should be exercised, the court held the comity factors of *Timberlane* and *Mannington Mills* to be inapplicable. The court stated that the factors set out in *Mannington Mills* were not binding because *Mannington Mills* was not the law of the Fifth Circuit.⁴⁵ Then, in dictum, the court stated that the defendants' absence from the court prevented a useful and beneficial inquiry into those factors.⁴⁶ The important comity factors for the district court were the complexity of the lawsuit, the seriousness of the charges, and the recalcitrant attitude of the defaulters.⁴⁷ This approach was adopted by the appellate court.⁴⁸

Although the opinion strongly asserts its consistency with *Timberlane*,⁴⁹ the failure to consider the foreign nation interest makes that argument difficult to accept. Because Westinghouse only pleaded an intent to affect and an actual impact on United States commerce, the decision resurrects the effects test as the dominant factor for subject matter jurisdiction.⁵⁰

44. "Accordingly, the picture which emerges is one of concerted conduct both abroad and within the United States intended to affect the uranium market in this country. . . . We therefore conclude that Westinghouse's allegations against the defaulters do fall within the jurisdictional ambit of the Sherman Act, as defined in *Alcoa*." *Id.* at 1254.

45. *Id.* at 1255.

46. *Id.* at 1255-56.

47. *Id.* at 1255.

48. *Id.* at 1256.

49. Amicus curiae stated that the *Timberlane* case required that jurisdiction be premised on a balancing test. The court responded:

We do not read *Timberlane* so broadly. The "jurisdictional rule of reason" espoused in *Timberlane* is that while an effect on American commerce is the necessary ingredient for extra-territorial jurisdiction, considerations of comity and fairness require a further determination as to "whether American authority should be asserted in a given case." The clear thrust of the *Timberlane* Court is that once a district judge has determined that he has jurisdiction, he should consider additional factors to determine whether the exercise of that jurisdiction is appropriate.

Id. at 1255 (footnotes omitted).

50. The decision may not amount to a complete resurrection of the *Alcoa* test because in addition to the effect on commerce, it was alleged that part of the conspiracy

*Zenith Radio Corporation v. Matsushita Electric Industrial Company*⁵¹

Zenith involved an alleged conspiracy among eight foreign and two domestic corporations to gain control of the American market for consumer electronic products.⁵² The plaintiffs, Zenith Radio Corporation (Zenith) and National Union Electric Corporation (NUE), and all the defendants, are world-wide manufacturers of consumer electronic products. Zenith and NUE contended that for a period of thirty years the defendants agreed to artificially lower the export prices of their products, including those in United States commerce. This was accomplished by flooding the United States markets with extremely low priced products. The plaintiffs alleged that this scheme was intended to eliminate the plaintiffs from competing effectively in the United States. As a result, NUE ceased production in the television receiver industry and Zenith was forced to relocate its operations outside the United States.⁵³

The subject matter jurisdiction issue involved Mitsubishi Electric Corporation, (MELCO), a Japanese corporation that neither sold products in the United States nor maintained a business presence there. MELCO argued that this absence of a nexus to American foreign or domestic commerce required that it be dismissed from the action. MELCO asserted that the holding in *American Banana* was the controlling test for subject matter jurisdiction.⁵⁴ While MELCO recognized *Alcoa* and its progeny, it attempted to distinguish those cases.⁵⁵ Additionally, MELCO contended that customary international law has never authorized the extraterritorial application of economic regula-

was entered into in the U.S. See note 16 *supra*.

51. [1980-2] Trade Cas. (CCH) ¶ 63,288, 494 F. Supp. 1161 (E.D. Pa. 1980).

52. The principal defendants were: Matsushita Electric Industrial Co., Ltd., Toshiba Corporation, Hitachi, Ltd., Sharp Corporation, Sanyo Electric Co., Ltd., Sony Corporation, a Japanese trading company (Mitsubishi Corporation), and two American companies (Sears, Roebuck & Co. and Motorola, Inc.). "Fourteen other defendants are subsidiaries of these principals." 494 F. Supp. at 1164-65.

53. *Id.* at 1165. For the litigation on other issues in the case, see *Zenith Radio Corp. v. Matsushita Electric Indus. Co.*, 494 F. Supp. 1190 (E.D. Pa. 1980); 494 F. Supp. 1246 (E.D. Pa. 1980); *National Union Elec. Corp. v. Matsushita Elec. Indus. Co.*, 494 F. Supp. 1257 (E.D. Pa. 1980); *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 494 F. Supp. 1263 (E.D. Pa. 1980).

54. 494 F. Supp. at 1170.

55. *Id.*

tory laws, especially when the conduct is legal in the country of its occurrence.⁵⁶ The plaintiffs argued that the court did have subject matter jurisdiction over MELCO because it was alleged that MELCO participated in a world-wide conspiracy intended to affect and actually affecting American commerce.⁵⁷

The district court began by addressing MELCO's somewhat novel argument that customary international law operates as a bar to the extraterritorial application of economic laws. By definition, a principle of customary international law develops when nations regularly and repeatedly act in a certain manner because of an understanding that a legal obligation requires them to do so.⁵⁸ Rather than analyze the development of customary law between nations in the economic area, the court instead focused on the relationship between customary international law and United States domestic law when the two conflict. The unequivocal position of the United States courts has been that "international law must give way when it conflicts with or is superseded by a federal statute."⁵⁹ Therefore, the determination is controlled by United States law.

According to MELCO, the controlling United States law was the strict territorial principle set forth in *American Banana*.⁶⁰ The court rejected this argument, finding that "it is abundantly plain that some extraterritorial application of the Sherman Act is proper."⁶¹

After noting the differing approaches by *Mannington Mills* and *Timberlane*, the court, in essence, failed to adopt either. The court chose not to rely entirely on *Mannington Mills* because "the parties in that case were both American firms, and the issues were therefore simpler . . ."⁶² Instead, the following test was set forth:

Our independent canvass convinces us that the
Alcoa plus comity test applied in *Mannington*

56. *Id.* at 1171.

57. *Id.*

58. See G. SCHWARZENBERGER, *supra* note 1, at 26; J. BRIERLY, *supra* note 1, at 59-62.

59. 494 F. Supp. at 1178.

60. See note 14 *supra*.

61. 494 F. Supp. at 1185.

62. *Id.* at 1189.

Mills is equally appropriate for the case at bar. Therefore, when we examine the factual record in this case, we will look for 1) intent to affect United States commerce, 2) some actual effect on that commerce; and 3) facts relevant to balancing the ten comity factors outlined in *Mannington Mills*⁶³

Contrary to *Mannington Mills*, the court specifically indicated that the "substantiality of both the effect and the intent are taken into consideration in the balancing process."⁶⁴ This language, added in a footnote, tends to revert the standard back toward a *Timberlane* framework by directly comparing the United States interests to the interests of the foreign nation. However, the court was not clear on this point. The court concluded by deferring its final subject matter determination until completing a further factual analysis.⁶⁵

C. IMPACT

Extraterritorial application of the antitrust laws is deemed necessary to prevent dissimilar regulation between businesses located within and those located beyond the United States. It is believed that failure to regulate foreign conduct having an effect on United States foreign or interstate commerce would provide a haven for antitrust immunity. Conversely, the foreign nation interest in the extraterritorial controversy lies in the infringement of national sovereignty. The significance of the *Timberlane* case is that these two competing national interests were weighed against each other to determine jurisdiction.⁶⁶ In other words, the antitrust laws would apply to foreign conduct only when the United States, on balance, is the most interested nation state.

Certainly, the degree to which the conduct affects the commerce of the respective nations is of significance to both nations. The *Timberlane* court clearly states that the relative effects on

63. *Id.* (footnotes omitted).

64. *Id.* at 1189 n.66.

65. *Id.* at 1189.

66. In the litigation before the *Timberlane* opinion was decided, the only case that was reversed for lack of subject matter jurisdiction was *American Banana v. United Fruit*, 213 U.S. 347 (1909). This includes actions brought both by the government and by private parties. See Rahl, *Foreign Commerce Jurisdiction of American Antitrust Laws*, 43 ANTITRUST L.J. 521, 521 (1973-1974); W. FUGATE, *supra* note 4, at 498.

commerce should be compared, along with the other comity factors. Only in such a comparative context can the infringement of national sovereignty and the threat to effective antitrust enforcement be articulated. The developments since the balancing approach in *Timberlane* have resulted in courts placing greater emphasis on the interests of the United States, and giving correspondingly less consideration to the legitimate foreign nation interests.

The likelihood of dismissal of an antitrust suit is much greater under the *Timberlane* approach, because a moderate or even minimal foreign nation interest would warrant dismissal if the corresponding United States interest is of lesser significance. Under the *Mannington Mills* view, if application of the comity factors reveals a minimal or moderate foreign nation interest, this would presumably be insufficient to dismiss, in light of the existing United States subject matter jurisdiction over the conduct via the effects test. Only a strong foreign nation interest will suffice for dismissal under this test.

While the *Zenith* case is a sign of encouragement for a more equitable treatment of the foreign nation interest, it is not certain that this approach will be employed in the future. This issue is critical, especially to foreign entities, because after jurisdiction has been properly pleaded, the defending party becomes subject to the United States procedural rules for discovery.⁶⁷ When potential evidence is located abroad, the extraterritorial effect of a discovery order has also been a very sensitive issue among foreign nations.⁶⁸ The United States has only partially responded to these concerns, as some extraterritorial discovery orders are upheld even if compliance violates a foreign law.⁶⁹

67. FED. R. CIV. P. 26-37 govern the discovery of parties. Failure to comply with a discovery order may attract the sanctions of rule 37.

68. In the past, foreign countries have responded with legislation which prohibits production of documents requested when the documents are located in their respective countries. See Quebec Business Concerns Act, Que. Rev. Stat. ch. 278 (1964); Netherlands Economic Competition Act of June 28, 1956, amended Act of July 16, 1958; (Foreign Proceedings (Prohibition of Certain Evidence) Act), 1976, Australia. For the United Kingdom, see text accompanying notes 73-119 *infra*.

69. The present standard of the United States is to weigh the hardships placed on the defendant in relationship to the importance of the documents to the plaintiff. The balance almost always favors the plaintiff because of the vital national interest in prosecuting antitrust violations. See *Timberlane v. Bank of America Nat'l Trust & Savings Assoc.*, 549 F.2d 597, 613-15 (9th Cir. 1976); *United States v. Field*, 532 F.2d 404 (5th

The subject matter jurisdiction issue is also important because the remedies enforced are guided by United States law. In general, antitrust violations are remedied by actual damages for suits brought by the United States government,⁷⁰ and by treble damages for suits brought by private parties.⁷¹ The punitive nature of the latter is rapidly becoming another area of international disapproval.⁷²

III. RETALIATORY LEGISLATION BY THE UNITED KINGDOM

Recently, the United Kingdom (the legislating country) approved legislation that will create a disincentive to the extraterritorial reach of various foreign laws.⁷³ The Protection of Trading Interests Act (the Act), contains four major components:

[1] The Secretary of State is empowered to order non-compliance with commercial document and information orders by foreign courts or authorities against persons in the United Kingdom, when the material sought is outside the territorial jurisdiction of the ordering country.⁷⁴

Cir. 1976); *United States v. First National City Bank*, 396 F.2d 897, 902-04 (2d Cir. 1968); *American Indus. Contracting, Inc. v. Johns-Manville Corp.*, 326 F. Supp. 879, 880 (W.D. Pa. 1971).

The prohibition under the law of the country where the documents are located is no excuse for failure to comply, although a good faith attempt to comply may induce the court to avoid using penalties. *See generally* E. KINTNER & M. JOELSON, *supra* note 7, at 48-58. However, collusion between the party and the foreign government will warrant either a production order or sanctions. *See Note, Discovery of Documents Located Abroad in U.S. Antitrust Litigation: Recent Developments in the Law Concerning the Foreign Illegality Excuse for Non-Production*, 14 VA. J. INT'L L. 747 (1974).

70. 15 U.S.C. § 15a (1976).

71. *Id.* § 15.

72. [May 8, 1980] ANTITRUST & TRADE REG. REP. (BNA) No. 963, A-10. Forty-one British Commonwealth Nations adopted a resolution against U.S. multiple damage enforcement. *See, e.g.*, Australia's Foreign Antitrust Judgments (Restriction of Enforcement) Act, No. 13, Austl. Act (1979), and the United Kingdom's Protection of Trading Interests Act, 1980, c. 11.

73. The Protection of Trading Interests Act, 1980, c. 11, [hereinafter cited as *The Act*], reprinted in ANTITRUST & TRADE REG. REP. (BNA) No. 959 at F-1. *See Comment, United Kingdom Protection of Trading Interests Act 1980*, 14 J. WORLD TRADE L. 461 (1980).

74. The Act, c. 11 § 2. The Secretary of State is granted very broad discretion to disallow a request that "infringes the jurisdiction of the United Kingdom or is otherwise prejudicial to the sovereignty of the United Kingdom [or that] would be prejudicial to the security of the United Kingdom or to the relations of the government of the United

[2] Foreign multiple damage judgments are barred from recognition in the United Kingdom, and the Secretary of State possesses broad discretionary power to deny recognition to other foreign country judgments.⁷⁵

[3] Certain parties suffering multiple damage judgments in foreign courts are now provided with a cause of action which allows for a reduction of the award to actual damages.⁷⁶

[4] The Act allows for recognition, in the legislating country, of judgments obtained in foreign tribunals from legal proceedings pursuant to a similar law.⁷⁷

Kingdom with the government of any other country." *Id.* § 2(2).

Additionally, requests for commercial documents and information may also be denied if made before a lawsuit has been filed in the foreign country. The Act § 2(3)(a). Similarly treated are orders requiring "a person to state what documents relevant to any such proceedings are or have been in his possession, custody or power or to produce . . . any documents other than particular documents specified in the requirement." The Act, § 2(3)(b). This subsection will impede efforts by foreign countries in determining if a substantive offense has occurred. *See Evidence (Proceedings in Other Jurisdictions) Act, 1975, c. 34, superseded in part by The Act, § 4.*

75. Foreign judgments recognition by either statutory registration or common law proceedings no longer apply. "[A] judgment for multiple damages means a judgment for an amount arrived at by doubling, trebling or otherwise multiplying a sum assessed as compensation for the loss or damage sustained by the person in whose favor the judgment is given." The Act, §§ 5(2)(a), 5(3). Multiple damage judgments rendered but not registered before March 20, 1980, are also affected. *See The Act, § 5(6).*

Foreign judgments for actual damages are also affected:

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

The Act, § 5(4). *See text accompanying notes 79-89 infra.*

76. The Act, § 6. *See text accompanying notes 90-116 infra.*

77. If it appears to Her Majesty that the law of an overseas country provides or will provide for the enforcement in that country of judgments given under section 6 above, Her Majesty may by Order in Council provide for the enforcement in the United Kingdom of judgments given under any provision of the law of that country corresponding to that section. An Order under this section may apply, with or without modification, any of the provisions of the Foreign Judgments (Reciprocal Enforcement) Act 1933.

The Act, § 7.

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The remainder of this Comment will focus primarily on the "non-recognition of judgments" and the "cause of action" clauses of the Act as they relate to United States antitrust enforcement.⁷⁸

A. RESTRICTIONS ON THE ENFORCEMENT OF CERTAIN OVERSEAS JUDGMENTS

The section of the Act providing for the non-recognition of certain overseas judgments alters the procedures for enforcement of various foreign country judgments in the United Kingdom. Briefly stated, statutory registration and common law proceedings are prohibited methods for enforcing foreign country judgments that either are in excess of actual damages or were rendered pursuant to laws promoting a competitive economic system.⁷⁹ This controversial section mandates non-recognition of all foreign judgments for multiple damages, and provides the Secretary of State with the option to not recognize other foreign judgments that were rendered pursuant to the economic regulatory laws of a foreign nation.⁸⁰

The unequivocal language with regard to multiple damage judgments characterizes such awards as per se contrary to British public policy.⁸¹ The critical factor is that the Act addresses *multiple damage judgments* rather than just the *multiple damages*; even the compensatory amount of a foreign multiple damage judgment will not be recognized by a United Kingdom court.⁸² The legislative intent is to discourage foreign lawsuits

78. Other provisions of the Act include: (1) an enabling section that grants the Secretary of State sole authority to decide the impact of conduct by an overseas country on international trade, and if determined to be damaging to British trading interests, the Secretary can order notification and noncompliance by persons in the United Kingdom that are adversely affected. The Act, § 1; (2) criminal penalties against citizens of the United Kingdom and Colonies or body corporates incorporated therein for acts done in the territorial boundaries of the United Kingdom that contravene the orders or directions of the Secretary of State. The Act, § 3; (3) the repealing of (a) the Shipping Contracts and Commercial Documents Act, 1964, c. 87, and (b) paragraph 18 of Schedule 2 and paragraph 24 of Schedule 3 of the Criminal Law Act, 1977, c. 45. The Act, § 8(5).

79. See note 75 *supra*.

80. *Id.*

81. Administration of Justice Act 1920, 10 & 11 Geo. 5 c. 81, § 9(2)(f); Foreign Judgments (Reciprocal Enforcement) Act 1933, 23 & 24 Geo. 5 c. 13, § 4(1)(a)(v), § 8(1), (2).

82. The Convention on the Reciprocal Recognition and Enforcement of Judgments in Civil Matters, initialed Oct. 26, 1976, United States - United Kingdom, *reprinted in* 16 INT'L LEGAL MATERIALS 71 (1977), was the result of a bilateral attempt to provide a

against individuals, corporations, and subsidiaries that have assets in the United Kingdom.⁸³

Since all multiple damages are denied, this section can be broadly applied. For example, multiple damage judgments are not recognized even though the defendant in the foreign litigation submitted to the court's jurisdiction.⁸⁴ Similarly, if the defendants satisfy the strict territoriality concept of subject matter jurisdiction in the rendering country, the judgment is still not enforceable in the United Kingdom. Multiple damage judgments against individuals of any nationality, or corporations registered under the laws of any country, can prevent a successful party from recovering assets that are located within the territory of the United Kingdom in satisfaction of the multiple damage judgment.⁸⁵ Perhaps most drastically, citizens and corporations

uniform approach to the recognition and enforcement of judgments in civil cases, including violations of economic laws. Although the Convention was never ratified, certain provisions of the text are useful in articulating the scope of this section of the Act. The Convention expressly excluded recognition of judgments "to the extent that they are for punitive or multiple damages." *Id.* Art. 2(2)(b). However, on the issue of whether or not the compensatory amount of such judgments should be recognized, the Convention stated: "Severable parts of a judgment in respect of different matters shall be entitled to recognition or enforcement under this Convention if such parts would have been so entitled had they taken the form of separate judgments." *Id.* Art. 2(5). A broad reading of this section indicates that the compensatory part of a treble damages antitrust award would be recognized because it is severable and easily calculable. *See Hay & Walker, The Proposed Recognition-of-Judgments Convention Between the United States and the United Kingdom*, 11 *TEX. INT'L L.J.* 421, 423 (1976). The qualifying language in section 5 of Article 2 of the Convention is not included in section 5 of the Act. For further discussions on the United States-United Kingdom Convention, see Smit, *The Proposed United States-United Kingdom Convention on Recognition and Enforcement of Judgments: A Prototype for the Future?*, 17 *VA. J. INT'L L.* 443 (1976-1977); Hay & Walker, *The Proposed U.S.-U.K. Recognition-of-Judgments Convention: Another Perspective*, 18 *VA. J. INT'L L.* 753 (1977-1978).

83. 973 *PARL. DEB.*, H.C. (5th ser.) 1533 (1979).

84. This directly conflicts with United Kingdom statutory and common law because judgments are generally recognized and enforced when the defendant has voluntarily appeared in the foreign tribunal. *See Administrative Justice Act*, 1920, 10 & 11 *Geo. 5*, c. 81, §§ 9(2)(a), (b) and *Foreign Judgments (Reciprocal Enforcement) Act*, 1933, 24 & 25 *Geo. 5*, c. 13, § 4(2)(a)(i). *See also Smith, Personal Jurisdiction*, 2 *INT'L AND COMP. L.Q.* 510 (1953).

The policy collision has been averted in the Westinghouse litigation because the British corporate defendants declined to appear, and instead submitted amicus curiae briefs. A similar response can be expected in future multiple damages cases. *See text accompanying notes 38-50 supra.*

85. Additionally, in *Pziser, Inc. v. Government of India*, 434 U.S. 308, *reh. denied*, 435 U.S. 910 (1978), the Supreme Court held that a foreign government was a "person" within the meaning of § 4 of the Sherman Act, and was thus entitled to sue for treble damages. The Court emphasized that foreign plaintiffs must be afforded the opportunity

are insulated from a multiple damage judgment rendered against them by their own country if assets sought for execution of the judgment are located in the United Kingdom. This holds true even though the issue involved may not concern British trading interests or may even promote economic policies similar to the United Kingdom.⁸⁶ The ability of a private party to enforce American antitrust laws is certain to be curtailed as a result of this multiple damage section.

Because of the Secretary of State's power to order non-recognition of actual damage judgments, the scope of this section is not clearly delineated. This portion of the Act allows an order to be made if the substantive law applied in the foreign tribunal either discourages cooperative business behavior or encourages competitive behavior.⁸⁷ The legislative focus in this instance is

to enforce the antitrust laws.

Also, § 4 of the Clayton Act allows reasonable attorney fees to successful antitrust plaintiffs. This additional amount appears to satisfy the Act's definition of multiple damages.

86. Compare Foreign Antitrust Judgments (Restriction of Enforcement) Act, No. 13, Austl. Act (1979). This law enacted by the Australian government has a limited scope, thereby presenting a far more sensible approach.

First, the Australian Act focuses on only antitrust judgments rendered by a foreign court which had asserted jurisdiction inconsistent with Australian standards, or which had in some manner threatened the trading stature of Australian commerce. Second, the Attorney-General maintains absolute discretion to grant total or partial enforcement or deny enforcement.

The problems with the British law are eliminated. Under the Australian statute, recognition depends on jurisdiction rather than the punitive nature of the judgment. Also, actual damages of a multiple damage judgment can be recovered if the Attorney-General finds jurisdiction to have been proper in the foreign court. The key factor is that the Attorney-General maintains some discretion.

For an overview of Australian antitrust law, see Taylor, *The Extraterritoriality of the Australian Antitrust Law*, 13 J. INT'L L. ECON. 273 (1979).

87. The economic policies of the United Kingdom are not guided by the notion that all anticompetitive behavior is per se harmful to the economy. Five statutes comprise the restrictive trade laws of the United Kingdom: Monopolies and Restrictive Practices (Inquiry and Control) Act 1948, 11 & 12 Geo. 6 c. 66; Restrictive Trade Practices Act 1956, 4 & 5 Eliz. 2 c. 68; Restrictive Trade Practices Act, 1968, c. 66; Fair Trading Act, 1973, c. 41; Restrictive Trade Practices Act, 1976, c. 34. In general, all restrictive agreements between two or more persons carrying on business in the United Kingdom must be registered with the government, provided the agreements are for goods or services. See Restrictive Trade Practices Act, 1976, c. 34 §§ 6, 11. Certain anticompetitive agreements are permitted if one of the following conditions is present: the agreement is important to the national economy, it holds down prices, or it generates some other public benefit. Determinations are made by the Restrictive Practices Court.

Thus, a conflict arises when the business entities making the agreement comply with United Kingdom antitrust law, but are condemned by the United States because their cooperative behavior has had an anticompetitive effect on American foreign commerce.

on countries with economic laws that are substantially different from those of the United Kingdom. It addresses itself to actual damage judgments which directly relate to antitrust suits prosecuted by the United States government.⁸⁸

The extent to which the Secretary of State will utilize his discretion is subject to great speculation. Undoubtedly, this clause would be utilized when the foreign country has overstepped the principle of subjective territorial jurisdiction and employed an objective territorial jurisdiction test.⁸⁹ In antitrust suits prosecuted by the United States government, the risk of non-recognition is very high when the defendants are citizens or corporations of the United Kingdom and lack a subjective territorial link to the United States. It is quite possible that the Secretary would order non-recognition regardless of the nationality of the defendants as long as the territorial link was not present.

B. THE NEW CAUSE OF ACTION ALLOWING RECOUPMENT FOR CERTAIN AGGRIEVED PARTIES

The new cause of action, allowing recoupment of the amount above actual damages awarded, imposes two qualifications on a party attempting to invoke its provisions (the qualifying defendant). First, the qualifying defendant must bear a sufficient territorial relationship with the legislating country such that the United Kingdom has an interest in protecting that person or entity, and second, the qualifying defendant must be adequately disconnected from the forum which rendered the multiple damage judgment.⁹⁰

The Relationship Between The Qualifying Defendant and The Legislating Country

The recoupment section allows a party to recover if it is a citizen, corporation, or person carrying on business in the legis-

88. Presumably, the per se denial is not applied in this instance for two reasons: 1) the U.S. government, not being a private party, will be involved and thus other considerations may be present, and 2) if jurisdiction is consistent with the strict territoriality principle, recognition may be granted.

89. The first test will most likely be the *Westinghouse* case where Rio Tinto Zinc Corp., Ltd., and RTZ Services, Ltd., were subjected to the United States antitrust laws by application of the objective territorial principle. See text accompanying notes 38-50 *supra*.

90. The Act, § 6(1).

lating country.⁹¹ A citizen and a body corporate have been clearly defined by statute and the composition of these groups is easily ascertainable.⁹² However, the same is not true for a person carrying on business in the United Kingdom.

In the United Kingdom, the issue of what constitutes "carrying on business" has developed from common law. There are four requirements which must be met before a company or other business arrangement is deemed to carry on business:

- [1] The activity must in fact be operated as a business.⁹³
- [2] The business must be located at a fixed and permanent place within the territorial jurisdiction of the legislating country.⁹⁴
- [3] The business must have been in operation for a substantial period of time.⁹⁵
- [4] In the case of an entity formed or incorporated abroad, the agent or subsidiary in the legislating country must possess independent authority to act.⁹⁶

91. *Id.*

92. An individual is a citizen of the United Kingdom by birth therein, descent, naturalization, or any statutory decree. See 4 HALSBURY'S LAWS OF ENGLAND ¶¶ 905, 908 (4th ed.). Aliens can obtain citizenship, subject to the major qualification of eight years residency. See *id.* ¶ 916. Additionally, individuals of the United Kingdom Colonies also qualify as citizens of the United Kingdom. See *id.* ¶¶ 902-03. The controlling statute in this area is the British Nationality Act, 1948, 11 & 12 Geo. 6 c. 56, amended 1965 c. 34.

The requirements for corporate creation are outlined in 9 HALSBURY'S LAWS OF ENGLAND, ¶¶ 1231-1248 (4th ed.). A corporation incorporated under English law has British nationality irrespective of the nationality of its members. *Id.* ¶ 1227.

93. A business entails every trade, occupation, or profession, and also includes banks and other intangibles. See generally A. DICEY & J. MORRIS, THE CONFLICT OF LAWS 164 (9th ed. 1973).

94. *Id.* A fixed and permanent place has been interpreted to require a person to conduct actual business operations at a defined location within the jurisdiction. For example, a place of business in the form of an office easily suffices. *In re Tea Trading K. and C. Popoff Bros.* [1933] Ch. 647. A temporary sales stand has also satisfied the standard. *Dunlop Pneumatic Tyre Co., Ltd. v. Actien-Gesellschaft Für Motor* [1902] 1 K.B. 342.

95. See A. DICEY & J. MORRIS, *supra* note 93. Nine days of operation has been held to be sufficient. There is no indication that any lesser amount of time would be insubstantial. However, the business must be in actual operation rather than preparing to operate or winding up. *Dunlop Pneumatic Tyre Co., Ltd. v. Actien-Gesellschaft Für Motor* [1902] 1 K.B. 342.

96. The business must be that of the corporation, not that of the agent who acts for it in England. This condition is fulfilled if the agent has authority to make contracts on behalf of the corporation, even if he is paid only by commission, pays the rent

The requirements of the "carrying on business" standard are consistent with the subjective territorial principle of jurisdiction followed by the United Kingdom.⁹⁷ Having been found to have carried on business there, foreign entities are regularly subjected to suit in the United Kingdom.⁹⁸ Thus, certain foreign entities are intended to be included among the beneficiaries of the cause of action for recoupment.

The Relationship Between The Qualifying Defendant and The Rendering Country

Even if an aggrieved party is properly before the British court, recoupment is not automatically guaranteed. Recoupment depends on the relationship between the qualifying defendant and the foreign court that rendered the multiple damage award. Recoupment will be denied when the defendant's nexus to the adjudicating forum is one of ordinary residence, or corporate identity and principal place of business, or carrying on business there in an activity exclusive to that country.⁹⁹

An individual obtains the status of ordinary residence when physically present in the forum with the intent to remain there indefinitely.¹⁰⁰ This standard requires a greater nexus than just a temporary or passing presence.¹⁰¹ As long as the defendant is

of his office, and also acts as agent for another foreign corporation. But it is not fulfilled if the agent has no general authority to make contracts on behalf of the corporation but merely to obtain orders and submit them to the foreign corporation for approval.

A. DICEY & J. MORRIS, *supra* note 93, at 164 (footnotes omitted).

97. See International Law Association, Report of the Fifty-Third Conference, 185 (Buenos Aires, 1968).

98. English courts recognise as juristic persons corporations established by foreign law in virtue of the fact of their creation and continuance under and by that law. However, an entity which, according to its proper law, possesses in certain respects a separate persona may not for this purpose necessarily, be regarded as a corporation. Companies incorporated outside Great Britain which have established a place of business within Great Britain are subject in certain respects to statutory control.

9 HALSBURY'S LAWS OF ENGLAND ¶ 1229 (4th ed.) (footnotes omitted) (citing Companies Act, 1948, 11 & 12 Geo. 6 c. 38 §§ 406, 407, 409-416).

99. The Act, §§ 5(3), (4).

100. See 8 HALSBURY'S LAWS OF ENGLAND ¶¶ 444-45 (4th ed.).

101. *Id.*

situated in the rendering country with the present intent to remain there and has disconnected ties with a previous country of residence, the recoupment provision cannot be invoked.

When the qualifying defendant is a corporation, the ability of the defendant to bring a successful action for recoupment depends upon the location of the defendant's principal place of business. If it is situated in the rendering country, the defendant fails to qualify for recoupment. The principal place of business has been interpreted to be the place where the business is centrally managed and controlled.¹⁰² This indicates a place where administrative and operational decisions are made.

In addition to the limitations imposed on individuals and corporations, recoupment is denied to any person¹⁰³ carrying on business in the rendering country if the activity is exclusive to that country. Since the same requirements for establishing "carrying on business" discussed earlier are applicable here, there must be a presently existing business operation located at a fixed place for a substantial period of time within the foreign jurisdiction.¹⁰⁴ However, the scope of this section is drastically limited because it only applies when the proceedings in which the multiple damage judgment was rendered were not concerned with activities "exclusively carried on in that country." The precise meaning of what constitutes an exclusive activity is not defined by British statutory or common law, so that the actual impact of this clause cannot be predicted accurately. However, in relation to jurisdiction of the Sherman Act and its progeny on United States foreign trade and commerce, foreign antitrust suits may never be barred from recoupment because foreign trade and commerce are not likely to be considered exclusive activities. Therefore, the reach of the new cause of action will likely extend to those who suffer a multiple damage judgment from a country in which they carry on business, as long as busi-

102. See A. DICEY & J. MORRIS, *supra* note 93, at 703.

103. The word "person" in a public statute as a general rule includes a person in law, that is, a corporation, as well as a natural person, and, in every Act of Parliament passed on or after 1st January 1890, the expression person, unless, the contrary intention appears, includes any body of persons corporate or unincorporate. See The Interpretation Act, 1889, 52 & 53 Vict. c. 63 §§ 19, 42. Therefore, foreign corporations as well as other business arrangements can come within the limitation because a contrary intention does not appear.

104. See text accompanying notes 93-96 *supra*.

ness is carried on simultaneously in the United Kingdom.

Lack Of Jurisdictional Requirements Over the Winning Party In The Multiple Damage Litigation

The limitations placed on qualifying defendants for recoupment purposes, are not similarly imposed on the actual defendants in this subsequent litigation—the winning party in the first action. Although proper jurisdiction over an adverse party has been critical to the maintenance of an action in a British court,¹⁰⁵ the new statute dispenses with that traditional element: “A court in the United Kingdom may entertain proceedings on a claim under this section notwithstanding that the person against whom the proceedings are brought is not within the jurisdiction of the court.”¹⁰⁶ Thus, this section gives a United Kingdom court power to render judgment against parties that are not subject to the court’s personal jurisdiction. The winning party is adversely affected by this even if no assets are located in the United Kingdom and the party has no connections with that forum,¹⁰⁷ because the qualifying defendant can still obtain a default judgment and seek satisfaction elsewhere.

Scope of the Action for Recoupment

The action for recoupment encompasses a range of potential qualifying defendants beyond British citizens and corporations.¹⁰⁸ While an action for recoupment deters the private party

105. “A foreign corporation is resident in this country for purposes of suit if it is conducting its own business at some fixed place within the jurisdiction.” 9 HALSBURY’S LAWS OF ENGLAND ¶ 1385 (4th ed.). For individuals, the defendant must be present in England and served there with a writ. For partnerships and other businesses, a lawsuit can be maintained against them only if business is being carried on in England. See A. DICEY & J. MORRIS, *supra* note 93, at 159.

106. The Act, § 6 (5).

107. Of the five principles of jurisdiction, the two which justify prescribing such a rule of law are the passive personality and protective principles. Both have been rejected by the United Kingdom. See 18 HALSBURY’S LAWS OF ENGLAND ¶ 1531 (4th ed.).

108. *Fleischmann Distilling Corp. v. Distillers Co.*, 395 F. Supp. 221 (S.D.N.Y. 1975) provides an example of the benefits of the action for recoupment to a British national. The two plaintiffs were whiskey distributors operating in the United States. The two defendants were corporations organized and existing under the laws of the United Kingdom. The parties had distributorship contracts whereby whiskey was sold f.o.b. United Kingdom ports to the exclusive United States distributors. The contracts included termination clauses of three months and sixty days respectively. When the defendants exercised the termination clause, the plaintiffs alleged a conspiracy among defendants to impose the short term clauses in violation of § 1 of the Sherman Act and § 3 of the Wilson

in the antitrust area from prosecuting a violation when jurisdiction is based only on the "effects test," the provisions clearly extend beyond these boundaries. The result is a dangerous threat to effective antitrust enforcement in the United States.

The practical differences between the objective and subjective territorial principles are very narrow. Both concepts recognize jurisdiction based on citizenship and incorporation wherever the conduct occurs.¹⁰⁹ Further, the "carrying on business" standard is also an agreed upon basis for jurisdiction under either view.¹¹⁰ The two theories only diverge in evaluating conduct by foreign entities occurring outside the rendering country.¹¹¹ Assuming an antitrust multiple damage judgment has been rendered in an United States court, the British cause of action operates against the objective territorial principle by partially compensating those foreign entities with the requisite nexus to the United Kingdom.¹¹² Because the "effects test" remains a proper standard for United States subject matter jurisdiction,¹¹³ the private party in an antitrust suit is certain to lose the punitive portion of an award when the effects test is relied upon for jurisdiction.¹¹⁴ Thus, the initial suit will only be brought if the actual

Tariff Act. The defense moved for dismissal for lack of subject matter jurisdiction. The court denied the motion because an intent to affect commerce and an actual effect therein were alleged.

If a multiple damage judgment was rendered against the British corporations, the defendants would have a cause of action for recoupment. First, the nexus to the United Kingdom would be satisfied by their incorporation there. Second, the disconnection with the United States would be established because the principal place of business is abroad and the defendant did not "carry on business" in the United States.

109. See, 1 E. KINTNER, FEDERAL ANTITRUST LAW 321-27 (1980).

110. "[T]here is no question that American courts may enforce American law under the territorial principle against foreign companies that carry on business in the United States." *Id.* at 324 (footnotes omitted).

111. *Id.* But as Kintner accurately points out, the only case in this category is the *Alcoa* decision.

112. Therefore, in a case like *Alcoa*, where some of the defendants were Swiss, French and British corporations, and American subsidiaries, the recoupment action would be available because the defendants did not carry on business in the United States and did not have their principal place of business there. However, in a situation like *Timberlane*, the recoupment clause could not be utilized because the defendant was a body corporate with its principal place of business in the United States. See text accompanying notes 24-27 *supra*.

113. See Part II of this Comment, *supra*.

114. Note that in the *Westinghouse* litigation, the United Kingdom defendants easily qualify for recoupment. Furthermore, the other defendants could also qualify if they "carry on business" in the United Kingdom.

damages can adequately compensate the private plaintiff. The unlikelihood of this occurring will make recoupment a useful weapon against the alleged extraterritorial reach of the United States antitrust laws.¹¹⁵

If the cause of action applied only to the type of multiple damage defendants described above, some degree of consistency with the present concept of territorial jurisdiction could be maintained.¹¹⁶ However, the provisions are so broad that the cause of action is capable of applying in situations that are of minimal British concern. For example, by placing emphasis on the qualifying defendant's principal place of business rather than on the location of incorporation, the Act will cause the United States to lose the right to fully legislate against its own incorporates, simply because they carry on business in England. Thus, an United States corporation subject to a treble damage judgment can qualify. Additionally, by emphasizing the ordinary residence of the qualifying defendant rather than citizenship, the right to fully enforce rules of law against citizens is restrained if they happen to be ordinary residents of the United Kingdom. Also, by requiring involvement in an "exclusive activity" before the qualifying defendant may be dismissed, the ability to fully legislate against those who carry on business in the United States is sacrificed for the British interest in protecting those who carry on business there.

The recoupment action has no qualifications for the nature of the transaction out of which the multiple damage judgment arose. Legislating against lawsuits originating from international trade and commerce may be understandable, but suits arising from purely domestic antitrust violations also present opportunities for recoupment. In these situations, the recoupment section does not appear to support any legitimate British interest. As the interest of any nation in international transactions fluctuates depending on the facts and circumstances in each case, so too should the application of its laws. The recoupment section of

115. The significant policy factors for the severity of the sanctions provided in the Sherman Act and the Clayton Act are to redress injury and to create an incentive to prosecute violations. See 2 P. AREEDA & D. TURNER, *ANTITRUST LAW* 33-41, 149-153, 227-29 (1978).

116. See Report of the Fifty-First Conference, *supra* note 8, at 304-557; *RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES* § 30 (1965).

the Act inadequately responds to this problem because it represents a fixed standard to be employed without consideration of United States interests.

C. THE ATTEMPT TO ENCOURAGE OTHER COUNTRIES TO PASS A SIMILAR STATUTE

When the plaintiff in the multiple damage action possesses assets in the United Kingdom, the recoupment process presents few, if any, problems for the qualifying defendant. The requisite procedure for obtaining a judgment in an amount above actual damages, and satisfaction by execution, are events that will occur entirely in the United Kingdom. A different situation arises when the plaintiff either does not hold assets in the United Kingdom or has removed them from that jurisdiction before initiating the multiple damage lawsuit in the foreign tribunal. The absence of assets to levy upon will limit the scope of the recoupment section, even though the defendant is able to qualify under the provisions of the Act.

In this situation, the only option for a qualifying defendant is to obtain a judicial decree for recoupment from a United Kingdom court and proceed to seek recognition of this judgment in a country where the plaintiff's assets are located.¹¹⁷ The Act encourages this activity by appealing to a system of reciprocity. If a foreign country will recognize and enforce judgments rendered under the recoupment section of the Act, then the United Kingdom will reciprocate by recognizing judgments from the foreign country that stem from a similar statute.¹¹⁸ This will compensate parties that cannot qualify in the territory where the assets are located by allowing qualification in one territory and judgment recognition in another.

Thus, an action for recoupment may be maintained by British citizens and corporations, and by persons carrying on business there even though the assets are located elsewhere. Similarly, multiple damage defendants that are incapable of qualifying under the British statute could qualify under a similar statute elsewhere and then rely on the plaintiff's assets in the

117. For the United Kingdom approach to foreign judgments, see A. DICEY & J. MORRIS, *supra* note 93, at 209-14.

118. The Act, § 7; for the text of § 7, see note 77 *supra*.

United Kingdom for satisfaction. This forces the plaintiff in a treble damage antitrust lawsuit to locate its assets either in the United States, where recoupment would be impossible, or in a country where a similar law would likely not be passed.

This particular section of the Act aims at achieving universal opposition to the extraterritorial application of United States antitrust laws. The success of this attempt is highly unpredictable at this early stage. Undoubtedly, the critical factors will be the manner in which United States laws are applied, the status of relations between the respective countries, and the attitude regarding the legality of extraterritorial application. Although similar legislation has not yet been enacted, many foreign nations have responded favorably.¹¹⁹

IV. THE INTERRELATIONSHIP BETWEEN THE ACT AND THE EMERGING UNITED STATES TEST FOR SUBJECT MATTER JURISDICTION

As the previous section indicates, the constraints on discovery and judgment recognition and the opportunity for recoupment significantly reduce the private enforcement of United States antitrust laws. The effect may be so adverse that a potential plaintiff will refrain from pursuing antitrust violations. Unfortunately, the Act has an additional element that is very disconcerting to public and private enforcement of United States antitrust laws.¹²⁰ Although probably not the intent of the drafters, the new Act operates to tip the scale of the emerging balancing test for subject matter jurisdiction in favor of a finding that the United States does not have subject matter jurisdiction in a particular case.

Presuming that the ten *Mannington Mills* factors remain the standard by which United States courts pay tribute to international comity, the presence of the Act will be an important factor in the courts' determinations. For example, the new Act creates a clear *conflict of law* between the United States and the

119. The forty-one Commonwealth nations and Australia have threatened to enact identical legislation for a cause of action if the treble damages are awarded in the *Westinghouse* litigation.

120. This discussion assumes that the effects test plus the ten *Mannington Mills* factors is the test for subject matter jurisdiction.

United Kingdom.¹²¹ This would lend support to the dismissal of cases. Similarly, the new Act undoubtedly establishes a *conflict of policy* between the two nations, a factor that also favors dismissal.¹²² Perhaps most importantly, the Act decreases the likelihood that an American court *can make its order effective*.¹²³ Failure of effective enforcement would arise when the plaintiff has assets in the United Kingdom or in another country with a similar statute because multiple damage judgments would no longer be recognized.

The manner in which the *Mannington Mills* factors will be applied and the relative weight to be given to each has not yet been determined. Therefore, calculating the precise effect the Act will have on the *Mannington Mills* factors is difficult. It would be unwise for an American court to disregard international comity entirely because of the offensive nature of the Act. However, complete deference in all cases where the Act could become a factor after judgment cannot be recommended. Rather, the United States courts should evaluate the Act in light of the *Mannington Mills* factors only in those cases where the power over the defendant requires application of the "effects test." When the subjective territorial principle can be employed to bring the suit before an United States tribunal, the Act should not be considered in the subject matter jurisdiction analysis.

V. CONCLUSION

When economic regulatory laws and policies conflict, resolution of legal matters has been an impossible task. The governments involved continue to view their respective approaches as being consistent with domestic laws as well as international principles. This has been the traditional position of the United

121. The importance of giving closer consideration to the foreign interest when a conflict exists was recognized in *Mannington Mills* as one of the ten balancing factors. See text accompanying note 36 *supra*.

"A court evaluating these factors should identify the potential degree of conflict if American authority is asserted. A difference in law or policy is one likely sore spot," *Timberlane*, 549 F.2d at 614. In an adjoining footnote the court stated that dissimilar economic laws do not always indicate a conflict because non-prohibition does not always mean approval. See P. AREEDA, *ANTITRUST ANALYSIS* 127 (1974).

122. This was also a factor highlighted by the *Mannington Mills* court. See text accompanying note 36 *supra*.

123. See text accompanying note 36 *supra*.

States in defending the "effects test."¹²⁴ The United Kingdom has responded to criticisms of the Act in a similar fashion.¹²⁵

Bilateral approaches to this problem have met with very limited success and only then in the area of foreign judgment recognition.¹²⁶ Negotiations between the United States and the United Kingdom have been occurring for nearly a decade.¹²⁷ The aim has been to reach an agreement on recognition and enforcement of foreign judgments in civil matters. The controversy over the proper jurisdictional requirements to obtain recognition has prevented a final agreement.¹²⁸ The Act appears to operate as a further obstacle to an agreement.

A unilateral approach has been the most common measure. For example, the Antitrust Guide to International Operations¹²⁹ has brought a degree of certainty and predictability to the antitrust field. Additionally, in the past three years, the Antitrust Division has refrained from prosecuting possible antitrust violations by foreigners operating outside the United States. The Division has indicated that the interests of foreign nations will not be taken lightly.¹³⁰ Progress in the private sector has not been as significant. The balancing of interests standard developed in *Timberlane* and its progeny provides a more constructive approach than either interpretation of the territorial principle. While presently deficient in providing certain and predictable results, the balancing method has the potential for bringing American antitrust enforcement into a position of international

124. See Shenefield, *The Perspective of the U.S. Department of Justice*, in AMERICAN BAR ASSOCIATION, PERSPECTIVES ON EXTRATERRITORIAL APPLICATION OF U.S. ANTI-TRUST AND OTHER LAWS 12-25 (J. Griffin ed. 1979).

125. See Comment, *The Protection of Trading Interests Act*, 14 J. WORLD TRADE L. 461 (1980).

126. The United States has negotiated successful agreements with Canada, reprinted in 5 TRADE REG. REP. (CCH) ¶ 50,112, and West Germany, reprinted in 5 TRADE REG. REP. (CCH) ¶ 50,283.

127. See note 82 *supra*.

128. *Id.*

129. The Antitrust Guide to International Operations, published by the United States Justice Department in 1977, attempts to clarify the situations in which the U.S. antitrust laws will apply to foreign operations. See Fugate, *The Department of Justice's Antitrust Guide for International Operations*, 17 VA. J. INT'L L. 645 (1977); Griffin, *A Critique of the Justice Department's Antitrust Guide for International Operations*, 11 CORNELL INT'L L.J. 215 (1978).

130. See comments by Associate Attorney General, John H. Shenefield, in 5 TRADE REG. REP. (CCH) ¶ 50,424.

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The attempt to isolate the United States through retaliatory legislation will be strongly resisted. Although the Act does have its own extraterritorial effect in practice, it may only serve as a bargaining element in future government negotiations.