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Extraterritorial Effects of United States Commercial and Antitrust Legislation: A View from "Down Under"

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EXTRATERRITORIAL EFFECTS OF UNITED STATES COMMERCIAL AND ANTITRUST LEGISLATION: A VIEW FROM "DOWN UNDER"*

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I. INTRODUCTION

British Commonwealth lawyers, in general, and Australian lawyers, in particular, traditionally maintain a conservative view of the extraterritorial reach of commercial legislation. As a result of the *Alcoa*[1] decision in 1945, if not earlier decisions,[2] the United States courts have espoused fairly grand ideas on the stretch of their judicial writ. In fact, the "effects" doctrine was first pro-

1. United States v. Aluminum Co. of Am. (*Alcoa*), 148 F.2d 416 (2d Cir. 1945). The *Alcoa* "effects" doctrine has been followed in a number of cases. *See, e.g.*, Continental Ore Co. v. Uranium Carbide & Carbon Corp., 370 U.S. 690, 704-05 (1962); Steel v. Bulova Watch Co., 344 U.S. 280, 288 n.16 (1952).

2. *See, e.g.* Strassherim v. Dailey, 221 U.S. 280, 285 (1911) (citing American Banana Co. v. United Fruit Co., 213 U.S. 347, 356 (1909) (Holmes, J.) ("the State has power to punish acts done outside a jurisdiction but intended to produce detrimental effects within it.")).

claimed in 1909 by the United States Supreme Court in *American Banana Co. v. United Fruit Co.*[3] In this case, the Court proclaimed that the United States has the power to punish "acts done outside [the] jurisdiction but intended to produce and producing detrimental effects within it."[4]

Although the international community was cool to the Court's position, it did not react too violently in the 1950s and 1960s. The reach of United States commercial legislation at this time appeared bearable. This somewhat mild response to the expansive reach of United States laws may have been grounded in the standing of the United States as *the* giant of the international trading world. The United States quickly filled the trading vacuums left by World War II when the prewar cartel arrangements and, to some extent, prior colonial links had broken down. During this period, practically anyone who could produce and deliver scarce goods was welcome. The United States was one of the countries able to meet the demand. Its companies actively developed worldwide branches and subsidiaries. The United States remains an international trading giant but, as the United States itself is beginning to realize, other countries and trading blocks now have the ability to retaliate if they regard the reach of United States laws as an unwarranted extension of jurisdiction.

The United States perspective was accorded a somewhat uneasy acceptance until the early 1970s. By the mid-1970s, however, this acceptance evaporated with the advent of the *In re Westinghouse Electrical Corporation Uranium Contract Litigation.*[5] In a paper delivered at the University of Western Australia in August 1980, entitled in part "The Empire Strikes Back," Professor Morris noted the beginning of the new era:

> Five foreign Governments filed Amicus papers with the District Court and four filed Amicus papers with the Court of Appeals. The governments affected responded in a number of ways, including . . . passing blocking and other defensive legislation, issuing restrictive regulations under their Atomic Energy Control Acts, and refusing to enforce letters rogatory as the Canadian Courts did.

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3. 213 U.S. 347 (1909).

4. *Id.* at 356.

5. *In re* Westinghouse Elec. Corp. Uranium Contracts Litigation (*Uranium Litigation*), 405 F. Supp. 316 (J.P.M.D.L. 1975). *See also* Westinghouse Elec. Corp. v. Rio Algom Ltd., 1980-1 Trade Cas. (CCH) ¶ 63,183 (7th Cir.); *id.*, 1979-1 Trade Cas. (CCH) ¶ 62,657 (D.C. Ill.).

> The House of Lords even refused to execute letters rogatory in the United Kingdom following the personal intervention of the Attorney-General . . . .[6]

In addition to the furor over the *Uranium Litigation*, the Australian Federal Government and the Western Australian State Government experienced a substantial affront to their sovereignty in *Conservation Council v. Aluminum Co. of America*.[7] In this case, a United States court was petitioned to prevent the continuance of a mining project in Western Australia on environmental grounds. The Australian authorities expressly approved this mining operation, which was wholly within its jurisdiction. Any danger of environmental damage was posed to the Australian, and not the United States, environment. Not surprisingly, the Australian Federal Government and the Western Australian State Government thought that the United States courts should stay out of the case. Judge Cohill wisely refused to exercise jurisdiction.[8] At the invitation of the Conservation Council of Western Australia, he remarked:

> The Federal Courts are sometimes accused of attempting to conjure up panaceas, then sending them down from the heavens on high to cure all the ills of society. We do not see that as our proper role or function. Unlike Zeus, who is said to have caused the Palladium to fall near Troy, this Court will not place a palladium in Western Australia.[9]

Although this case did not overcome the threshold issue of jurisdiction, the mere fact that a plaintiff could bring serious action on these facts demonstrates how far the extraterritorial reach of United States law may extend. United States courts have asserted

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6. J. Morris, The Jurisdiction of the Sherman Act Over Activities Abroad by Non-Nationals: Defensive Legislation: The Empire Strikes Back, (Aug. 9, 1980) (paper given at the University of Western Australia) (the Governments of Australia, Canada, South Africa, and the United Kingdom filed amicus briefs with the court). The United Kingdom litigation relating to the letters rogatory is reported in *In re* Westinghouse Elec. Corp. Uranium Contracts Litigation, [1977] 3 W.L.R. 430 (C.A.), *rev'd on additional facts*, 1978 A.C. 547 (H.L.).

7. Conservation Council v. Aluminum Co. of Am., 518 F. Supp. 270, 282 (W.D. Pa. 1981).

8. The "[p]laintiff, an Australian Conservation group . . . has travelled to the United States in an unprecedented attempt to have a United States Court sit in judgment on mining and refining activities taking place entirely within the foreign country from which the plaintiff comes . . . ." *Id.* at 271.

9. *Id.* at 282.

jurisdiction in other actions similar to *Conservation Council.* In *Sierra Club v. Adams,*[10] for example, the Court held that injunctive relief was available to halt the construction of a United States-funded highway within Colombia and Panama because a proper environmental impact study required by the United States National Environmental Policy Act of 1969[11] had not been done. The jurisdictional reach taken in *Sierra Club* is distinguishable from *Conservation Council,*[12] however, on the grounds that the United States had granted funds contingent upon the satisfaction of certain conditions.

Faced with an aggressive United States extraterritorial position, the Commonwealth lawyer is understandably puzzled by the degree of interest shown by the United States in events that happen in countries far removed from its shores. At the same time, some of these lawyers are finding it important to know the applicable United States law for advising multinational clients. In particular, gaining a familiarity with the United States antitrust laws is increasingly important for rendering commercial advice on transactions that many think have no real relation to the United States.

Australia has a competition policy similar in many ways to that of the United States. Although its competition laws are modeled significantly after United States legislation, Australia views its laws as a method of consumer protection and as an adjunct of economic anti-inflationary policy. It is very difficult to equate the Australian competition policy with the United States pontifications that these competition laws are aimed against size,[13] constitute "a charter of freedom,"[14] or establish "the Magna Carta of free enterprise."[15] The Australian simply does not see matters in

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10. 578 F.2d 389 (D.C. Cir. 1978).
11. 42 U.S.C. § 4321 (1976).
12. *See supra* note 7 and accompanying text.
13. *See Alcoa,* 148 F.2d at 447.
14. Appalachian Coals, Inc. v. United States, 288 U.S. 344, 359-60 (1933).
15. United States v. Topco Associates, Inc., 405 U.S. 596, 610 (1972). The Court stated:

> Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms. And the freedom guaranteed each and every business, no matter how small, is the freedom to compete—to assert with vigor, imagination, devotion and ingenuity

such extreme terms, especially when the aim of much Australian industry is to achieve substantial domestic size in order to obtain economies of production akin to world standards.

Competition policy also may be viewed differently in the two countries because the United States and Australian civil rights and law enforcement traditions are distinct. Although both countries inherited the Magna Carta from Great Britain, it is still part of the unrepealed statutory law of the various states in Australia. Most Australians, however, do not see the relationship between the actions at Runnymede in 1215 and the competition laws of the late twentieth century, notwithstanding the ability of the United States judiciary to make the link. To the Australian, the picture is more pragmatic and less poetic. The attempts at extraterritorial application of United States commercial law most often are made in circumstances favoring the United States party to the disadvantage of the non-United States party. Furthermore, exemptions similar to those found in the United States Webb-Pomerene export exemption,[16] if found in the laws of other countries, appear to receive little consideration in the reasoning of the United States judiciary. Thus, many conclude that the United States antitrust laws constitute a new form of United States imperialism. Depending upon one's viewpoint, this conclusion may be either an anathema to or totally consistent with the concept of antitrust laws as a bastion of economic liberty.

II. Methods Utilized by United States Statutes and Regulations to Extend United States Jurisdiction[17]

The formalized nineteenth century jurisdictional principles have very little relevance to present trading arrangements. In the nineteenth century, with less trade and state interaction, the same desire to expand commercial power and venture into far corners of the globe did not exist, unless the corners were in fact

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whatever economic muscle it can muster . . . .

Id. at 610.

16. Webb-Pomerene Export Trade Act, 15 U.S.C. §§ 61-66 (1976 & Supp. IV 1980).

17. The material in this section is prepared from a paper presented at the Ninth International Trade Law Seminar, which was conducted by the Australian Attorney-General's Department. *See* G. Triggs, State Jurisdiction over Corporations: The Nationality Principle at International Law (1982). New and updated material is included in this article.

colonies. Jurisdictional limitations tended to be physical. The 1904 Bynkershoek Rule, for example, provided that sovereignty should be extended as far as the force of arms was effective, three miles from shore (the distance of a cannon shot).[18] The extension of state jurisdiction has strained the traditional concepts of international law and has engendered complaints from countries alleging that national sovereignty is compromised.[19] It is tempting to regard the United States antitrust "effects doctrine," in particular, as the only extension of United States jurisdiction into the affairs of other countries. A number of other stratagems, frequently legislative in nature, are utilized, however, to extend United States jurisdiction. The following discussion briefly shows that the United States antitrust laws are the only means whereby the United States has asserted de jure as well as de facto extraterritorial jurisdiction.

A. Statutory and Regulatory Controls

The concept of nationality has expanded to embrace the view that jurisdiction may be asserted over nationals wherever they may be located. The United States Congress, for example, has enacted legislation requiring "every male citizen of the United States" to register for military service.[20] This law applies to all male citizens, even if they reside abroad in a country which has no draft registration requirement. Nationality jurisdiction also is claimed by other countries. The United Kingdom punishes treason, homicides, and bigamy when committed abroad by a British subject.[21] Similar legislative bases for asserting jurisdiction can be found in France[22] and Germany.[23]

By interpreting nationality to include any entity under the control of a national, certain economic and domestic political policies have been extended extraterritorially. Thus, the parent of a sub-

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18. *See* L. OPPENHEIM, INTERNATIONAL LAW: A TREATISE § 186, at 444 (H. Lauterpacht 7th ed. 1948).

19. *See, e.g.*, Second Reading Speech of Senator Peter Durack, Q.C., (June 11, 1981) (discussing the Foreign Antitrust Judgments (Restriction of Enforcement) Amendment Bill) (Sen. Durack is the former Australian Attorney-General).

20. 50 U.S.C. app. § 453 (Supp. V 1981).

21. 10 Halsbury's Laws of England 322-24 (1955).

22. Code de procédure pénale [C. PR. PÉN.], art. 689 (1977-78).

23. Strafgesetzbuch [STGB] §§ 3-4.

sidiary, or the controlled subsidiary of a parent, incorporated in the United States might be considered a United States national, notwithstanding the theoretical argument that the subsidiary is a separate legal entity from its parent. This is the law in both Australia[24] and the rest of the British Commonwealth.[25] The distinct advantage of this theory is that neither the subsidiary nor the parent can avoid the jurisdiction of the legislating state by claiming that the prohibited action is carried out by a foreign subsidiary beyond the control of both the national home company and the legislating state. This theory is used quite aggressively in the United States to support laws which are designed to effectuate trade embargoes, achieve political ends, circumvent the boycott of other states, and prohibit the bribery of foreign government officials. A non-United States lawyer advising a locally incorporated subsidiary of a United States parent company, therefore, must become acquainted with United States statutes having extraterritorial effect.

To prevent United States enterprises from aiding the League of Arab States in an organized boycott of Israel, the amendments to the Export Administration Act of 1979[26] define "a United States person" to include "any foreign subsidiary or affiliate of any domestic concern which is controlled in fact by such domestic concern."[27] The Export Administration Act was enacted to control the export and reexport of United States-originated goods and technology. By using expansive jurisdictional language in the Act, Congress attempted to extend United States controls to the reexportation of goods and technology from one foreign country to another.[28] In December of 1981 and June of 1982, the United States Government banned the export of oil and gas equipment to the Union of Soviet Socialist Republics in an effort to further

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24. *See* Walker v. Winbourne, [1976-7] 137 C.L.R. 1 (Austl.); Industrial Equity Ltd. v. Blackburn, [1976-7] 137 C.L.R. 567 (Austl.). Both of these decisions posit that common directors of separate companies owe duties to each company and not to the group as a whole because the profits generated are the profits of the individual company and not the profits of the group as a whole.

25. *See generally* L. GOWER, THE PRINCIPLES OF MODERN COMPANY LAW (1957).

26. Pub. L. No. 96-72, 93 Stat. 503 (1979) (codified at 50 U.S.C. app. § 2407 (Supp. V 1981)).

27. 50 U.S.C. app. § 2415(2). The Department of Commerce uses examples to define a United States person. *See* 15 C.F.R. § 369.1(b)(4) (1980).

28. 50 U.S.C. app. § 2407(1)(A)-(F).

United States political objectives concerning the construction of the West Siberian pipeline. Only the United States has claimed such far-reaching jurisdiction. In response to this maneuvering, the European Economic Community issued a strongly worded memorandum on August 12, 1982. In addition, the United Kingdom issued seven directives under the Protection of Trading Interests Act of 1980[29] stating that its companies were prohibited from complying with the United States embargo.[30] The United States regulations were withdrawn three months later because of their apparent lack of effectiveness and the hostile reaction of its allies.

The repercussions of the United States boycott regulations have affected even Australia. Due to the round-robin effect of United States regulations on reexportation, Santos Limited, an Australian company, was unable to obtain materials for an Australian pipeline from a French supplier involved with the Soviet pipeline construction. Australia, not surprisingly, finds the United States jurisdictional claim unreasonable because it detrimentally affects Australian projects and Australian national interests.

The difficulty inherent in the exercise of United States jurisdiction under these circumstances goes beyond the fundamental concept of export regulation. It also can be found in the "Submission Clause" of the Export Administration Act, which requires that United States-based technology not be used in violation of United States laws.[31] The problem arises because changes in United States laws will be given a de facto retrospective effect. Countries tendering for Soviet pipeline contracts had no idea at the time that the United States would attempt through export restrictions to pressure the Soviet Union to relax military law in Poland and to prevent Western Europe from becoming a major purchaser of Soviet energy. The United States attitude was not discernible in view of the nonstrategic nature of the goods affected.

The Foreign Corrupt Practices Act[32] was enacted to eliminate corrupt payments by United States corporations to foreign government officials. If a foreign subsidiary is a "registered foreign issuer" as defined in the Securities and Exchange Act of 1934,[33]

29. [1980] 11 All E.R. 243.
30. *See id.* § 1, at 243.
31. 50 U.S.C. app. § 2404(e)(2).
32. 15 U.S.C. § 78dd(2)(d)(1) (Supp. V 1981).
33. *Id.* § 78n (1976).

both the subsidiary and the parent will be held liable for any corrupt payments. Although it is commendable to try to stamp out corruption, and although no one will argue with the applicability of the Foreign Corrupt Practices Act to United States-based companies, the host country of the foreign subsidiary may view market ethics in a different light with respect to a United States subsidiary operating within its territory. United States law may well place all United States affiliates at a competitive disadvantage in most third world countries.

The Iranian Assets Control Regulations of 1979[34] required foreign branches and subsidiaries of United States financial institutions to block Iranian assets and permitted them to use such funds as a setoff against Iranian indebtedness.[35] The flood of litigation[36] potentially emanating from the regulations was stemmed only by a January 1981 executive order[37] that cancelled the setoffs and ordered the transfer of any funds made subject to the regulations to escrow accounts.

The Foreign Assets Control Regulations,[38] issued pursuant to the Trading with the Enemy Act of 1917,[39] forbid any unlicensed trade, payment, foreign exchange transaction, or transfer of property in which a designated country or its nationals have an interest. The regulations apply to "persons subject to the jurisdiction of the United States," specifically: (1) any persons, wherever located, who are citizens or residents of the United States; (2) any persons actually within the United States; (3) any corporation actually within the United States; and (4) any partnership, association, corporation, or other association, wherever organized or doing business, which is owned or controlled by persons specified above.[40] *Societé Fruehauf Corp. v. Massady*[41] illustrates the extraterritorial effect of these regulations. A French court, utilizing

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34. 31 C.F.R. § 535 (1980) (issued pursuant to the International Emergency Economic Powers Act of 1977, 50 U.S.C. app. §§ 1701-1706).

35. 31 C.F.R. § 535.329 (1980).

36. *See, e.g.*, Chase Manhatten Bank v. Iran, 484 F. Supp. 832 (S.D.N.Y. 1980).

37. Exec. Order No. 12,278, 46 Fed. Reg. 7917 (1981).

38. 31 C.F.R. § 515.329 (1980).

39. 50 U.S.C. app. §§ 1-34 (1976).

40. *Id.* § 2.

41. 1968 D.S. Jur. 147 (regional courts of appeal). The United States parent controlled 70% of Fruehauf France and had the power to designate five of its eight directors.

the civil law concept of abuse of right, implemented a contract of a United States subsidiary incorporated in France even though the United States regulations prohibited the transaction.[42]

The Trading with the Enemy Act of 1917 also has been used in other contexts. The Cuban Assets Control Regulations,[43] dating from the 1963 Cuban Missile Crisis, impose conditions and limitations on the export of goods to companies outside the United States. A consent to export must be obtained from the Treasury Department by those companies in which United States persons own a controlling interest. Consent is granted only upon satisfying certain conditions, the most important of which are: (1) the company's management must be foreign and (2) not more than twenty percent of the goods exported may be goods manufactured in the United States or with United States technology.[44] Again, the regulations apply to a wide range of companies with United States links even though these companies are incorporated outside the United States and carry on all their business outside the United States.

The Foreign Assets Control Regulations also seek to prohibit exports to North Vietnam, Kampuchea, and North Korea.[45] One effect of the Vietnam embargo under the Foreign Assets Control Regulations was that an Australian mining subsidiary of a United States multinational, Utah Developments, was compelled to cancel coal contracts with Vietnam after the State Department "approached" its United States parent company. As a result of the cancellation of these coal contracts, notwithstanding the interests of the United States, Australian and not United States resources were affected; significant Australian revenue was lost; Australia's

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42. During the period in which the United States had imposed trade sanctions against China, Fruehauf France was awarded a contract to supply 60 Fruehauf trailers for export to China. The parent company complied with Treasury Department orders to cancel the contract. An application was made to the Paris Court of Appeals for the appointment of a judicial administrator to execute the contract. The French court examined the public policy issues, including the potential loss of 600 jobs. The decision of the directors was overruled because the court viewed the abuse of right concept as contrary to the corporate interest. The United States Treasury Department did not prosecute the parent company or its directors because the subsidiary was no longer under the "control" of the parent company.

43. 31 C.F.R. § 515 (1963).

44. *Id.* § 515.559.

45. *See id.* § 500 (1976).

reputation as a reliable resource supplier was undermined; and Australian foreign policy was subjugated to that of the United States despite the location of the resources in question. It would not be surprising if the Australian government disliked the exercise of this economic imperialism, notwithstanding its strong traditional alliances with the United States. Perhaps a more disturbing aspect of the embargo was that the Australian government was not officially advised on the application of the United States regulations to the imminent transaction; Australian officials were informed ex post facto only when some explanation had to be given as to why concluded export contracts were cancelled.

Another telling example of United States expansive extraterritorial designs was the jurisdiction asserted under the aegis of the proposed, but not enacted, Energy Antimonopoly Bill of 1979.[46] George W. Ball's scathing comments before the Judiciary Committee of the United States Senate illustrate the intended extraterritorial scope of the bill. Ball described the "grotesquerie of this proposal" which was shown "by the fact that the law, . . . would have prohibited either Shell or British Petroleum [British or Dutch companies with United States incorporated subsidiaries] . . . from acquiring controlling interests in joint ventures organized to exploit their own North Sea or Dutch offshore fields."[47]

B. Environmental Controls

The world community is seriously concerned that the United States will impose its environmental standards on activities conducted outside the United States. In 1978, the *Sierra Club* court ruled that an injunction is an available remedy to prevent the construction of a highway in Colombia and Panama because an environmental impact study (required under United States law but not under Colombian or Panamanian law) had not been undertaken.[48] The project was funded with United States monies, giving the court a jurisdictional nexus.[49] Many foreign countries feared that the scope of the National Environmental Policy Act of

46. S. 1246, 96th Cong., 1st Sess. (1979).

47. *Energy Monopoly Act of 1979: Hearings on S. 1246 Before the Senate Comm. on the Judiciary*, 96th Cong., 1st Sess. 683 (1979) (statement of George W. Ball).

48. *See supra* note 10 and accompanying text.

49. 578 F.2d at 391; *see also supra* note 10 and accompanying text.

1969[50] would become quite extensive and enable the United States to apply its environmental concepts to other countries with different environmental views. The feared reach of the United States legislation may have been reduced severely by the recent *Conservation Council v. Aluminum Co. of America* decision.[51] The environment is a physical concern of the host country and should be regulated by its legislation; the United States should have no legitimate regulatory interest whatsoever.

United States import laws and quotas also have been used to maximize their de facto extraterritorial effect. For example, the United States prohibits the import of several varieties of Australian kangaroo products based on the determination that kangaroos are a threatened species under the United States Endangered Species Act of 1973.[52] On May 29, 1981, the United States Fish and Wildlife Service determined that kangaroos and kangaroo products, other than those of the Red, Eastern Grey, and Western Grey species, could be imported for a two-year trial period, but that the ban on the importation of other kangaroo products would continue. At the end of the trial period, the United States Fish and Wildlife Service was to "review the entire situation and determine whether the ban on imports should be reimposed or whether commercial imports may continue."[53] The Australian attitude always has been that kangaroos, generally, and the three species that remain subject to United States import ban, in particular, are in no danger of extinction.[54] The legal basis upon which the United States exercises customs jurisdiction in these cases is not doubted and no *legally* improper exercise of jurisdiction is suggested. This exercise of power, however, is clearly a method by which the United States imposes its "environmental" view on the manner in which Australia should treat her kangaroos. Because of the significant misrepresentations of

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50. 42 U.S.C. § 4321 (1976).

51. 518 F. Supp. 270 (W.D. Pa. 1981); *see also supra* notes 7-8 and accompanying text.

52. 16 U.S.C. §§ 1531-1543 (1976).

53. Letter from the U.S. Embassy in Canberra to Warren Pengilley, (Apr. 27, 1983).

54. This is a bipartisan opinion in Australia. *Compare* Speech by Senator Ryan, HANSARD (SENATE) DEBATES 35 (Apr. 21, 1983) (Labor Party view—the present government) *with* Statement of Former Deputy Prime Minister, J. Anthony (May 3, 1981) (Press Release 81/33) (Liberal/Country Party—prior government view).

the United States position on kangaroo imports, including one quite misleading film[55] widely shown in the United States, many Australians tend to regard United States laws as de jure legal, but inherently misconceived on the assumption of de facto jurisdiction. The de facto imposition of "endangered species" laws may well have quite an effect opposite to that intended. Australian Minister, Barry Cohen, the official responsible for such matters, recently declared that the United States attitude could well harm the Australian environment and kangaroos, in particular, because it could lead to policies preventing the culling of kangaroos to better preserve them as a species.[56]

Although it is conceded that all states may have universal jurisdiction over, and a common interest in the suppression of, certain crimes against the international order,[57] many countries simply do not regard trading with an enemy of the United States, bribing foreign officials (if this is the locally accepted practice), or deviating from the United States views on environmental and wildlife issues as equivalent to antisocial actions. In most cases, furthermore, the failure to comply with United States antitrust law is not thought to be particularly antisocial. No doubt a great deal of the resentment against United States legislation is predicated on the attempted usurpation of local decision-making by the de facto control exercised through United States statutes. A partial explanation for the effectiveness of this power is that as much as ninety percent of the world's multinational enterprises are incorporated and headquartered in the United States.[58] According to Servan-Schreiber, forecasts in 1968 predicted that the third largest industrial power in the world by 1975 would be United States-

55. The film, depicting scenes of cruelty to kangaroos, aroused considerable United States sympathy. The film company staged the cruelty scenes and filmed the picture in a suburban backyard and not in the Australian outback. Incorrect information also was given on the kangaroo meat consumption practices. *See* Press Statement of Australian Minister for Home Affairs and the Environment (Mar. 29, 1983); *see also* Senate Speech of Senator Martin, HANSARD (SENATE) DEBATES 1220-23 (June 2, 1983).

56. *See generally* The Australian, Apr. 30, 1983.

57. *See* RESTATEMENT (REVISED) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 404 (Tent. Draft No. 2, 1981) (examples are piracy, slave trading, hijacking, genocide, terrorism, and war crimes).

58. *See* Vagts, *The Multinational Enterprises: A New Challenge for Transnational Law*, 83 HARV. L. REV. 739 (1970).

owned industry in Europe.[59] The United States writ of jurisdiction runs to the parent company and its decision-making. The potential for the United States to assert its political will on other nations, therefore, is very great.

The United States is not alone in imposing legislation with extraterritorial reach. As trading blocks become more powerful, their ambitions expand. Until recently, the United States probably has been the only entity large enough to make its jurisdictional writ run elsewhere; the European Economic Community is currently flexing similar expansionary muscles. A now moot EEC provision would have required substantial disclosure of a company's business, even if the business had only an indirect effect within the EEC.[60] In response to this provision, Idaho Senator Steven Symms introduced legislation that would have blocked the foreign authorities' access to the confidential information of businesses located in the United States. This response is quite ironic given the years of official United States opposition to foreign blocking legislation. It dramatically brings home the point that the United States is no longer the only nation capable of aggressively applying its laws.[61]

III. Major United States Court Decisions on the Extraterritorial Operation of United States Antitrust Laws

Although many United States statutes have an impact in foreign countries, the United States antitrust laws are best known overseas for their extraterritorial effect. These laws create the greatest foreign ulcerations in practice. Judge Learned Hand in his 1945 *Alcoa* opinion[62] concluded that although Congress did not intend the Sherman Act to prohibit conduct having no effect

59. J. Servan-Schreiber, The American Challenge 3 (1968).

60. *See Regulation in Europe Worries U.S. Firms*, Legal Times of Washington, Nov. 2, 1981, at 1.

61. For example, a United Kingdom commodity dealer trading on the New York Stock Exchange was required to provide extensive information on contracts and transactions outside the United Kingdom by the Commodity Futures Trading Commission. Diplomatic requests to withdraw the notice were unsuccessful. Ultimately, the company was directed not to produce the information in a directive issued in March 1981 under § 2 of the United Kingdom Protection of Trading Interests Act of 1980. *See* U.K. Dept. of Trade, The British Case for Amendment to the U.S. Export Administration Act (Mar. 22, 1983).

62. 148 F.2d 416 (2d Cir. 1945).

in the United States, it did intend the Act to reach conduct having consequences within the United States if the conduct is intended to and actually does have an effect on United States imports or exports.[63] This broad "intended effects" test has been cited with approval by the United States Supreme Court.[64] In addition, the practices of a United States citizen abroad having a substantial effect on United States commerce have been found subject to the Sherman Act.[65] The Court, in a 1952 decision, *Steele v. Bulova Watch Co.*,[66] found jurisdiction on the basis of citizenship alone.[67] The Court stated: "Congress in prescribing standards of conduct for American citizens may project the impact of its laws beyond the territorial boundaries of the United States."[68]

Once a jurisdictional base exists, the question becomes whether a United States court should, in its discretion, exercise this jurisdiction. In *Mannington Mills, Inc. v. Congoleum Corp.*,[69] the Third Circuit Court of Appeals determined that the United States rules of substantive antitrust analysis should not be applied mechanically, even in the case of per se violations, if foreign contracts are involved. The *Mannington Mills* court recognized that "the individual interests and policies of each of the foreign nations differ and must be balanced against our nation's legitimate interest in regulating anticompetitive activity."[70] A balancing approach was devised composed of the following:

(1) degree of conflict with foreign law or policy;
(2) nationality of the parties;
(3) relative importance of the alleged violation of conduct compared to that abroad;
(4) availability of a remedy abroad and the pendency of litigation there;
(5) existence of intent to harm or affect United States commerce

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63. *Id.* at 444-45.
64. *See supra* note 1.
65. *See, e.g.*, Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287 (3d Cir. 1979).
66. 344 U.S. 280 (1952).
67. *Id.* at 282.
68. *Id.*
69. 595 F.2d 1287 (3d Cir. 1979). *See also* Timberlane Lumber Co. v. Bank of Am., N.T. & S.A., 549 F.2d 597 (9th Cir. 1976); United Nuclear Corp. v. General Atomic Co., 1980-1 Trade Cas. (CCH) ¶ 63,639 (N.M.).
70. *Mannington Mills*, 595 F.2d at 1298.

and the foreseeability of the harm or effect;
(6) possible effect upon foreign relations if the court exercises jurisdiction and grants relief;
(7) if relief is granted, whether a party will be placed in the position of being forced to perform an act illegal in either country or be under conflicting requirements by both countries;
(8) whether the court can make its order effective;
(9) whether an order for relief would be acceptable in the United States if made by the foreign nation under similar circumstances; and
(10) whether a treaty with the affected nations has addressed the issue.[71]

Mannington Mills also dealt with the Act of State doctrine. This doctrine prohibits judicial inquiry into the validity of certain actions by a foreign government. The basic premise of the doctrine is that a foreign government's action within its own territory cannot be questioned or made the subject of legal proceedings in United States courts.[72] Recently, the foundation for the doctrine has been characterized in terms of not hindering the executive branch's conduct of foreign policy through the exercise of judicial review or oversight of foreign acts.[73] Another view is that the doctrine is based upon notions of comity and conflict of laws; foreign law is to be accepted as the rule of decision in passing upon acts occurring within the foreign power's jurisdiction.[74] Under this view, a defense of foreign sovereign compulsion may be presented if the acts of the parties are carried out in obedience to the mandate of a foreign government. The concern of the United States court, however, is whether the foreign government "*compelled* the American business to violate American antitrust law."[75]

In *Mannington Mills*, the court determined that a successful Act of State defense must have the following attributes. First, the foreign decree must be basic and fundamental to the party's behavior and more than merely peripheral to the overall course of conduct.[76] Second, the foreign government's behavior must be in-

71. *Id.* at 1297-98.
72. *Id.* at 1292.
73. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 423 (1964).
74. *See Note, Sherman Act Jurisdiction and the Acts of Foreign Sovereigns*, 77 COLUM. L. REV. 1247, 1255 (1977), *cited in Mannington Mills*, 595 F.2d at 1293.
75. 595 F.2d at 1293 (emphasis added).
76. *Id.*

dependently conceived rather than arranged at the instance of the defendants.[77] Third, foreign governmental *approval* is not adequate. "It is necessary that foreign law must have *coerced* the defendant into violating American antitrust law."[78] Last, the defense is not available if the defendant legally could have refused to accede to the foreign power's wishes.[79]

Thus, the Act of State defense is very tightly worded. It assumes that an enterprise's only avenue of escape from the application of the antitrust laws is for the foreign government to legislate in compulsory terms. Such legislation will be effective only if the foreign government "independently conceives" the need.[80] On this basis, a defense would not be available if the industry itself requested the foreign government to legislate. Yet, in nearly all cases, the initial request for legislation comes from the industry. Legislation is not conceived in heaven as a matter of economic purity, but results from very hard lobbying. One might expect that this would be best known in the United States.

Export arrangements entered into with the encouragement of foreign governments are not judicially recognized by United States courts if United States commerce is affected. A foreign equivalent of the United States Webb-Pomerene export exemption[81] rarely would qualify as an antitrust defense because these foreign statutes usually only *allow* rather than *compel* an export arrangement. In the Australian context, an export cartel exempted under section 51(2)(g) of the Australian Trade Practices Act[82] and acting legally under Australian law would appear to be acting illegally under the Sherman Act. On the other hand, a United States cartel affecting the Australian market could be conducting its business legally under the Sherman Act because it either does not affect United States commerce or is exempted under the Webb-Pomerene legislation. This inconsistent treatment supports the complaint against the United States antitrust scheme that it is all a little unfair. Another major element of un-

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77. *Id.*

78. *Id.*

79. *Id.*

80. *See* W. FUGATE, FOREIGN COMMERCE AND THE ANTITRUST LAWS 148 (1958) ("if private parties . . . influence foreign government legislation as part of a conspiracy to restrain United States foreign trade, the government sanction of some of their activities will not justify their conspiracy").

81. 15 U.S.C. §§ 61-66 (1976 & Supp. IV 1980).

82. AUSTL. ACTS P. 397 (1974).

fairness is the treble damage remedy under United States law. The Australian counterpart only allows the recovery of single damages. The prevalent Australian attitude is that the treble damages remedy is highly punitive and has no place in the regulation or the conduct of business.

Australia's Trade Practices Act of 1974[83] is more limited in its international reach than United States antitrust laws. Section 5 provides that the Act extends to that conduct occurring outside Australia which is undertaken by entities incorporated or carrying on business in Australia, or by Australian citizens or persons ordinarily resident within Australia. The relevant market in which to assess an anticompetitive effect is the market in Australia.[84] All other conduct is excluded from Australian law. In addition, it is generally believed that even without these limiting statutory definitions, Australian judges would not be likely to find a breach of Australian law when the conduct is legal where committed.[85] Certainly, the former Australian Attorney-General is of this view.[86] Thus, the possibility of conduct relating to exports to Australia being legal under United States law but illegal under Australian law is quite remote. Some may argue that Australia should be more ambitious in its aims and urge its judiciary not to be timid in applying the "effects" doctrine when the Australian market is concerned. One must consider, however, an additional issue: the unequal bargaining position in economic terms between the two countries.

IV. The Uranium Litigation

The *Uranium Litigation*[87] of the 1970s demonstrates most vividly all of the international jurisdictional problems in the antitrust arena. The normally dull, analytical concepts of international law and comity became issues of hot political conflict and global diplomacy. The international fire ultimately was cooled by a variety of measures; however, the smoldering embers remain, possibly to rekindle at the first breath of a new litigious wind.

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83. *Id.* § 5, at 406.

84. *Id.* § 4(1), at 404.

85. This proposal assumes, of course, that there is a reasonable nexus between the conduct and the law involved.

86. *See infra* notes 162-66 and accompanying text.

87. *In re* Westinghouse Elec. Corp. Uranium Contracts Litig. (*Uranium Litigation*), 405 F. Supp. 316 (J.P.M.D.L. 1975).

A. The Uranium Situation Worldwide

Since 1961, Australia has controlled the export of uranium under The Customs Act 1901-1973.[88] The Act's control formed an integral part of a policy announced by the Minister for National Development on April 10, 1967, under which no export of uranium could take place without governmental approval. Australia's export revenue from minerals and mineral products was $5.2 billion during 1978-1979, which represented thirty-seven percent of the total annual national export income. As of June 1978, Australia was on the verge of becoming a major uranium exporter, possessing eighteen percent of the western world's estimated reserves. The viability of the country's export market depended upon securing long-term export contracts with reliable markets because Australia had no domestic demand for uranium to meet civilian power needs. In Canada, the quantities, prices, and exports of uranium were continually regulated by the Atomic Energy Control Act.[89] Canadian production of uranium was expected to rise in 1979 to $2 billion per year. South Africa had an affirmative regulatory system of uranium exports under its Atomic Energy Act of 1967. Pursuant to regulations, the Minister of Mines determined the price and the buyer of the uranium. As of 1978, the government of South Africa had concluded contracts for short-term and extended delivery of uranium for approximately $1.495 billion. Australia, Canada, and South Africa each had a national interest in the development of uranium and in its orderly marketing and export.

B. The United States Uranium Position

In the late 1950s and early 1960s, the United States was the world's largest uranium customer. The United States long-term contracts enabled foreign nations to develop their uranium resources. In the later 1960s, the demand for uranium to meet power generation needs declined and, as a result of the easing of military tensions, military demand also declined. On October 13, 1971, the United States Atomic Energy Commission imposed an embargo which required, in general, that United States uranium purchases be made only from United States domestic sources. This response to the drop in demand was legally available under

88. 3 AUSTL. ACTS P. 751 (1901-1973).
89. 1 CAN. REV. STAT. 153 (1970).

section 161 of the United States Atomic Energy Act of 1954, which enables embargoes to be imposed "to the extent necessary to assure the maintenance of a viable domestic industry."[90] The United States market, comprising seventy percent of the world market, was foreclosed to foreign producers. At the same time, the United States Government released 50,000 tons of U_{308} from its stockpiles into domestic and foreign markets, further depressing the price obtainable by overseas producers.

C. The Formation of the Uranium Cartel

Not surprisingly, the producer countries formed a cartel to make a joint stand against the United States Atomic Energy Commission boycott.[91] In the spring of 1972, uranium producers from France, South Africa, Australia, Great Britain, and Canada formed a cartel and agreed to place a floor on prices for the period between 1970-1977, to set rules and methods for pricing the uranium delivered after 1977, and to establish quotas by dividing the available market between producers. In addition, the cartel agreed to establish a Secretariat as the communications link among the members and to manage the quota allocation through a bid rotation system.

The formal general cartel arrangements, as written,[92] did not apply to the United States. The cartel, however, did fix the sales of uranium for future delivery to United States utility companies at cartel prices and imposed a boycott on the sales of uranium to United States middlemen, affecting anyone purchasing uranium

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90. 42 U.S.C. §§ 2011, 2201.

91. *See generally*, J. Morris, *supra* note 6. *See also* United Nuclear Corp. v. General Atomic Co., 1980-1 Trade Cas. (CCH) ¶ 63,639 (N.M.); *Confirmation of John Shenefield, Nominee Associate Attorney General: Hearings Before the Senate Comm. of the Judiciary*, 96th Cong., 1st & 2d Sess. 48 (1980) [hereinafter cited as *Confirmation Hearings*]; J. TAYLOR & M. YOKELL, YELLOWCAKE, THE INTERNATIONAL URANIUM CARTEL (1979); Wood & Carrera, *The International Uranium Cartel: Litigation and Legal Implications*, 14 TEX. INT'L L.J. 59 (1979). For additional sources, see Maher, *Time, Uranium and the Legislative Process*, 9 FED. L. REV. 399, 401 n.7 (1978).

92. It may be alleged that the participants envisioned the arrangements would operate for much longer than the initial period. In addition, it may be alleged that the cartel members intended to take certain actions designed to have an effect on the United States market in the event of the lifting of its embargo. In one case, Australian sales of uranium to the United States were affected in periods from 1976 to 1985. *See* Austl. Parl. Deb. (H of R) 2956 (Nov. 17, 1981).

for resale. The cartel also devised discriminatory price structures to prevent United States companies from competing in foreign markets.

D. The Westinghouse Dilemma

In the late 1960s and early 1970s, Westinghouse Electric Corporation entered into a series of contracts to provide a number of United States utilities and foreign concerns with uranium for their nuclear reactors. Under the contracts, the company supplied the uranium at a fixed price subject only to adjustment for inflation. Westinghouse did not cover itself for forward sales price increases. The fixed price of fuel was one method used by Westinghouse to sell reactors; the sale was a package deal of both the reactor and the long-term supply of cheap nuclear fuel.[93]

In September of 1975, Westinghouse sent a notice to all its uranium customers stating that due to "commercial impracticability" it could not supply the uranium required by its contractual obligations.[94] Westinghouse's purchasers, not surprisingly, instituted twenty-seven breach of contract suits against Westinghouse. Damages claimed against Westinghouse were estimated at $2 billion, and Westinghouse's very survival was in doubt.[95]

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93. In 1972, uranium was selling at about $4.50 per pound. Until late 1975 uranium prices rose rapidly, reaching $42.00 per pound. The formation of the OPEC oil cartel and the prospect of rapidly spiralling oil costs were major reasons for the price increase. Alternative fuels, such as coal, had been appreciably depleted and nuclear power seemed to be a viable answer. The environmental problems related to nuclear power were not viewed initially as a potential problem. The nuclear power industry appeared to have a rosy future and predictions reflected this optimism. The International Atomic Agency predicted that world nuclear power capacity would develop as follows:

INTERNATIONAL ATOMIC ENERGY PREDICTIONS ON WORLD NUCLEAR POWER CAPACITY

Date	In thousands of M.W.E.
1975	9,200
1980	255,000
1985	663,000
2000	3,600,000-5,300,000

Uranium prices reflected these predictions. Baxter, *Nuclear Joy for Margarita—The Large Scale Use of Nuclear Power*, 53 CURRENT AFF. BULL. 19 (1976).

94. The default was necessitated because Westinghouse had made no provision in its long-term contracts for the escalating price of uranium.

95. The litigation was described as "what may be the highest priced package of private law suits in the United States history." BUS. WK., Sept. 26, 1977, at

E. The Government Reaction

The United States State Department, focusing on its foreign affairs obligations rather than on competition considerations, knew in 1972 of the uranium cartel's existence but failed to inform the Department of Justice. The State Department also tried to terminate a grand jury investigation of the cartel in 1976.[96]

The Department of Justice charged Gulf Oil with Sherman Act violations, to which the company pleaded nolo contendere and paid a $40,000 fine. This insignificant fine was later regarded as evidence that the United States authorities had proceeded against the cartel arrangements and, by such actions, did not believe the cartel defendants were outside the jurisdiction of the United States.[97] The handling of the case by the Department of Justice did not impress several influential members of Congress.[98]

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125. Westinghouse was in default by an amount that was approximately three times the United States production of uranium in 1975. *See* Owen, *The Market In Australian Uranium*, 5 AUSTL. Q. 6 (1983).

96. *See* J. Morris, *supra* note 6. A grand jury investigation involving 90 witnesses and 500,000 documents was convened in 1976 and continued for more than two years. It was discharged without the issue of an indictment.

97. *See* United Nuclear Corp. v. General Atomic Corp., 1980-1 Trade Cas. (CCH) ¶ 63,639, at 77,410 (N.M.).

98. The Senate Judiciary Committee, spurred into action by Senator Metzenbaum, petitioned the district court for production of the grand jury documents. This request was denied. *See In re* Grand Jury Investigation of Uranium Industry, 1979-2 Trade Cas. (CCH) ¶ 62,798 (D.D.C.). At the suggestion of the court, Attorney General Benjamin Civiletti agreed that certain documents could be made available after deletion of foreign policy-sensitive material. *See* Wood & Carrera, *supra* note 91, at 596. On Jan. 24, 1980, the information subsequently became available to the public at the conclusion of the confirmation hearings of John Shenefield for Associate Attorney General. The grand jury documents revealed that four top Justice Department officials, Messrs. Davidow, Favretto, Simms, and Rosenthal, had reviewed the matter personally and in detail. The Department failed to act in view of the four review opinions. Mr. Davidow determined that although the cartel created a sufficient anticompetitive effect on United States commerce, this effect did not outweigh the interests of the foreign government in having the cartel operate. Mr. Favretto believed that a middleman boycott case was uncomfortable because it left the Department on the side of Westinghouse who seemingly acted in bad faith. Mr. Simms felt that because a sufficient effect on United States commerce could not be demonstrated, the national interest argument was weak. Only Mr. Rosenthal would have proceeded within the limited parameters. *See generally Confirmation Hearings, supra* note 91; J. Morris, *supra* note 6.

F. The Westinghouse Litigation

After commencement of the grand jury proceedings in 1976, Westinghouse brought antitrust proceedings against twenty-nine domestic and foreign uranium producers.[99] Among the nine foreign companies who failed to appear, the Australian companies were: (1) Conzinc Riotinto Australia Ltd. ("CRA"),[100] (2) Mary Kathleen Uranium Ltd. ("MKU"),[101] (3) Pancontinental Mining Ltd. ("Pancontinental"),[102] and (4) Queensland Mines Ltd. ("Queensland Mines").[103] Consent settlements were negotiated for the four Australian defendants with the settlement sums[104] to-

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99. *See generally* Maher, *Uncle Sam Exports His Laws*, 54 AUSTL. Q. 10-11 (1982) (the article provides a brief chronology). On Jan. 3, 1979, Westinghouse obtained a final default judgment against the four Australian-based defendants and five of the other nonappearing foreign defendants. This enabled Westinghouse to produce evidence of the extent of its financial losses. *In re* Uranium Antitrust Litigation, 1979-1 Trade Cas. (CCH) ¶ 62,657 (N.D. Ill.). On Feb. 27, 1979, Judge Marshall invited the Australian Government to provide a statement of its attitude toward the production of documents for the case. On Sept. 17, 1979, Westinghouse won a ruling that provided it could pursue its claim against all the nonappearing defendants without having to wait until the trial against the appearing defendants. This ruling was appealed by the concerned defendants and the Governments of Great Britain, South Africa, Australia, and Canada filing amicus curiae briefs. On Feb. 15, 1980, the appellate court dismissed an appeal of the default judgments but postponed the hearing on the case against the nonappearing defendants until the trial of the main action was concluded. Westinghouse Elec. Corp. v. Rio Algom, 1980-1 Trade Cas. (CCH) ¶ 63,183 (7th Cir.). In September of 1980, Judge Marshall rejected arguments by several of the appearing defendants that they be excused from producing certain documents that were subpoenaed by Westinghouse because Australian law forbade their production. On Dec. 23, 1980, the first settlement agreement was announced. CRA, MKU, and Pancontinental announced their respective settlements on March 18, 1981, followed by Queensland Mines on May 7, 1981.

100. CRA is a United Kingdom-owned company.

101. The Australian government owns 49% of MKU.

102. Pancontinental had an equity link with Getty Oil Company, a United States-based company.

103. Queensland Mines, which is United Kingdom-controlled, was a majority-owned Australian company.

104. Westinghouse obtained the largest settlement, $25 million, from Gulf Oil. Gulf, headquartered in the United States, also agreed to deliver up to 13 million pounds of uranium, valued at approximately $350 million, to six utility customers of Westinghouse. Although denying liability, Homestake Mining Company, the first company to announce a settlement, agreed to deliver 450,000 pounds of uranium to Westinghouse at $14 per pound and make a cash payment of $2 million. Getty Oil, also denying liability, agreed to pay $13 million. The

taling $11,270,000, broken down as follows:

AUSTRALIAN COMPANIES' SETTLEMENTS

Company	Amount of Settlement
CRA	U.S. $6,800,000
MKU	U.S. $870,000
Pancontinental	U.S. $2,600,000
Queensland Mines	U.S. $1,000,000

The Westinghouse litigation was of immense concern to the governments of Australia, Canada, the United Kingdom, and South Africa. The foreign companies took the view that they should not file an appearance because it would constitute a submission to the jurisdiction of the United States courts. The above governments submitted amicus briefs that supported the submissions on the issues of comity and jurisdiction for the various nonappearing foreign defendants. The Seventh Circuit Court of Appeals was not highly impressed by this tactic, noting:

> In the present case, the defaulters have contumaciously refused to come into court and present evidence as to why the District Court should not exercise its jurisdiction. They have chosen instead to present their entire case through surrogates. Wholly owned subsidiaries of several defaulters have challenged the appropriateness of the injunctions, and shockingly to us, the governments of the defaulters have subserviently presented for them their case against the exercise of jurisdiction. If this court were to remand the matter for further consideration of the jurisdictional question, the District Court would be placed in the impossible position of having to make specific findings with the defaulters refusing to appear and participate in discovery. We find little value in such an exercise.[105]

In explaining the Australian position, the Australian Attorney-General, Senator Durack, stated that treble damage judgments could amount to millions of dollars and cripple the Australian companies involved.[106] The litigation also raised substantial policy issues; in this case, United States antitrust laws conflicted with the policy of Australia, which had legitimate contrary na-

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legal costs and the uncertainty of the final outcome appeared to be prime motivations for settlement. Maher, *Antitrust Fall Out: Tensions in the Australian American Relationship*, 13 FED. L. REV. 105, 124-25.

105. *Westinghouse Elec. Corp.*, 1980-1 Trade Cas. at 77,897.

106. *See* Press Statement by Senator Durack (Jan. 4, 1979).

tional interests.[107] The Australian position was that "the arrangements which were made by Australian uranium producers were made with the approval of the Australian Government . . . ."[108] The international situation of legal and governmental conflict is obvious, as are the reasons behind the conflict. Although the United States Justice Department did not proceed against the overseas companies, the investigation itself provoked considerable concern. The Australian Government made intergovernmental representations that "the United States Government should take full account of the Australian Government's policies, which provided for the arrangements, and not institute any proceedings in respect of the arrangements."[109] A type of political "rule of reason" approach could have been assumed by the Justice Department. The Westinghouse civil litigation, however, involved much trickier issues.

The United States Government could not stop Westinghouse from instituting civil proceedings. The United States State Department advised the Australian Government that a defense solely contesting jurisdiction could be entered.[110] Perhaps with hindsight, and considering the views of Messrs. Davidow, Favretto, Simms, and Rosenthal[111] of the Justice Department, the appropriate course of action would have been to file a defense and contest jurisdiction.[112] Hindsight, however, cannot dictate decisions that must be made at the moment when the picture neces-

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107. In concurrence with its position, the Australian Government refused to allow a United States citizen, employed by a United States company and willing to return voluntarily to the United States, to give testimony in the case. The Australian Government stated that this person was an Australian resident and a director of a company incorporated in Australia. The Government utilized the provisions of its Foreign Proceedings (Prohibition of Certain Evidence) Act to subject the individual to penalties if he gave evidence in the United States. *See Aide Memoire* of Australian Government to United States Embassy (Feb. 17, 1978); *Aide Memoire* United States Embassy to the Australian Government (Feb. 7, 1978); Letters from the Former Australian Attorney-General to Various Solicitors (Apr. 21, July 10, Sept. 19, 1978).

108. Note No. 13/78 from the Australian Embassy in Washington to the United States State Department (Mar. 23, 1978) (discussing the grand jury investigations).

109. *See id.*

110. Note by the United States State Department to the Australian Embassy (Oct. 30, 1979).

111. *See supra* note 98 and accompanying text.

112. *See* Maher, *supra* note 104, at 115-16.

sarily is seen differently. The Justice Department opinions only became available in 1980 and, thus, were of no use in making the appropriate decisions. In addition, a judge may not have regarded the matter in the same way as the Justice Department. Indeed, it appears that the United States judiciary viewed the Justice Department's actions as indicative of a Departmental position favoring the assertion of jurisdiction, although in fact, the Departmental opinions were the opposite. The New Mexico Supreme Court determined that the Gulf nolo contendere plea and the overall guidelines of the Justice Department indicated a Departmental view that the cartel activities were not immune from United States jurisdiction.[113]

The United States prima facie legal situation did not look good for the Australian defendants in the *Uranium Litigation.* Not only was an effect on United States commerce claimed, but also the Act of State defense could not succeed because membership in the cartel was not "coerced" by any foreign government. Indeed, no specific request was made under Australian law for sanctioning of the cartel.[114] The only recourse for Australia was to file amicus briefs, to enact "blocking" legislation to prevent the enforcement of the judgment in Australia, and to enact legislation to prevent certain evidence from being made available in proceedings outside Australia.[115] All of the above actions served as only

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113. *See* United Nuclear Corp. v. General Atomic Co., 1980-1 Trade Cas. (CCH) ¶ 63,639, at 77,409-10 (N.M.).

114. *See* Austl. Parl. Deb. (H of R) 3704 (Dec. 9, 1976). The government did not receive a request to validate the cartel arrangement, but was asked to take actions that would prevent Australian companies and individuals from giving evidence in United States proceedings.

115. *See, e.g.*, Foreign Proceedings (Prohibition of Certain Evidence) Act of 1976 (No. 121), *amended by* Foreign Proceedings (Prohibition of Certain Evidence) Amendment Act of 1976 (No. 202), Austl. Gov't Gaz., No. S.214 (Nov. 29, 1976) (implemented by Order of the Attorney-General). For legislation in other countries, see Atomic Energy Control Act, CAN. REV. STAT. ch. A-19 (1970); Uranium Information Security Regulations, CAN. STAT. O. & REGS. 76-644 (1976); see also Business Concerns Records Act, QUE. REV. STAT. ch. 278 (1964); The Ontario Business Records Protection Act, ONT. REV. STAT. ch. 54 (1970); South Africa Atomic Energy Act of 1967, No. 90, 15 STAT. REP. SO. AFR. 1045 (1977).

On October 31, 1979, the British Secretary of State for Trade introduced new United Kingdom legislation. At a press conference on the bill's publication, he stated:

> The Protection of Trading Interests Bill, which I have today introduced into the House of Commons, will strengthen, in a variety of ways, our defences against U.S. practices which are not only widely regarded as un-

partial solutions, inadequate in many respects.

Those regarding the United States antitrust laws as a form of United States judicial imperialism may be justified in their views. The foreign producers formed the uranium cartel because of a United States Atomic Energy Commission policy decision which closed off the United States market to protect domestic producers.[116] The equivalent Australian view was that "[t]he Government attaches the greatest importance to orderly development of our uranium resources . . . .[W]e will not allow the development of our uranium industry to be dictated by volatile elements in the market abroad."[117] A defensive cartel organized in reaction to United States atomic energy policy might not be an unreasonable strategy. The overseas producers had nothing to do with Westinghouse's commercial blunders. In this situation, it seems peculiar for the Sherman Act, the "Magna Carta of free enterprise,"[118] to be levied against the uranium producer arrangements.

V. AUSTRALIAN "BLOCKING" LEGISLATION

In December of 1976, the Australian Parliament passed the Foreign Proceedings (Prohibition of Certain Evidence) Act[119] which provides that:

> the Attorney-General shall exercise his powers under [the] Act only where he is satisfied that—
> (a) 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

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acceptable internationally but are having a most damaging effect on the commercial activities of British companies. It is one thing for a firm to be expected to abide by the laws of an overseas country whilst it is doing business in that country. It is quite another thing to be expected to abide by the laws of that country, to accept the judgments of its courts or the requirements of its authorities, when operating elsewhere.

This is one piece of legislation which we would be happiest never to use. Nevertheless, its need is self-evident and urgent. It is an argument of justifiable commercial self-defence.

Dep't of Trade, Press Notice (Ref. 452) (Oct. 31, 1979).

116. *See supra* text accompanying note 90.

117. Statement by former Australian Deputy Prime Minister for National Resources and Minister for Minerals and Overseas Trade (Uranium-Australia's Decisions) (Aug. 25, 1977).

118. *See* United States v. Topco Associates, Inc., 405 U.S. 596, 610 (1972).

119. 1976 AUSTL. C. ACTS 1125 (No. 121).

matters to which the laws or executive powers of the Commonwealth relate; or
(b) the imposition of the restriction is desirable for the purpose of protecting the national interest in relation to matters to which the laws or executive powers of the Commonwealth relate.[120]

The Attorney-General is authorized to prohibit the following: the production of documents to a foreign tribunal[121] if the documents are located in Australia; the doing of any act in Australia that will lead to the documents being produced in a foreign tribunal; the giving of evidence to a foreign tribunal by an Australian citizen or Australian resident; and the giving of evidence or production of documents before a tribunal in Australia for the purposes of proceedings in a foreign tribunal.[122]

In March 1979, the Australian Parliament passed the Foreign Antitrust Judgments (Restriction of Enforcement) Act.[123] This Act specifically refers to judgments in cases involving "antitrust law."[124] Under the Act, the Attorney-General may declare that a judgment given under antitrust law is not enforceable in Australia if he is satisfied that a court, in giving judgment, has exercised jurisdiction in a manner inconsistent with international law or comity and the recognition of the judgment might be detrimental to or adversely affect Australian trade or commerce. The Attorney-General also may declare a judgment unenforceable if in the Australian national interest.[125]

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120. *Id.* § 4(1).

121. The term "foreign tribunal" is defined very broadly. It "includes a court or a grand jury and also includes any authority, officer, examiner or person having authority to take or receive evidence whether on behalf of a court or otherwise." *Id.* § 3.

122. *Id.* § 5(a)-(d).

123. 1979 AUSTL. C. ACTS 143 (No. 13).

124. *Id.* § 3(1) (includes a broad definition).

125. *See id.* § 3(2)(c). If the judgment is given for a certain amount of money, the Attorney-General can reduce the judgment by a specified sum. *Id.* Further steps to provide relief were mooted. A bill was introduced in Parliament in June 1981 to allow Australian companies to "recover back" the amount of damages awarded under certain overseas antitrust judgments and enforced against overseas assets. This was to be achieved by an amendment to the Foreign Antitrust Judgments (Restriction of Enforcement) Act. This type of measure has been given the appellation "clawback" legislation by United States lawyers. Because Australian and United States authorities amicably reached an arrangement and the parties settled the antitrust uranium litigation, this "clawback" legislation was not pursued. If necessary, however, no reason exists

VI. FOREIGN "BLOCKING" LEGISLATION AND UNITED STATES COURTS

The United States judiciary tends to ignore "blocking" legislation enacted by other countries when this legislation runs contrary to the antitrust laws of the United States. A case illustrating this trend is *United Nuclear Corp. v. General Atomic Co.*,[126] considered by the Supreme Court of New Mexico. The case, brought under the New Mexico Antitrust Act and not the Sherman Act,[127] demonstrates the notice or lack of notice taken by a United States court of overseas "blocking" legislation.

This case was an appeal from a default judgment entered against General Atomic Company ("GAC") for willful and bad faith failure to comply with discovery orders. The court's judgment is a valuable record of the factual history of some aspects of the uranium cartel and also confirms the principles of the Act of State defense articulated in *Mannington Mills*.[128]

The structural facts of the companies involved in *United Nuclear* are complex. Most of the allegations in the case involved

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why such legislation would not be enacted. This author's personal evaluation is that the change of government in Australia in the election of March 1983 would not affect the Australian government's willingness to act on this issue. The present Attorney-General, Senator Evans, has advised this author that "[w]hile the Labor Party generally supported the measures taken by the previous government in this area . . . we have not, as a government, made any formal decisions on the detailed approach that we will take to these complex issues." Letter from Senator Evans to Warren Pengilley. (May 12, 1983); *see also* Press Statement of Australian Attorney-General (June 27, 1978) ("The Australian Government [will] continue the approach of the previous government in this area in seeking to protect its trading laws and policies.").

126. 1980-1 Trade Cas. (CCH) ¶ 63,639 (N.M.). For additional cases representative of this trend, see Batista, *Confronting Foreign Blocking Legislation: A Guide to Securing Disclosure from Non-Resident Parties to American Litigation*, 17 INT'L LAW. 61, 72-75 (1983).

127. When reading the case, one might feel that New Mexico was asserting a type of extraterritorial reach for its state statute. This may be a valid observation in a de facto sense. The New Mexico court held that there was no basis to find the New Mexico antitrust act, in the case of uranium contracts, preempted by the Sherman Act. *United Nuclear Corp.*, 1980-1 Trade Cas. at 77,418-19. In any event, the case is by far the largest single litigation in New Mexico's history in both dollar value and the volume of court records. The value of the litigation approached one billion dollars. In addition, 28,000 pages of the official record, 13,000 pages of transcript, 16,000 pages of deposition testimony, 2,700 exhibits, and thousands of documents were produced.

128. *See supra* notes 72-80 and accompanying text.

alleged wrongdoings by Gulf,[129] which had wholly owned GAC as a subsidiary at one time. An agreement between Gulf and United Nuclear, a major New Mexico producer of uranium, was the subject of the litigation. It was alleged that Gulf had engaged in monopolistic practices as part of a worldwide conspiracy by certain international uranium producers to fix prices, allocate markets, and control the production of uranium. United Nuclear's efforts to secure discovery of records relating to the international uranium cartel became the major focus of the litigation. Gulf's failure to supply the cartel-related information was the principal basis for the default judgment entered by the lower court. Gulf asserted that the Canadian records could not be produced because of the Canadian "blocking" legislation.

The holdings of the court illustrate in part the extent that a home-based company may be compelled to produce documents held abroad and also demonstrate the scant regard taken of foreign legislation prohibiting the production of such documents. In affirming the sanction order and default judgment, the court held:

> [T]here is substantial evidence to support the [trial] court's finding that Gulf followed a deliberate policy of storing cartel documents in Canada, and that this policy amounted to courting legal impediments to their production . . . . [T]hese findings alone may be the basis for the imposition of such a discovery sanction as a default judgment.[130]

In reaching this conclusion, the court determined that all partners in an enterprise have the same obligation with respect to discoverable documents because a partnership is not an entity known at law. If one partner is a United States enterprise, therefore, it must produce any document which another party, such as an overseas party, is required to produce. The coordinated nature of a business enterprise may justify the imposition of discovery obligations on separate entities which are not parties to the action. The court approved the principle established in the *Uranium Litigation* that "[t]he formalities separating . . . two corpo-

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129. Gulf entered the uranium market by purchasing GAC. In 1967, Gulf became involved in uranium exploration and made substantial discoveries in the Rabbit Lake area of Canada. It established Gulf Minerals Canada Limited as a wholly owned subsidiary. Through another subsidiary Gulf had discovered additional uranium reserves in New Mexico. In 1970, Gulf formed Gulf Energy, which marketed uranium and manufactured nuclear reactors.

130. *United Nuclear Corp.*, 1980-1 Trade Cas. at 77,445.

rations cannot be used as a screen to disguise the coordinated nature of their uranium enterprise."[131] Thus, in essence, a United States parent enterprise must produce the records of a subsidiary even if the subsidiary is a legally separate entity, and the records are kept in another country which protects them from production.

The Canadian Uranium Information Security Regulations, considered by both the Canadian executive and judicial authorities to be in the best interests of Canada clearly constitute an act of state. The New Mexico court determined that although the regulations were an act of state, the viability of the discovery orders was not precluded by the Act of State doctrine. The orders were enforceable because: (1) Gulf had an obligation to make an immediate, diligent, and good faith application for waiver of the Canadian "blocking" legislation and should have recited all steps taken to achieve the waiver in its reply to discovery; and (2) foreign "blocking" legislation is not relevant to the validity of the order itself, but only to the question of appropriate sanctions in the event of noncompliance with the order.[132]

The court also found that the prevention of anticompetitive, monopolistic, and predatory trade practices is a legitimate exercise of a state's police powers and that New Mexico has a "legitimate local public interest" in uranium contracts.[133] Over one-half of the United States uranium reserves and one-half of the production mills are located in New Mexico. "Therefore it would be impossible to monopolize the American uranium market without having an immediate relationship to, and a substantial effect on, the trade and commerce [of New Mexico]."[134]

The point of the case is clear. Although it was not suggested that the documents had to be produced in breach of Canadian law, it was unmistakable that: (1) a United States parent company is liable for noncompliance with discovery orders made against a United States subsidiary incorporated in another country; (2) the mere act of storing the documents with a subsidiary in another jurisdiction may bring sanctions against the United

131. *In re* Uranium Antitrust Litigation, 1980-1 Trade Cas. (CCH) ¶ 63,124, at 77,610 (N.D. Ill.).

132. *See United Nuclear Corp.*, 1980-1 Trade Cas. at 77,413.

133. *Id.* at 77,416.

134. *Id.*

States parent company;[135] and (3) in any event, a foreign law will not be recognized on its face. The foreign party served with process must make all attempts to make foreign law subservient to the United States law.

On this basis, United States subsidiaries have little room to comply with the laws of their host countries in those cases of conduct which the United States competition law finds contrary to the national interest of the United States. In the *United Nuclear* case, the public policy of the host state was totally subjected to the paramount policy of the United States. The "blocking" legislation of the United Kingdom, Canada, Australia, and South Africa relating to evidence and production of documents may be of little benefit if the company is a United States subsidiary. Legislation preventing the enforcement of United States judgments in foreign countries, however, may effectuate a more successful result. Because at least ninety percent of the world's multinational enterprises are apparently United States- controlled,[136] it is fairly obvious whose national policy will be implemented. Host country policies not complementary to those of the United States will be

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135. The result may have been different if the Canadian legislation had required that all original documents be executed and retained in Canada. It could be argued that a company complying with this requirement could not be regarded as following "a deliberate policy of storing cartel documents in Canada" because it was merely complying with Canadian law. There appears, however, to be no hope of adopting this tactic. Based on the language used by the New Mexico court, the court apparently would have no difficulty finding that the United States parent company was under an obligation to keep two sets of records, one of which was within the jurisdiction of United States courts.

The exchange at the Shenefield confirmation hearings illustrates the problem. Senator Metzenbaum asked whether Shenefield would be receptive to legislation that would make documents inaccessible to foreign governments by prohibiting their placement in foreign countries by United States multinational companies. Shenefield, obviously not sympathetic to the principle of secreting documents outside the jurisdiction, replied: "I would be quite willing to work with you. I do regard it as an important problem that is going to become more and more a frustration." *Confirmation Hearings, supra* note 102, at 76. He added a pointed barb relating to the United States embargo of uranium imports:

> I would also bring to your attention what I think is in a sense an unaddressed issue in this case and that is how it is that a regulatory agency of the United States Government can take a fundamentally anticompetitive step apparently without addressing or certainly not addressing explicitly the competition implications of that step.

Id. at 76-78.

136. *See supra* text accompanying note 58.

quickly condemned, even if the trading entity is conducting business totally outside the United States and has significant obligations to countries other than the United States. This policy conflict is most clear in the case of resource-related entities. It is, after all, the resources of the host country, and not those of the United States, being exploited. One legitimate question to consider is why a host country should not implement policies designed to give as high a return as possible, even though the United States may be detrimentally affected as an overall consumer of the resource involved.

VII. Cartel Trading and United States Policy

The views of the United States relating to cartel trading are frequently misunderstood and should be examined. This Article will discuss in detail three conclusions reached with respect to cartel trading. First, given a world perspective, cartel trading is not unusual, especially in commodities. United States companies are involved in many of these arrangements. Second, cartel trading corresponds to United States policy if the commodity is exported from the United States. This conclusion implicates the Webb-Pomerene exemption and other specific statutory exemptions in the United States antitrust laws. The activities of United States companies trading under the Webb-Pomerene exemption are very strong in the world market and, in a number of cases, these activities control world prices. Third, foreign cartels affecting United States commerce are frequently organized at the request of United States authorities. The above three conclusions give rise to significant questions of whether the United States antitrust laws should be applicable to international commodity trading cartels, and, indeed, whether the application of these laws are in many cases contrary to United States policy.

A. Cartel Trading Is Not Unusual in World Terms

The existence, operation, and impact of cartels suffer from a considerable, persistent problem of ignorance. This "shield of ignorance"[137] both protects these cartels and conceals their virtues. The data, though incomplete, suggests that the number of inter-

137. Smith, *Cartels and the Shield of Ignorance*, 8 J. Int'l L. & Econ. 53 (1973).

national trade cartels is considerable.[138]

Professor Robert Smith of Oregon University has attempted to quantify the extent of cartelization in world trade.[139] Conceding the absence of reliable data and the paucity of knowledge with respect to their impact and significance,[140] Smith was able to identify the following cartel arrangements involving the countries listed.

IDENTIFIED CARTEL ARRANGEMENTS

Country	Number of Identified Cartels
Federal Republic of Germany	81
Japan	214
United States	35
United Kingdom	64
Denmark	18
Norway	19
Sweden	24

Smith noted the trend of cartels in national law, stating:

> As a general rule, a Government enacts and enforces an antimonopoly law to protect its own domestic trade interests. Reflecting this parochial interest, these policies reveal a type of double standard with respect to cartels; an antimonopoly law is applied by a government only to cartels that adversely affect its domestic market or foreign trade interests but not to those within their jurisdiction that affect only the economic interests of another country, at least in the absence of a treaty or other international agreement.[141]

B. Cartel Trading and the Webb-Pomerene Exemption

United States export cartels are exempt from the antitrust laws of the United States. Professor Smith's study found thirty-five United States cartels operating under the exemption.[142] Some of these cartels appear to operate in industries in which the United States is very strong. In addition, the cartels in some cases ac-

138. R. Smith, Current Challenges to Competition Policy (Sept. 1973) (a paper given at a conference on the International Economy and Competition Policy in Tokyo), *cited in* Smith, *supra* note 137, at 92-107.

139. Smith, *supra* note 137, at 96.

140. *Id.*

141. *Id.* at 98.

142. *Id.*

count for a high percentage of total United States exports of the commodity. Approximately eighty-six percent of United States sulphur exports and greater than eighty percent of motion picture and television film exports operate under Webb-Pomerene exemptions.[143] The existence of these exempt trading groups has created some interesting responses. For example, the activities of exempt United States companies exporting sulphur led to the approval of a United Kingdom cartel under United Kingdom competition laws on "public interest" grounds. The cartel was formed to give United Kingdom purchasers some countervailing power in the market against the United States cartel.[144] Other products represented by exempt export cartels include coal, rice, lumber, machine tools, and railway equipment.[145] Not surprisingly, price setting and market allocation head the list of activities that these cartels may conduct.[146] As stated in a Federal Trade Commission staff survey:

> [T]he most active [Webb-Pomerene] associations have held a dominant position in world markets . . . high domestic industry concentration allowed each of these associations to represent all or almost all the domestic capacity for its product. Thus, each of these associations had a large enough share of export capacity to determine the export price and allocate sales among its members . . . .[147]

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143. FEDERAL TRADE COMMISSION, ECONOMIC REPORT: WEBB-POMERENE ASSOCIATIONS—A FIFTY YEAR REVIEW 41 (1967) [hereinafter cited as FTC FIFTY YEAR REVIEW].

144. *See In re* National Sulphuric Acid Ass'n Ltd. Agreement, 1963 L.R. 4 R.P. 169. This court found that the United States cartel had tried, and would continue to try, to obtain unreasonably favorable terms for itself and that its attempts would be likely to succeed unless there was a common buying agreement among United Kingdom manufacturers. This is another example of United States policy giving rise to countervailing cartels. It would be interesting to see whether a United States court would hold the British cartel in breach of the Sherman Act. *See infra* note 160 and accompanying text.

145. FTC FIFTY YEAR REVIEW, *supra* note 143, at 43.

146. *Id.* at 48. For example, the sulphur group, Sulexco, had arrangements not to export to Mexico, Canada, or Cuba. The Concentrated Phosphate Export Association was restricted to operating in the Eastern hemisphere (excluding India) and the Potash Export Association concentrated on the Far East. The Carbon Black Export arrangements involved members dealing only through an association that acted as the exclusive agent on all orders. *Id.* at 50.

147. *Id.* at 51-52; *see also* Chapman, *Exports and Antitrust; Must Competition Stop at the Water's Edge?* 6 VAND. J. TRANSNAT'L L. 399 (1973) (provides descriptions of some interesting international cartel activities).

The United States is a prime offender of perpetuating the "double standard" by applying antitrust law only to cartels adversely affecting the domestic market, and not to those affecting the economic interests of other countries.[148] The United States, of course, is not unique in this regard, but the impact of the double standard is very great indeed because of the country's economic power and the large number of multinational companies which are United States-based. In addition, the export exemption in the Webb-Pomerene Act has kindred domestic and international brethren in agriculture, fishing, defense supply, insurance, banking, land, sea and air transportation, communications, entertainment, electric power, atomic energy, securities and exchange, and balance of payments improvement measures.[149] The purity of United States competition principles is open to considerable doubt, both at home and internationally.

The passage of the Export Trading Company Act[150] in October of 1982 should completely dispel any questions of the applicability of the "double standard" in United States cartel policy. This Act extends the operation of the Webb-Pomerene Act[151] and applies to those organizations which deal in goods and services. The Act opens up new vistas in terms of technological services which may now become an item of cartel trading. Certificates granting protection against all civil and criminal liability arising from export trade activities may be issued under the Act. Emphasizing the commitment of the United States to cartel trading, the Act includes financial institutions within its scope to facilitate the activities of export trading companies and export trading associations.

Japan is the only country which has legislation to moderate the effect of an exempt national export cartel. A Japanese cartel may require modification unless "the interest of importers or enterprises concerned at the destination is not injured and there is no fear of gravely injuring international confidence in Japanese ex-

148. *See* R. Smith, *supra* note 138, at 98.

149. Chapman, *supra* note 147, at 405.

150. Pub. L. No. 97-290, 96 Stat. 1233 (1982). On March 11, 1983, the Commerce Department's International Trade Administration issued interim regulations on the Act. For a commentary on the Act, see Bruce & Pierce, *Understanding the Export Trading Act and Using or Avoiding its Antitrust Exemptions*, 39 BUS. LAW. 975 (1983).

151. *See supra* notes 143-47 and accompanying text.

porters."[152] Although its success in practice is unknown, this Japanese provision has effectively modified some arrangements.

C. Foreign Cartels Organized at the Request of the United States

One method of preserving domestic production from international competition is to request overseas exporting companies to enter into "voluntary restraints" in their exporting activities. The word "voluntary" is placed in quotation marks because the restraints are not voluntary at all, but result from governmental pressure on traders.[153] The United States has entered into a number of these arrangements, the most publicized ones being with Japan. These "voluntary restraints" also have been imposed on Australia.[154] A Japanese commentator, as long ago as 1963, stated:

> [I]ronically the establishment of . . . [Japanese] export associations has been encouraged to a very considerable extent by the American Government, which has sought to meet the opposition of domestic American industry to Japanese imports by obtaining "voluntary quotas" that restrict the volume and maintain the price of Japanese exports to the United States.[155]

This trend toward "voluntary restraints" probably has increased rather than declined. The comparatively large number of Japanese cartels[156] may be explained by the Japanese willingness to accede to these "voluntary restraints" and the increasing pressure placed on Japan by overseas countries because of the ever increasing efficiency of Japanese industry.

Section 201 of the United States Trade Agreements Act[157] sets

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152. Yushutsu nyu Torihiki Ho (Export and Import Trading Act), Act No. 299 of 1952, § 5(2)(ii), *partially reprinted in* 3 ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, GUIDE TO LEGISLATION ON RESTRICTIVE BUSINESS PRACTICES, ch. J, § 1.2 (1973) (official translation).

153. This statement is the view of Senator Durack, former Attorney-General of Australia. *See* Statement by Senator Durack on Australia's Position Regarding United States Antitrust Enforcement (June 11, 1981).

154. For example, since 1964 the quantity of Australian beef that can be exported to the United States has been limited. *Id.*

155. Kanazawa, *The Regulation of Corporate Enterprise: The Law of Unfair Competition and the Control of Monopoly Power*, 1963 LAW IN JAPAN 497, 502-05.

156. *See supra* text accompanying note 138.

157. Pub. L. No. 96-39, 93 Stat. 144 (1979) (codified in scattered sections of U.S.C.).

out the ultimate sanction for "voluntary quotas."[158] It provides that relief is to be granted when quantities of imported goods become "a substantial cause of serious injury or threat thereof to a domestic industry."[159] The question arises as to whether an overseas "voluntary" cartel is exempt from the Sherman Act. One would think that the exemption would apply. No doubt, the trading and diplomatic left arms of government would be able to prevent the strong right arm of the Justice Department from launching a prosecution. A private suit, however, is a different animal. The United States assets of a corporation engaging in cartel activities could be in jeopardy. Generally speaking, no Sherman Act immunity would exist in the case of a foreign corporation participating in a cartel that directly affects United States commerce, even if the cartel was encouraged by the United States Government and the very *raison d'etre* of its existence was due to United States governmental pressure.[160] This is a slightly odd result regardless of how lawyers may be able to rationalize the United States policy.

VIII. Some Pragmatic Objections from the Land "Down Under"

The Australian objections to the extraterritorial application of the Sherman Act have been voiced in a variety of arenas, including the Australian Federal Parliament, a Commonwealth Law Ministers' meeting held in March 1980, and at intergovernmental negotiations between Attorneys-General. The objections to this imperialism are discussed in detail below.

A. Damage to International Relationships

Intractable differences on the extraterritorial operations of the United States antitrust laws have generated friction between otherwise friendly governments.[161] This result is clearly recognized

158. 19 U.S.C. § 2501 (1982).

159. *Id.*

160. One United States district court has endorsed this view. *See* Daishowa Int'l v. North Coast Export Co., 1982-2 Trade Cas. (CCH) ¶ 64,744 (N.D. Cal.); *see also* Recent Decision, *Foreign Import Cartels Are Liable Under the Sherman Act Although Domestic Export Competitors Are Shielded with a Webb-Pomerene Exemption*, 16 Vand. J. Transnat'l L. 645 (1983) (criticizes the *Daishowa* holding).

161. Address by Senator Durack to the American Bar Association at New

within the United States itself. In an address to the International Bar Association on November 3, 1977, United States Associate Attorney-General Egan stated that "an unyielding and unresponsive antitrust policy, heedless of considerations of comity, could seriously disrupt United States foreign policy. It would weaken vital alliances. It could provoke damaging retaliation . . . ."[162]

B. Blocking Legislation

The reach of United States legislation has spawned blocking legislation which is counterproductive. It is being recognized that:

> In the world today present assertions of jurisdiction just cannot go on. Most of the countries concerned, if not all, are allies. That is certainly true of Australia and the United States. Most, if not all, of the countries concerned have competition laws. All recognise that international co-operation is of the essence in combating restrictive business practices.[163]

The former Australian Attorney-General, Peter Durack, has identified blocking measures taken against the United States antitrust laws in Australia, Belgium, Canada and the provinces of Quebec and Ontario, Denmark, Finland, France, Germany, Italy, the Netherlands, New Zealand, Norway, the Philippines, Sweden, and the United Kingdom. Enacting blocking legislation is hardly unusual and is becoming the norm, rather than the exception to the norm.[164]

If pursued by a government with sufficient will, "clawback" and "blocking" legislation could result in some disastrous consequences. This legislation may attack the multinational enterprise where it is weakest, for example, in those areas where the host government has the greatest influence. In response, a host government could reduce or exclude the provisions of patent and trademark protection and retaliate against the application of United States antitrust laws. Political decisions, such as the appropriation of property or the according of differential tax treatment,

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Orleans (Aug. 12, 1981) (extraterritorial application of United States law and United States foreign policy).

162. Diplomatic Note No. 390/79 from the Australian Embassy Washington to the United States Secretary of State (Oct. 19, 1979).

163. Durack, *supra* note 161.

164. For elaboration of French, British, Canadian, Australian, and South African "blocking" legislation and the United States judicial response, see Batista, *supra* note 126.

also are not beyond contemplation. In short, retaliatory "blocking" and "clawback" legislation has boundless possibilities, very few of which are pleasant to contemplate if used on any widespread basis.

C. Undermined Rule of Law

The effect of applying United States legislation to activities abroad is that the rule of law may be undermined because politicians in the "target" country can exercise political discretion with respect to how "blocking legislation" will be applied. Former Australian Attorney-General Durack has stated: "[I]t is for me a distasteful task to determine the question as to whether documents should or should not be allowed production in a foreign Court which, like our own, respects the rule of law and due process."[165]

D. Unrecognized Foreign Interests

Another acknowledged effect of the extraterritorial application of United States commercial laws is that foreign interests are not recognized. The former Australian Attorney-General has noted that:

> [T]he exercise of jurisdiction is an evaluation of the interests of the United States and the foreign country *by a Court of the United States*. I must say quite frankly that it is unrealistic to ask foreign countries to accept that. In addition, it is impractical for a Court to conduct such an evaluation. It involves a judgment upon non-justiciable issues . . . .[166]

In the *Uranium Litigation*, for example, the Australian Government suggested that it had a national interest in the outcome. The national interest claim was based on the severe effects that a damages judgment could have on the Australian economy in fields such as the financing of resource projects, the attraction of foreign investment, trade in uranium and other commodities, and the financial viability of the four Australian companies sued, all of which played a major role in the production and export of Australia's natural resources.[167]

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165. Durack, *supra* note 161.

166. *Id.*

167. *See supra* note 162. Australian exports from agricultural and mining industries amounted to $14.1 billion (Australian) in 1979-1980, which represents 77% of the total national export income of that period. Statement on Australia's

E. Indirect Effects

The indirect effects on Australia from United States extraterritorialism should not be overlooked, nor should the magnitude of the effects be underestimated. At least one effect could be a de facto prohibition on the travel to the United States of Australian businessmen associated with companies involved as defendants in United States antitrust litigation.[168]

F. United States Antitrust Laws and Foreign Trade

An OECD Committee of experts on restrictive business practices reported in 1977 that "the special feature of United States antitrust laws is that they alone also apply to restrictions on competition which affect the foreign trade of the United States."[169] This observation is supported by the former Australian Attorney-General's statement:

> Trading laws are common enough. Nations, by their laws, regulate their exports and their imports. . . . But ordinarily what they regulate is "their" exports and their "imports". We would not, for example, regard it as open for a country to impose criminal sanctions upon a foreign trader because he refused to sell to us, or require him to sell to our traders at a stipulated price. . . . The United States antitrust laws, as applied extraterritorially, do prescribe the way in which foreign exporters shall do business where there is an adverse effect upon American trade. But the matter does not rest there. The conduct by foreign exporters is subject to American law even where they are carrying out the laws and policy of the exporting country . . . . Nations, in the ordinary course, regulate their exports and their imports. That is clearly a corollary of each nation's sovereignty . . . .[170]

G. United States Antitrust Laws—Forked Tongue

Australian officials have a clear impression that the United States "speaks with a forked tongue." This feeling is well expressed in the following statement of the former Australian Attorney-General.

Position of United States Antitrust Enforcement by Senator Durack (June 11, 1981).

168. *See supra* note 162.

169. Durack, *supra* note 161.

170. *Id.*

> I need not dwell upon the contradictions in the United States position of insisting by its antitrust laws, that foreign exporters shall act competitively in the international market whilst allowing by specific legislative provision its own exporters to act anticompetitively in that market. Nor upon the collision of laws and policies which would result if each and every nation were to apply an "adverse effect on foreign commerce" test of legislative jurisdiction and if, at the same time, each such State were to give effect to an export exemption.
>
> Many countries have legislated to require competition within their economies, yet consider restrictive conduct by their exporters to be permissible and justified. And they do so because of the special character of the international market . . . .[171]

Some macabre spectacles are caused by the number of conflicting jurisdictional claims made by the United States. At one point in the *Uranium Litigation*, a United States district court judge was present in the United Kingdom to preside over the taking of evidence. The bizarre spectacle was followed by the executives of Rio Tinto Zinc Corporation pleading the Fifth Amendment privilege against self-incrimination on English soil.[172] This circus was halted by a decision of the House of Lords,[173] which effectively prevented the search for evidence in that country, and the subsequent passage of the Protection of Trading Interests Act of 1980.[174] An equally tragic-comic spectacle in 1983 was the obtaining of injunctions by corporations in the United Kingdom courts allegedly prohibiting a party from exercising its rights in the United States under the United States antitrust laws. The United States courts predictably refused to take any notice of these United Kingdom injunctions.[175] The United States courts, with undeniable logic in the writer's opinion, determined that: "[E]xcept in unusual, very narrow circumstances, there is no basis—at least not in a free country—for precluding a citizen by an injunction-type order from suing in the courts of another na-

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171. *Id.*

172. *See generally* Maechling, *The Long Arm of U.S. Antitrust: Is It Too Long?*, EUROPE, May-June 1980.

173. Rio Tinto Zinc Corp. v. Westinghouse Elec. Corp., 1978 A.C. 547 (H.L.).

174. 1980 Halsbury Laws ¶ 1346.

175. Laker Airways Ltd. v. Pan Am. World Airways, 1983-1 Trade Cas. (CCH) ¶ 65,309 (D.D.C.). For further commentary, see 44 ANTITRUST & TRADE REG. REP. (BNA) No. 1106, at 606-08 (Mar. 17, 1983); *id.*, No. 1111, at 848 (Apr. 21, 1983); *id.*, No. 1114, at 982-83 (May 12, 1983).

tion."[176] Given enough imagination, the permutations of these jurisdictional wrangles, in time, may equate to a number computed from a collection of cricket scoreboards.[177] The former Australian Attorney-General's comments that there are "contradictions" is indeed an understatement in light of the possibilities.

H. Unrecognized Sovereign Authorization

An additional problem in the extraterritorial application of United States law is that sovereign authorization is not recognized. The narrow defense of sovereign compulsion, as interpreted in United States courts, is inadequate in that a party must have been *compelled* to carry out the impugned conduct. In considering sovereignty, the issue of compulsion as against *authorization* is an arbitrary and irrelevant distinction.[178]

I. Treble Damages

The treble damages provisions of United States law are regarded as penal and purely "serve to supply an ancillary force of private investigators to supplement the Department of Justice's law enforcement."[179] Moreover, although the United States plaintiff is entitled to recover attorney's fees as an incentive to litigate, the defendant is unable to recover the fees if he wins the suit. This result is contrary to the general British Commonwealth rule that provides that either successful party may recover attorney's fees. The fees alone may constitute a quite undeserved penalty for an innocent defendant. Even though these damage and fee issues do not concern the Australian government when United States economic policy is given effect in the United States, it is a different matter when the United States law is superseding the

176. *Laker Airways*, 1983-1 Trade Cas. at 69,823. The unusual circumstances would appear to be those in which litigation is "vexatious." *See* Chase Manhatten Bank v. Iran, 484 F. Supp. 832, 835 (S.D.N.Y. 1980).

177. I do not wish to be sidetracked into a dissertation on the game of cricket for the benefit of my United States readers. More important, it would not be appropriate to use this forum as one in which to extol the superiority of Australians over the English in this field of endeavour. Suffice it to say that whereas a number computed from a collection of baseball scoreboards is still a very lean number, one computed from a collection of cricket scoreboards is very large indeed—even if the English are batting!

178. *See* Durack, *supra* note 161.

179. *Id.*

laws of other countries.[180]

J. United States Discovery Procedures

United States law provides that a defendant may be required to produce not only documents directly relevant to proceedings but also documents possibly leading to admissible evidence. In the *Uranium Litigation*, approximately half a million documents in Australia were subject to discovery. The expense to Australian companies in complying with this discovery order would have been much greater than the discovery expense of local litigation. The right to discovery can exist only when jurisdiction exists, manifesting another problem of jurisdiction. The United States discovery system is something feared and resented in British Commonwealth countries and a process that many believe should not be used except in cases of clear United States jurisdiction.

K. United States Refusal to Intervene

Although United States officials have generally embraced the *Timberlane* and *Mannington Mills* decisions,[181] the United States Government has refused to intervene in private litigation and express its view on the interests of foreign governments in matters before the courts. The views expressed at the United States governmental level,[182] therefore, have been translated to nil action "on the ground." The absence of United States governmental intervention perhaps is the result of a desire to appear impartial between litigants. A foreign government wishing to have its views put to a United States court, however, is not helped if the United States Government will not express a view on the foreign sovereignty issue.

In the *Uranium Litigation*, the State Department expressed the view that "[i]t is not United States Government practice to take a position in litigation on behalf of private parties to a lawsuit that have refused to appear before the Court on their own behalf."[183] The State Department also commented, however, that although it did not "question the authority of the Australian gov-

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180. *Id.*

181. *See supra* notes 69-80 and accompanying text.

182. *See, e.g., supra* text accompanying note 162.

183. Diplomatic Note from the United States State Department to the Australian Embassy in Washington (Oct. 30, 1979).

ernment to take these steps [blocking legislation], they are relevant to the present issue."[184] One can only guess at what this innuendo means. One possible interpretation is that the enactment of blocking legislation is not appreciated by the United States State Department if United States laws are inhibited as a result.

If the State Department nonintervention policy is predicated on the nonappearance of the defendants, what is the result if a defendant does appear? This was the situation in the *Conservation Case*.[185] The State Department rejected an Australian request to state its view to the court because the defendant had appeared and "the Court will have before it arguments on this issue."[186] A request for intervention in the event of either an appearance or a nonappearance by a defendant appears to involve a "no win" situation. The results of the State Department's nonintervention position in private litigation may be understandable, but it seems that United States courts can draw quite adverse conclusions if the State Department takes no stand. In *United Nuclear*,[187] the Supreme Court of New Mexico thought that enforcing jurisdiction would have no effect on United States foreign relations.

> The United States Government declined to state that this litigation involves "a breach of friendly relations" between the United States and Canada. In a letter transmitting communications from the Canadian Government to the trial court, the State Department stated that it was taking "no position with regard to any of the issues raised" by those letters, and that transmittal of the letters "should not be understood as having implications with respect to the foreign affairs of the United States."[188]

L. An Overall Evaluation

Corporations subject to different jurisdictions and different legal requirements are experiencing great difficulty in knowing ex-

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184. *Id.*

185. *See supra* text accompanying notes 7-9.

186. *See* Australian Amicus Curiae Brief, attachment B, Conservation Council v. Aluminum Co. of Am., 518 F. Supp. 270 (W.D. Pa. 1981). The State Department letter did state, however, that "this decision [does not] necessarily foreclose the possibility of participation by the United States Government at a later date in the event that the case is not dismissed." *Id.*

187. 1980-1 Trade Cas. (CCH) ¶ 63,639 (N.M.).

188. *Id.* at 77,409-10.

actly who they should and should not obey. Caught between the jaws of the inexorable antitrust policy of the United States and the patent protectionist policy of foreign countries, the foreign subsidiary and the United States parent company are on a collision course, and the company director is in an "increasingly lugubrious position."[189]

IX. THE "LANDMARK AGREEMENT" BETWEEN AUSTRALIA AND THE UNITED STATES ON ANTITRUST LAWS

The Australian position always has been that the question of Sherman Act jurisdiction should be determined at a governmental level when foreign nations are involved. Australia has made strong efforts to achieve this end over a period of four years of negotiation.[190] On June 29, 1982, the Australian and United States Governments concluded an agreement, described as a "Landmark Agreement,"[191] on the extraterritorial reach of United States antitrust law and antitrust judgments delivered in United States courts.[192]

The Agreement is in the form of an intergovernmental arrangement signed by the Australian Attorney-General, Senator Durack; the United States Attorney General, Mr. William French Smith; and the Chairman of the United States Federal Trade Commission, Mr. James C. Miller III. The agreement establishes a framework for consultation. No definitive problems are resolved but it is hoped that their resolution will take place within the spirit of the Agreement. Senator Durack described the Agreement as "the final breakthrough."[193]

The essential aspects of the Agreement are noteworthy. Australia may notify the United States of an adopted policy having antitrust implications for the United States. Reciprocally, if the Department of Justice or the Federal Trade Commission undertakes an antitrust investigation that may have implications for Australian laws, policies, or national interests, the United States is to

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189. F. FULTON, COMMON MARKET AND AMERICAN ANTITRUST: OVERLAP & CONFLICT 445-46 (1970).

190. *See* 55 AUSTL. L.J. 773 (1981); 52 AUSTL. L.J. 662 (1978).

191. Commentary, 56 AUSTL. L.J. 507 (1982).

192. Agreement Relating to Cooperation of Antitrust Matters, June 29, 1982, United States-Australia, *reprinted in* 43 ANTITRUST & TRADE REG. REP. (BNA) No. 1071, at 36 (July 1, 1982).

193. Commentary, *supra* note 191, at 507.

inform the Australian Government. If either Government feels that implications are of the nature contemplated, the notified party can request a consultation to avoid conflicts between the laws, policies, or national interests of both countries. For this purpose, due regard shall be taken of the sovereignty of each country and considerations of comity. Any exchanges of documents and information in the course of these consultations are regarded as confidential and not to be used in any antitrust proceedings. Each Government is to cooperate with the other in antitrust investigations or enforcement actions which do not adversely affect its own laws, policies, or national interests. 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 . . . ."[194] Upon a request by Australia, the United States will participate in private antitrust proceedings before United States courts which involve conduct that has been the subject of Australian-United States intergovernmental consultations and inform the court of the substance and outcome of these negotiations.

In addition, each party under the Agreement shall seek to avoid conflict in their policies. In this regard, Australia is to give its fullest consideration to modifying any aspect of its policies that may have implications for the enforcement of the United States antitrust laws. The United States Department of Justice and the Federal Trade Commission also are to give fullest consideration to modifying, or discontinuing, investigations or proceedings involving those Australian interests in which the conduct:

> (1) was undertaken for the purpose of obtaining a permission or approval required under Australian law for the export of Australian natural resources or manufactured goods; (2) was undertaken by an Australian authority in discharge of its functions with Australian exports; (3) related exclusively to exports from Australia of Australian raw resources or Australian manufactured goods to countries other than the United States; or (4) consisted of representations to, or discussions with, Australian authorities concerning Australian exports of raw materials or Australian produced goods.[195]

194. *Id.*

195. Agreement, *supra* note 192, art. 2(6)(b)(1)-(4).

X. Some Observations on the Future Efficacy of the Australian-United States Agreement

The Australian-United States Agreement has diffused much of the acrimony felt "Down Under" with respect to the conflicts between the somewhat imperialistic reach of the United States Sherman Act and Australian policies. The Agreement relies totally on the goodwill intentions of each party and contains no absolute prohibitions on the legal entitlements of the United States Government or private parties in the United States courts. The possibility of negotiation between the countries, however, in no way ensures agreement. Although the results of negotiation may be communicated to a United States court, the court may not be given a definite State Department view on the subject matter of the suit. To date, the State Department has taken the attitude that it should not intervene in *inter partes* suits.[196] In addition, it is quite possible that even if the State Department takes a view, the court may simply disregard it. As stated in the *United Nuclear* case, "[t]he fact that [the executive and legislative] branches of the Federal Government which are responsible for the formulation and execution of foreign policy do not consider a certain subject to involve act of state implications is relevant to, but not dispositive of, the applicability of that doctrine."[197] The same result presumably follows if the legislative or executive branches consider the Act of State doctrine applicable.

The Agreement also may be undermined by the use of various state antitrust acts, such as the New Mexico statute in *United Nuclear*.[198] This case was evaluated on New Mexico's, and not the United States, interests. The Supreme Court of New Mexico did not appear to be impressed with parties' submissions, which argued that the court's jurisdiction was limited because either the United States commerce power or the conduct of intergovernmental relations was exclusively federal in nature. Thus, there may be a third player in the United States litigation game. State enforcement of state antitrust acts is added to federal and private enforcement. The arrangements between Australia and the United States do not address this wild card that has recently appeared in the deck.

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196. *See supra* text accompanying notes 183 & 186.

197. 1980-1 Trade Cas. at 77,409.

198. *Id.*

In short, the Agreement has some deficiencies from the Australian viewpoint. It relies upon goodwill and the courts in implementing executive decisions. In some areas, the Agreement lacks certain coverage, particularly if a state act and state enforcement are involved. It is hoped that the Agreement will include intergovernmental negotiations and the transfer of national interest decisions from judges to politicians. As discussed above, however, no United States governmental action resulted from the *Uranium Litigation* saga;[199] thus, private litigation, not government enforcement, may be the chief concern. The impact of the Agreement on the private litigation arena is unpredictable at this point. One can well imagine that United States governmental authorities will be reluctant to intervene, whatever their views, in private litigation because to do so leaves them open to charges of "taking sides."

The Agreement, however, does hold out hope that Australia may be able to place material before the United States courts that will soften some of their decisions. For example, Australia may persuade a court that an act of state must be "permitted," not merely "compelled," or that an act of state defense should be allowed when there is extensive governmental involvement, but not compulsion. The case law on these points is very strong indeed,[200] however, and it is likely that United States courts will find themselves unable to modify previous rulings, despite what an intergovernmental agreement may say or government action suggests. From Australia's viewpoint, United States legislation on this point would be far more desirable than ad hoc court decisions. It must be recognized, however, that the passage of United States legislation providing relief is a highly unlikely event because it would involve a voluntary divestiture of United States power over conduct that operates to the detriment of the United States.

Australia's blocking legislation clearly did not work in the *Uranium Litigation.* The Australian-based defendants effectuated the settlement, notwithstanding Australian governmental efforts to prevent an adverse verdict. Commercial circumstances forced the Australian companies to "buy out" the Westinghouse claims. CRA and MKU paid the price to regain access to the world's largest national market for uranium oxide and to secure assets in the

199. *See generally Confirmation Hearings, supra* note 91.

200. *See supra* notes 69-80 and accompanying text.

United States from attachment under a United States default judgment. Pancontinental had equity links with Getty Oil, which probably explains its willingness to settle. For Queensland Mines, the only majority-owned Australian company, Westinghouse was just too powerful a combatant.[201] The ultimate Australian sanction, governmental refusal of authority to remit funds, was not exercised, and the remission of funds was allowed subject to certain Australian governmental requirements, mostly cosmetic in nature.[202] Matters of high principle such as expressions of "national interest" seem to crumble quickly under the demands of expediency when the latter is commercially important. Perhaps from Australia's viewpoint, any intergovernmental agreement must be considered a plus in light of these commercial realities.

The United States has advantages in the Agreement, primarily relating to "cooperative enforcement." These advantages are possibly the *quid pro quo* for concessions made by the United States in other parts of the Agreement. The provisions will be valuable, but the United States courts may already have reached the situation in which United States parent companies are in contempt if they do not submit subsidiary company records to the United States discovery process. The general furor raised worldwide by the *Uranium Litigation* may be more important than the Agreement between Australia and the United States. On October 8, 1982, the United States Congress adopted the Foreign Trade Antitrust Improvements Act[203] which adds a new section to the Sherman Act and amends section 5(a) of the Federal Trade Commission Act to provide a special statutory standard of subject matter jurisdiction in foreign commerce situations. The new standard requires that the alleged improper conduct must have a "di-

201. *See* Maher, *supra* note 99, at 13.

202. HANSARD (SENATE) DEBATES 810 (Sept. 16, 1981). There was a consent to remitting the funds because the settlement included terms that vacated the final judgment on the liability issue. The settlement was to state that there was no implication of wrongdoing and that the settlement proceedings did not constitute a waiver of jurisdictional objections. In addition, none of the uranium was to be supplied from Australia or by an Australian company.

203. Pub. L. No. 97-90, §§ 401-402, 96 Stat. 1246. Although this act was enacted as Title IV of the Export Trading Act of 1982, the provisions of the two statutes developed separately and have completely different legal histories. The two acts were incorporated verbatim during intensive last minute negotiations in the conference committee. For more detail, see generally Bruce & Pierce, *supra* note 150.

rect, substantial and reasonably foreseeable effect" on (a) domestic United States trade; (b) import trade; or (c) export trade of a United States-located exporter (in which case, liability is limited to business in the United States). Although this legislative action is responsive to some concerns, it is only "a jurisdictional threshold for enforcement actions."[204] The court's evaluation of comity, balance of interests, and reasonableness is not affected by the Act.

Trends in the areas of comity, interests, and reasonableness may, however, be changing direction. On April 15, 1983, Deputy Secretary of State Kenneth Dam, in a speech before the American Society of International Law, discussed some United States initiatives aimed at harmonizing policies among the Western industrialized countries on this subject. Dam stated that these initiatives included:

> (1) a review of United States legal guidelines to govern assertion of authority where this assertion conflicted with foreign law;
> (2) prior notice, consultation and cooperation with foreign governments;
> (3) proposed amendments to the Clayton Act by the Justice Department to allow treble damages only in the case of *per se* damages. This would reduce friction concerning United States policy in the regulating of vertical relationships, including those of supplier/distributor;
> (4) consideration by the Departments of State and Justice of further proposals to address problems arising in the international context from treble damage actions; and
> (5) seeking procedures whereby investigatory or enforcement actions that substantially involve the interests of other countries will be regulated by the Department of State.[205]

In view of economic realities, one is more inclined to put faith in the United States choosing to limit its exercise of jurisdiction rather than in the ability of smaller nations, such as Australia, to do so. The extent to which Secretary Dam's "initiatives" will result in action, however, is still very much an unknown. It may be appropriate for the United States to implement Professor Barry Hawk's suggestion that a commission be established to implement "an in depth and comprehensive reassessment of United States

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204. H.R. REP. No. 924, 97th Cong., 2d Sess. (1982).

205. Speech by Deputy Secretary of State Dam to the American Society of International Law (Apr. 15, 1983).

antitrust laws" independent of any particular dispute.[206]

The Agreement has, no doubt, smoothed troubled waters for the moment. Should there be a future difference of opinion akin to the *Uranium Litigation*, the Agreement may work at the governmental level. The future of the Agreement in private litigation and under the statutes of various states is far less certain. It is, therefore, quite likely that the application of "blocking" and "clawback" legislation has not ended.

At the time of writing, the United States has given the Australian Government three notifications under the Agreement.[207] The Agreement, therefore, is a start in the search for a solution to the problems caused by the extraterritorial reach of United States antitrust laws. In the long run, however, the jurisdictional war will probably never be won or settled to the satisfaction of all. One might characterize this war as a type of endless economic Indo-Chinese conflict or a perpetual game of snakes and ladders played by elaborate and costly rules, usually with considerable courtesy, but often with great acrimony. Given this characterization, it is certain that the jurisdictional war will never end. The Australian-United States Agreement, nevertheless, does set some of the strategies of battle in place. It attempts to highlight why conflicts occur, to eliminate sneak attacks, and to establish some of the rules by which the combatants must play. It perhaps indicates areas where truces may be made. Although the Agreement is not a treaty outlawing the jurisdictional war, it is a type of Geneva Convention governing the conduct of such a war; no one denies that, whatever their problems of enforcement may be, Geneva Conventions have had highly beneficial effects over the years.

206. Hawk, *International Antitrust Policy and the 1982 Acts: The Continuing Need for Reassessment*, 51 FORDHAM L. REV. 201, 252 (1982).

207. Submission by Australian Attorney-General's Department to the Joint Committee on Foreign Affairs and Defense (July 1983).